Sections 119.2 and 119.3 of the Criminal Code: Declared Areas
The Independent National Security Legislation Monitor

The Independent National Security Legislation Monitor Act provides for the appointment of the INSLM. The INSLM independently reviews the operation, effectiveness and implications of national security and counter-terrorism laws; and considers whether the laws contain appropriate protections for individual rights, remain proportionate to terrorism or national security threats, and remain necessary. In conducting the review the INSLM has access to all relevant material, regardless of national security classification, can compel answers to questions, and holds public and private hearings. INSLM reports are provided to the Prime Minister and are tabled promptly in Parliament. The INSLM does not deal with complaints but welcomes submissions on the reviews. The INSLM is a part-time role and is supported by a small permanent staff located in Canberra. More information and contact details can be found at www.inslm.gov.au.

There have been three INSLMs since the role began in 2010: Bret Walker SC, the Hon Roger Gyles AO, QC and the current INSLM, Dr James Renwick SC (pictured).
Independent National Security Legislation Monitor Review of section 119.2 and 119.3 of the Criminal Code: Declared Areas

As required by section 6(1B) of the Independent National Security Legislation Monitor Act 2010 (Cth) (INSLM Act), I am pleased to present my report on the review of sections 119.2 and 119.3 of the Criminal Code (Cth).

As the report is unclassified, and does not include information of the kind referred to in subsection 29(3) of the INSLM Act, it is suitable to be presented in this form to each House of the Parliament.

Yours sincerely

James Renwick
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<tbody>
<tr>
<td>AFP</td>
<td>Australian Federal Police</td>
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<tr>
<td>AGD</td>
<td>Commonwealth Attorney-General’s Department</td>
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<td>AHRC</td>
<td>Australian Human Rights Commission</td>
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<td>ALHR</td>
<td>Australian Lawyers for Human Rights</td>
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<td>ASIO</td>
<td>Australian Security and Intelligence Organisation</td>
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<td>ASPI</td>
<td>Australian Strategic Policy Institute</td>
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<td>AUSTRAC</td>
<td>Australian Transaction Reports and Analysis Centre</td>
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<tr>
<td>CDPP</td>
<td>Commonwealth Director of Public Prosecutions</td>
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<td>COAG</td>
<td>Council of Australian Governments</td>
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<tr>
<td>COAG Review Committee</td>
<td>Committee chaired by Anthony Whealy QC commissioned by COAG to review Australia’s counter terrorism legislation</td>
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<td>Crimes Act</td>
<td><em>Crimes Act 1914 (Cth)</em></td>
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<td>CRC</td>
<td>Convention on the Rights of the Child</td>
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<td>Foreign Fighters Act</td>
<td><em>Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014 (Cth)</em></td>
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<td>HRC</td>
<td>UN Human Rights Committee</td>
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<tr>
<td>ICCPR</td>
<td><em>International Covenant on Civil and Political Rights</em></td>
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<tr>
<td>ICESCR</td>
<td><em>International Covenant on Economic, Social and Cultural Rights</em></td>
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<tr>
<td>INSLM</td>
<td>Independent National Security Legislation Monitor</td>
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<td>INSLM Act</td>
<td><em>Independent National Security Legislation Monitor Act 2010 (Cth)</em></td>
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<td>Acronym</td>
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<td>AFP</td>
<td>Australian Federal Police</td>
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<td>Joint Academic Submission</td>
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<tr>
<td>LCA</td>
<td>Law Council of Australia</td>
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<td>PJCHR</td>
<td>Parliamentary Joint Committee on Human Rights</td>
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<td>PJCIS</td>
<td>Parliamentary Joint Committee on Intelligence and Security</td>
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<td>UN</td>
<td>United Nations</td>
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EXECUTIVE SUMMARY

This is one of three reports provided simultaneously to the Prime Minister as required by s 6(1B) of the INSLM Act. Each report concerns counter-terrorism legislation which, unless renewed, is due to expire by 7 September 2018.

The INSLM Act requires me to provide reports of these reviews by 7 September 2017 so that the PJCIS can undertake its own review of the same laws within six months (s 6(1B)).

Each report is self-contained, although there are some common chapters concerning the national security and counter-terrorism landscape, relevant human rights and other obligations, and constitutional and inter-governmental arrangements.

My recommendations can only be fully understood by considering each report as a whole; however for the convenience of readers, I now provide a brief summary of my conclusions detailed in this report.

This review concerns the ‘declared areas’ provisions in div 119 of the Criminal Code. In essence, the provisions provide for the Foreign Affairs Minister to make a declaration in to an area where the Minister is satisfied that one or more listed terrorist organisations are engaging in hostile activity. It is an offence to enter, or remain in, a declared area. It is not necessary for the prosecution to establish an intent, for example, to commit a terrorist act in that area – such an offence already exists. These provisions are, with the exception of Denmark where there is an analogous offence, unique.

It is a defence to a declared area offence if the accused can show that the sole purpose of being in the declared area is one of a narrowly defined list of purposes.

For the reasons which follow, I recommend these laws be continued, subject to a declaration being reviewable by the PJCIS at its discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister.

I also recommend that the Commonwealth consider (noting in particular the potential issues set out in paragraphs 8.18 - 8.35 of this report) making a regulation under, or an amendment to, the 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.

Provided the review provision is amended as recommended above, I recommend that the laws be continued for a further period of five years. I do so in substance because, as to the matters in s 6(1)(a) of the INSLM Act, I conclude that the laws have the capacity to be effective (noting that no prosecution of the declared area offence has occurred).
As to the matters in s 6(1)(b) of the INSLM Act, I have considered Australia’s human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and I conclude that the laws are:

- consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals
- proportionate to the current threats of terrorism and to national security
- necessary.

Finally, consistent with s 6(1)(d) of the INSLM Act, I have considered whether the legislation considered in this review is being used for any matter unrelated to counter-terrorism and national security. In the conduct of this review there was no evidence to suggest this.
1. CONTEXT

1.1. When I was appointed the Prime Minister, the Hon Malcolm Turnbull, said this:

The Independent National Security Legislation Monitor is an important and valued component of Australia's national security architecture, responsible for ensuring that national security and counter-terrorism legislation is applied in accordance with the rule of law and in a manner consistent with our human rights obligations.

In particular, as it becomes more important than ever for the Government to continue modernising and strengthening our laws to address the growing and evolving terrorist and espionage threat at home and abroad, the relevance of the independent reviewer becomes similarly important. This will help ensure that our individual freedoms that underpin the Australian way of life are balanced against the need to fight terrorism and other threats with every tool at our disposal.¹

1.2. Finding that ‘balance’ can be difficult, and fair-minded, informed, people, may disagree as to how the balance is to be struck. In 2004, a discussion paper prepared by the United Kingdom Home Office suggested the following way of viewing what it described as a ‘challenge’:

There is no greater challenge for a democracy than the response it makes to terrorism. The economic, social and political dislocation which sophisticated terrorist action can bring threatens the very democracy which protects our liberty. But that liberty may be exploited by those supporting, aiding or engaging in terrorism to avoid pre-emptive intervention by the forces of law and order. The challenge, therefore, is how to retain long-held and hard-won freedoms and protections from the arbitrary use of power or wrongful conviction whilst ensuring that democracy and the rule of law itself are not used as a cover by those who seek its overthrow.²

1.3. The INSLM Act sets out my functions and jurisdiction, and gives me guidance as to how to review counter-terrorism and national security laws in a way which strikes the balance referred to in these two quotes.

1.4. This is a report of my review of ss 119.2 and 119.3 of the Criminal Code. I have carried out the review under s 6(1)(a) of the INSLM Act, as required by s 6(1B) of the Act.

1.5. Section 6(1) confers on me the following functions:


(a) to review, on his or her own initiative, the operation, effectiveness and implications of:
   (i) Australia’s counter-terrorism and national security legislation; and
   (ia) without limiting subparagraph (i), Division 105A of the Criminal Code and any other provision of that Code as far as it relates to that Division; and
   (ii) any other law of the Commonwealth to the extent that it relates to Australia’s counter-terrorism and national security legislation;
(b) to consider, on his or her own initiative, whether any legislation mentioned in paragraph (a):
   (i) contains appropriate safeguards for protecting the rights of individuals; and
   (ii) remains proportionate to any threat of terrorism or threat to national security, or both; and
   (iii) remains necessary;
(c) if a matter relating to counter-terrorism or national security is referred to the Monitor by the Prime Minister - to report on the reference;
(d) to assess whether Australia’s counter-terrorism or national security legislation is being used for matters unrelated to terrorism and national security.

1.6. Section 8 of the INSLM Act requires me, when performing my functions (including carrying out a review under s 6(1)(a)), to have regard to Australia’s obligations under international agreements, as well as to arrangements agreed from time to time between the Commonwealth, the states and the territories, to ensure a national approach to countering terrorism. These matters are considered in detail in chapter 5 of this report.

1.7. I must also be conscious of the limitations of my functions by operation of s 6(2), which provides:

(2) To avoid doubt, the following are not functions of the Independent National Security Legislation Monitor:
   (a) to review the priorities of, and use of resources by, agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation;
   (b) to consider any individual complaints about the activities of Commonwealth agencies that have functions relating to, or are involved in the implementation of, Australia’s counter-terrorism and national security legislation.

1.8. I am also required by s 10(1) of the INSLM Act to have regard to the functions of other agencies and officials relating to the legislation under review. For the present review, the relevant agencies are ASIO, the AFP and AGD. Section 10(2) of the Act lists a number of agencies and officials with which or with whom I may consult when performing my functions. For the present review, I have had the advantage of consulting with, and hearing evidence from, the Human Rights Commissioner, Mr Edward Santow.
1.9. Although not required by s 6(1B) to consider the matters in s 6(1)(b), I have decided that it is appropriate to do so in conducting the present review. Section 6(1)(b)(i) is obviously informed by Australia's obligations under international agreements, especially human rights obligations, to which I must have regard when performing my functions by virtue of s 8(a) of the INSLM Act. The question of proportionality to the threat of terrorism, referred to in s 6(1)(b)(ii) is interlinked with the issue of the necessity of the legislation under review, referred to in s 6(1)(b)(iii).

1.10. In carrying out the review of ss 119.2 and 119.3 of the Criminal Code, I have:

a. considered the legislative history of these provisions
b. considered previous commentary on, and parliamentary scrutiny of, the provisions
c. issued a series of questions and requests for information and documents to ASIO, the AFP and AGD, each of which has a role in the administration and operation of ss 119.2 and 119.3
d. invited, received, and considered submissions from these agencies, as well as from other interested parties, including the LCA and the AHRC
e. sought views from experts in terrorism and law enforcement, notably Dr Rodger Shanahan3 and Mr John Lawler AM, APM4
f. held private and public hearings to explore information and submissions received.

1.11. A summary of the review process and a list of the submissions received are set out in appendix A. The submissions themselves are, except when confidential, available on the INSLM website www.inslm.gov.au.

1.12. I wish to thank the Commonwealth agencies and other interested parties for their contribution to this review. I also wish to thank for their assistance in carrying out the review and in preparing this report my Principal Adviser, Mr Mark Mooney, my Counsel Assisting, Dr Dominic Katter, and my Solicitors Assisting, Messrs Anthony Hall and Alexander Kunzelmann, who were on part-time secondment from the Office of General Counsel in the Australian Government Solicitor and my Executive Officer, Ms Karen Thornton.

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3 PhD in Arab and Islamic Studies from the University of Sydney, currently a Research Fellow at the Lowy Institute.
4 Former CEO of the Australian Crime Commission, former Deputy Commissioner of the AFP.
2. NATIONAL SECURITY AND COUNTER-TERRORISM LANDSCAPE

2.1. Although I am entitled to form my own opinion on the national security and counter-terrorism landscape, in this instance, I acknowledge and accept the expert views of others in government, especially ASIO in its most recent unclassified annual report (2015-16), relevant portions of which state:

Australia’s National Terrorism Threat Level is PROBABLE—credible intelligence, assessed to represent a plausible scenario, indicates an intention and capability to conduct terrorist attacks in Australia. [...] The principal terrorist threat in Australia emanates from the small number of Australia-based individuals who remain committed to anti-Western violent Sunni Islamist extremist ideology. This group presents a direct threat as well as a secondary threat due to their ability to influence others. [...] The changing nature of terrorism provides challenges to the early identification and detection of threats. While large-scale attacks, including coordinated attacks by multiple individuals, are still occurring around the world, there has been a trend towards simpler attacks that require minimal preparation perpetrated by lone actors. [...] The four onshore attacks since 2014 were all conducted by single individuals using relatively simple weapons (two with knives and two with firearms). While symbols of government and authority - including military, police and security agencies - remain attractive targets, indiscriminate attacks against the public align with the objectives of terrorists. ISIL, and to a lesser degree al-Qa’ida, continues to endorse and celebrate indiscriminate attacks against innocent citizens so as to reinforce their message and incite fear.  


2.2. Since the ASIO unclassified annual report was tabled on 13 October 2016 there has been a further terrorist attack within Australia (the Brighton siege) and a number of terrorist attacks around the world. For instance, the United Kingdom has seen four serious terrorist attacks over a period of just three months this year, namely:

a. Westminster Bridge on 22 March 2017
b. Manchester Arena on 22 May 2017
c. London Bridge/Borough Markets on 3 June 2017
d. Finsbury Park on 19 June 2017.

Three of these attacks (the Manchester attack being the exception) met the profile of simple weapons used indiscriminately against the general population; at least one of which (Westminster Bridge) was apparently a lone actor. The very recent attack in Spain, on 18 August 2017, continued this pattern of simplistic and indiscriminate violence.
2.3. In his evidence before me during the public hearing, the Director-General of Security, Mr Duncan Lewis AO, DSC, CSC said:

The threat we face is self-sustaining easily drawing in vulnerable individuals who are swiftly radicalised and able to undertake simple but deadly attacks. Our ability to counter these individuals is further challenged by the operating environment, from the continuing spread and increased uptake of technologies, including encrypted internet communications and device security, as well as the shift from complex methodologies to simple but very difficult to detect and prevent low sophisticated attacks.

Now, all of these factors mean that intelligence and law enforcement agencies have to evolve their approaches to be more innovative, integrated and agile in order to identify and disrupt would-be attackers.\(^6\)

I accept that evidence.

2.4. Further, AFP Deputy Commissioner, Mr Michael Phelan APM, gave evidence at the same hearing as follows:

The terrorist threat continues to adapt and evolve.

In 2005, when specialist counter-terrorism powers were introduced the primary terrorism threat involved the long-term planning for large-scale mass casualty attacks. At the time Operation PENDENNIS was the longest running and largest CT investigation undertaken in Australia. The two groups were engaged in activities over a sustained period. This included ideological instruction, team building, training, fund raising, gathering supplies and planning an attack.

The decision to go to resolution was made to minimise the risk to the public. Even so, after much planning, the groups had not identified a specific target for the attack. The PENDENNIS style threat of long-range planning for mass casualty attacks has not gone away. But we are seeing a major increase in the threat of smaller-scale opportunistic attacks by lone actors. The very short flash to bang, so to speak, time from radicalisation to violent action creates significant challenges for police and intelligence agencies.

Unfortunately, since mid-2014 rapid radicalisation and low-complexity plots have become the norm. The result is police have very little lead time or none at all to prevent spontaneous attack. The new threat environment means police have had to change the way in which we respond to disrupt terrorism. The pace at which plots develop, coupled with the potentially catastrophic consequences of a terrorist attack, mean police need to act fast to disrupt terrorist activity.

Where possible, we disrupt terrorist plots using traditional criminal justice methods. Protection of human life is always the AFP and, indeed, state polices’, paramount priority. But early overt action can mean insufficient evidence has been collected to support charging people with an offence. Since there is often strong intelligence to indicate the person poses a continuing terrorist threat, preventative measures may be necessary to manage that threat.\(^7\)

I also accept that evidence.

\(^6\) Transcript of Proceedings, Public Hearing, Canberra, 19 May 2017, 5 (Duncan Lewis).

\(^7\) Ibid 6 (Michael Phelan).
2.5. On 3 August 2017, charges were laid against two men for acts done in preparation for, or planning, a terrorist act, contrary to s 101.6 of the Criminal Code.8 It has been alleged that they attempted to smuggle onto an aircraft an improvised explosive device, and planned to build and smuggle onto an aircraft a hydrogen sulphide bomb. The Deputy Commissioner during a press conference said it was ‘one of the most sophisticated terror plots attempted on Australian soil’, which supports his view, quoted above (para 2.4) that ‘planning for mass casualty attacks has not gone away’. I also note the charges relate in part to acts involving a Commonwealth place, namely Sydney Airport.

2.6. I similarly acknowledge and accept the expert views of the authors of the 2017 Independent Intelligence Review report, Mr Michael L’Estrange AO and Mr Stephen Merchant PSM, on the national security and counter-terrorism landscape. Relevantly:

Australia’s national security circumstances have been re-shaped by the realities of extremism with global reach.

Economic globalisation over recent decades has dramatically accelerated the international movement of people, goods, money and ideas. This phenomenon has had a remarkably positive and empowering impact on states and individuals. It has been vital in bringing more people out of poverty more quickly than at any other time in history. This greater freedom of international movement and sense of global connectedness has been enabled through communications, financial and physical networks. But these transforming influences have also had a negative impact through their facilitation of the illegal and destabilising transfer of goods, money, weapons and people. This has broadened the potential for extremism, sectarian fundamentalism, radicalisation and terrorism to take root and have their destructive impact. It has also raised expectations, especially among Australians living and working abroad, that their government will protect them from such dangers or support them if those dangers directly affect them.

Extremism with global reach has important consequences for Australian society. It accentuates the urgency and constancy of the need to counter terrorist influences and ambitions in Australia.

In our view, extremism with global reach will continue and diversify over the coming decade. Fundamentalist advocacy of violence in the name of religion will continue to inspire attacks, especially from Islamist terrorist organisations. Radicalisation and terrorist acts will continue to be enabled by increasingly internationalised networks and encrypted communications. The prominence and power of individual groups such as the Islamic State of Iraq and the Levant (ISIL) may wane but many of the forces of deep alienation, ruthless hostility and ideologies of violence that have brought these groups to prominence will remain. Individuals inspired by ISIL will outlive any demise of the organisation. Al-Qaeda and its affiliates will remain a threat. Those groups and other splinter organisations that may emerge will aim to give effect to ambitions for mass casualty attacks and random violence. Such groups will continue to draw on local grievances to support their regional and global agendas.

These realities of Australia’s national security environment will continue as a vital focus for the work of the intelligence agencies over the coming decade and beyond. Particular challenges will emerge and others will evolve. These will include the activities and networks of Australian

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‘foreign fighters’ involved in international extremist and terrorist causes, the rise of ‘lone wolf’ assaults and the scope for low-technology terrorism attacks often facilitated online. The time taken between radicalisation and terrorist attack is shortening, further challenging intelligence agencies’ detection and response capabilities.

In our view, the terrorist and extremist threats to Australia and Australian interests will continue to grow in scale and complexity. Detecting and countering such threats will be increasingly challenging for our intelligence and law enforcement agencies. The greater numbers of Australians travelling and living overseas, as well as the international movement of radicalised individuals, will magnify the security threats Australia faces.9

2.7. These views are entitled, because of the standing and expertise of their authors, to considerable respect. They present a consistent picture of the national security and counter-terrorism landscape and are highly relevant in considering whether the legislation under review is proportionate to the threats, and necessary.

2.8. What I take from the above analyses is that:

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.

2.9. There is also the risk of opportunistic if unconnected ‘follow-up’ attacks in the immediate aftermath of a completed attack at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality. During the public hearing, Mr Lawler noted that:

If a multifaceted terrorist attack on a large scale occurs in Australia, the authorities responding will be under the most extreme pressure that one could possibly imagine. We know from even lone actor attacks, [like] the Lindt Café Siege, the huge number of police and security and other agencies involved into the many, many hundreds, as I understand it.10

2.10. Furthermore, I consider that it is better to have a carefully thought-out counter-terrorism legal structure in place before an attack: while legislating in an emergency is possible, it is generally undesirable, not least as it may lead to a disproportionate response.

2.11. I consider the necessity of the legislation under review, and its proportionality to these threats, bearing these matters in mind.

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9 2017 Independent Intelligence Review (June 2017) [1.11]-[1.16].
3. EXPLANATION OF STATUTORY PROVISIONS

Section 119.3 of the Criminal Code – declared areas

Power of Foreign Affairs Minister to declare areas

3.1. Section 119.3(1) of the Criminal Code empowers the Foreign Affairs Minister to declare an area in a foreign country for the purposes of s 119.2 (which establishes the offence of entering, or remaining in, a declared area).

3.2. A declaration may cover areas in multiple foreign countries (s 119.3(2)) but must not cover an entire country (s 119.3(2A)).

Foreign Affairs Minister must be satisfied of certain matters before exercising the power

3.3. The power to declare areas under s 119.3(1) may only be exercised if the Foreign Affairs Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area. The term ‘listed terrorist organisation’ is defined in s 100.1(1) to mean an organisation that is specified by regulation made for the purposes of para (b) of the definition of ‘terrorist organisation’ in s 102.1 of the Criminal Code. At present, 23 organisations are ‘listed terrorist organisations’. The term ‘engag[ing] in a hostile activity’ is in turn defined in s 117.1(1) of the Criminal Code.

3.4. AGD has published a ‘protocol’ that outlines the process of making a declaration under s 119.3(1). Among other things, it describes the roles of the National Threat Assessment Centre within the ASIO, AGD and the Department of Foreign Affairs and Trade in advising on matters connected to the making of declaration.

3.5. Before making a declaration, the Foreign Affairs Minister must brief the Leader of the Opposition (s 119.3(3)).

Cessation of declaration

3.6. A declaration ceases to have effect on the third anniversary of the day on which it takes effect (s 119.3(4)). Without limiting any power to revoke a declaration under s 33(3) of the Acts Interpretation Act 1901, the Foreign Affairs Minister must revoke a declaration if they cease to be satisfied of the matters mentioned in para 3.3 above (s 119.3(5)).

Review of declaration

3.7. The PJCIS may review a declaration before the end of the period during which the declaration may be disallowed under s 42 of the Legislation Act 2003 (s 119.3(7)). For each House of Parliament, this period is 15 sitting days commencing the date on which the

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declaration is tabled. There is currently no power for the PJCIS to periodically review the making of a declaration, or the non-revocation of a declaration.

**Section 119.2 of the Criminal Code – declared area offence**

3.8. Section 119.2(1) establishes an offence of entering, or remaining in, a declared area.

**Physical elements**

3.9. A person commits an offence if each of the following physical elements is satisfied:

a. the person enters, or remains in, an area in a foreign country (s 119.2(1)(a))

b. the area is an area declared by the Foreign Affairs Minister under s 119.3 (s 119.2(1)(b))

c. when the person enters the area, or at any time when the person is in the area, one of the following applies (s 119.2(1)(c)):
   – the person is an Australian citizen
   – the person is a resident of Australia
   – the person is a holder under the *Migration Act 1958* of a visa
   – the person has voluntarily put himself or herself under the protection of Australia.

**Fault elements**

3.10. No fault element is specified for any of the physical elements of the offence. However, s 119.2(2) provides that absolute liability applies to the third physical element (ie s 119.2(1)(c)), and therefore there is no fault element for that physical element (see s 6.2(2) of the Criminal Code).

3.11. For the remaining physical elements, the ‘default’ fault elements in s 5.6 of the Criminal Code apply. Thus:

a. For the first physical element (ie, s 119.2(1)(a)), the fault element is intention (to enter, or remain in, the area of the foreign country) (s 5.6(1))

b. For the second physical element (ie, s 119.2(1)(b)), the fault element is recklessness (with respect to the area being an area declared by the Foreign Affairs Minister).

**Exceptions**

3.12. Section 119.2(1) is subject to a number of specific exceptions, namely:

a. entering or remaining solely for legitimate purposes (s 119.2(3)), which provides that s 119.2(1) does not apply if the person enters, or remains in, the declared area solely for one or more of the following reasons:
   – providing aid of a humanitarian nature
   – satisfying an obligation to appear before a court or other body exercising judicial power
DECLARED AREAS

- performing an official duty for the Commonwealth, a state or a territory
- performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a state or a territory
- performing an official duty for the UN or an agency of the UN
- making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist
- making a bona fide visit to a family member
- any other purpose prescribed by the regulations (no regulations have been made for this purpose).

b. entering or remaining solely for service with an armed force other than a prescribed organisation (s 119.2(4))

c. engaging in conduct for the defence or international relations of Australia (s 119.9).

3.13. If the defendant wishes to rely on any of these exceptions, he or she bears the ‘evidential burden’ (s 13.3(3) of the Criminal Code), which is defined as ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that [a] matter exists or does not exist’ (ie, that the defence is made out) (s 13.3(6) of the Criminal Code). The operation of this burden was explained by the High Court in the case of The Queen v Khazaal.12 In his judgment, French CJ observed that the burden requires:

> evidence that is at least capable of supporting the inference that the matter to which the evidential burden applies “exists or does not exist” […] If no such inference is able to be drawn from the evidence there is no logical basis for saying that the evidence suggests that inference as a reasonable possibility. Evidence which is merely consistent with or not inconsistent with such a possibility does not “suggest” it.13

3.14. In a joint judgment, Gummow, Crennan and Bell JJ accepted that the evidential burden requires no more than ‘slender evidence’ to make out the relevant defence (at least where the defence relates to a negative state of affairs), and that the evidence ‘may be taken at its most favourable to the accused’.14

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13 Ibid 606-7 [12].
14 Ibid 624 [74].
Sunsetting

3.15. Section 119.2(1) ceases to have effect at the end of 7 September 2018 (see s 119.2(6) of the Criminal Code). Accordingly, the offence of entering or remaining in, a declared area will cease to be law from 8 September 2018.

Consent of the Attorney-General to prosecute offence

3.16. Section 119.11(1) requires that no committal proceedings may be commenced for the offence established in s 119.2(1) without the written consent of the Attorney-General. Such consent is not inconsistent with the independence of the CDPP, and indeed having proper regard to the implications that the declared area offence has for Australia’s foreign relations. However, a range of earlier steps in the prosecution may be taken without such consent, such as charging the person, arresting the person, and remanding the person in custody or on bail (s 119.11(2)).

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15 This date was chosen in response to a recommendation by the PICIS that the offence ‘sunset two years after the next Federal Election’: PICIS, Parliament of Australia, Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (17 October 2014) Recommendation 20. In view of the uncertainty surrounding that date, a date of two years after the third anniversary of the (then) last general election (which occurred on 7 September 2013) was set: Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 [910].

16 Similar views were expressed by the first INSLM in his 2014 annual report: Annual Report (28 March 2014), §III.6.
4. HISTORY OF LEGISLATION UNDER REVIEW

4.1. Sections 119.2 and 119.3 of the Criminal Code were introduced in 2014 by the Foreign Fighters Act. The sections have not been substantively amended since then.

4.2. In large part, the Foreign Fighters Act was designed to update and re-enact the Crimes (Foreign Incursions and Recruitment) (Cth) Act 1978, which was enacted in part ‘to prohibit persons preparing for or engaging in incursions into foreign countries’. At that time, the Commonwealth was concerned about recent incursions by Australians into foreign countries, notably Yugoslavia and Rhodesia (as they then were), by mercenaries in particular. A number of convictions have been recorded under that Act, including incursions and preparations for incursions into Yugoslavia, the Comoros Islands, Indonesia, Seychelles, Cameroon and Syria.

4.3. The 1978 Act was not the first time that Australian law had sought to curb the flow of foreign fighters. Indeed, the UK Foreign Enlistment Act 1870 (Imp), which was extended to Australia, prohibited a person from enlisting in, or leaving with intent to enlist in, the military or naval service of any friendly foreign state. However, neither the 1978 Act nor the 1870 Act contain any offence quite like the declared area offence now in s 119.2 of the Criminal Code.

4.4. The Foreign Fighters Act was enacted amidst a reported increase or change in the severity of the terrorism climate. This was noted in the second reading speeches to the Foreign Fighters Bill. In his second reading speech, the Attorney-General stated:

> The Bill amends several Acts and provides a number of important measures that will enhance the capability of Australia’s law enforcement, intelligence and border protection agencies to protect Australian communities from the threat posed by returning foreign fighters and those individuals within Australia supporting foreign conflicts.

As the Prime Minister remarked in his national security statement on 22 September 2014, ‘protecting our people is the first duty of government’. The rapid resurgence in violent extremism and the participation in overseas conflicts by some Australians present new and complex security challenges for our nation. The ongoing conflicts in Syria and Iraq are adding to this challenge and the number of Australians who have sought to take part, either by directly participating in these conflicts or providing support for extremists fighting there, is unprecedented. [...]

The risk posed by returning foreign fighters is one of the most significant threats to Australia’s national security in recent years. Our security agencies have assessed that around 160

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20 Foreign Enlistment Act 1870 (Imp), s 2.
21 Ibid ss 4 and 5.
Australians have become involved with extremist groups in Syria and Iraq by travelling to the region, attempting to travel or supporting groups operating there from Australia. While this is not the first time Australians have been involved in overseas conflicts, the scale and scope of the conflicts in Syria and Iraq, and the number of Australians presently involved, is unparalleled and demands specific and targeted measures to mitigate this threat.  

4.5. With regard to the new offence of entering, or remaining in, a declared area, the Attorney-General stated:

The Bill will create a new offence of entering a declared area overseas where terrorist organisations are active. This will enable law enforcement agencies to bring to justice those Australians who have committed serious offences, including associating with, and fighting for, terrorist organisations overseas.

It would not prevent a person from travelling overseas, including to a declared area, for a legitimate purpose. However, an individual suspected of entering a declared area to fight would have to point to evidence of their legitimate reason for travelling to the area. It is my expectation that this offence will only be enlivened in exceptional circumstances, where terrorist organisations are active and effectively exercising control over a particular region. In those circumstances, a declaration by government would have the dual benefit of warning people about the dangers associated with travelling to that area and creating an offence for those who, regardless of those warnings, choose to travel to the area without legitimate reason. Importantly, a 10 year sunset clause will be attached to this offence.

4.6. The Explanatory Memorandum to the Foreign Fighters Bill identifies the purpose of the offence established in s 119.2 as being ‘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’. It also stated that the ‘legitimate objective’ of the offence is ‘to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so’. It continues:

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 may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil.

4.7. Following its introduction into Parliament on 24 September 2014, the Foreign Fighters Bill was referred to the PJCIS for review. This review received submissions expressing concerns about the content and scope of proposed ss 119.2 and 119.3, and led the PJCIS to make a number of recommendations in its advisory report of 17 October 2014. The

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22 Commonwealth, Parliamentary Debates, Senate, 24 September 2014, 6999 (George Brandis QC).
23 Ibid 7001–7002 (George Brandis QC).
24 Revised Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, [896].
25 Ibid [234].
26 Ibid [243].
DECLARED AREAS

recommendations helped shape the provisions that are now found in ss 119.2 and 119.3 of the Criminal Code.27

4.8. The Bill was also:

a. reviewed by the Senate Standing Committee for the Scrutiny of Bills, which tabled its report on 23 October 201428

b. examined by the PJCHR in its Fourteenth Report of the 44th Parliament of 28 October 2014.29

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5. INTERNATIONAL OBLIGATIONS AND CONSTITUTIONAL ARRANGEMENTS

5.1. As noted above, I am obliged to have regard to Australia’s obligations under international agreements when performing my statutory functions. I am also obliged to have regard to arrangements agreed between the Commonwealth, the states and the self-governing territories to ensure a national approach to countering terrorism.

International obligations

5.2. For his 2011 annual report, the first INSLM carried out a survey of Australia’s obligations under international agreements in the areas of counter-terrorism and human rights. These two areas remain the focus of Australia’s international obligations that are engaged by the measures that are subject to the present statutory review.

International obligations in the area of counter-terrorism

Security Council Resolution 1373 (2001)

5.3. In the area of counter-terrorism, the first INSLM focused on Resolution 1373 (2001) of the UN Security Council, made in the immediate aftermath of the attacks in New York and Washington DC on 11 September 2001 (the ‘September 11 attacks’). By virtue of Art 25 of the Charter of the United Nations, Australia is under an international obligation to ‘accept and carry out’ such resolutions. Relevantly, Resolution 1373 contains the following decisions of the UN Security Council:

a. that all States ‘[t]ake the necessary steps to prevent the commission of terrorist acts’ (para 2(b))

b. that all States ‘[e]nsure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice’ (para 2(e))

c. that all States ‘ensure that ... such terrorist acts are established as serious criminal offences in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts’ (para 2(e)).

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30 INSLM Act, s 8(a).
31 INSLM Act, s 8(b).
33 [1945] ATS 1. Article 25 of the Charter provides that ‘[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter’.
Resolution 1373 does not define the term ‘terrorist act’, nor does any other decision of the Security Council.34

**Security Council Resolution 2178 (2014)**

5.4. Since the survey carried out by the first INSLM, the Security Council has adopted Resolution 2178 (2014) to address the issue of ‘foreign terrorist fighters’.35 Relevantly, that resolution contains a decision that all States:

> ensure that their domestic laws and regulations establish serious criminal offenses sufficient to provide the ability to prosecute and to penalize in a manner duly reflecting the seriousness of the offense [...] their nationals who travel or attempt to travel to a State other than their States of residence or nationality, and other individuals who travel or attempt to travel from their territories to a State other than their States of residence or nationality, for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts, or the providing or receiving of terrorist training [...]  

It is important to emphasise that this decision provides for the establishment of a criminal offence that is constituted by conduct that has as its purpose the perpetration, planning, or preparation of, or participation in, a terrorist act. In other words, it neither provides for measures less than the establishment of a criminal offence, nor the establishment of a criminal offence that applies where the purpose of the travel is unrelated to a terrorism act.

5.5. Moreover, Resolution 2178 needs to be read in the context of its preamble, in which the Security Council ‘reaffirm[s] that Member States must ensure that any measures taken to counter terrorism comply with all their obligations under international law, in particular international human rights law[.]’

**International obligations in the area of human rights**

**ICCPR**

5.6. In the area of human rights, the first INSLM understandably focused on the ICCPR.36 The ICCPR recognises an array of civil and political rights,37 and obliges Australia, as a State Party, to ‘respect’ those rights and to ‘ensure [those rights] to all individuals within its territory and subject to its jurisdiction’.38

5.7. The first INSLM divided his discussion of the ICCPR into two parts: first, he focused on the rights of individuals that were threatened or violated by terrorism; and secondly, he

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34 See INSLM, *Annual Report* (20 December 2012), 113. As noted by the first INSLM, Resolution 1566 provides some guidance on the definition of terrorism as a criminal act. Specifically, para 3 of the resolution refers to ‘criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act’.

35 Resolution 2178 defines the term ‘foreign terrorist fighters’ to mean ‘individuals who travel to a State other than their States of residence or nationality for the purpose of the perpetration, planning, or preparation of, or participation in, terrorist acts or the providing or receiving of terrorist training, including in connection with armed conflict’.


37 Arts 6 to 27.

38 Art 2(1).
focused on the rights of individuals who were accused of terrorism or otherwise caught up in its prevention or investigation. This division is instructive, because sometimes commentary on the human rights impact of terrorism tends to focus on the latter and not on the former.

5.8. In other words, within limits, counter-terrorism laws which restrict the human rights of criminal suspects to protect the human rights of victims of terrorist acts, operate as envisaged by, and in a manner consistent with, the ICCPR. This was a point helpfully emphasised by the AHRC in its submission to all of these reviews.

5.9. With regard to rights threatened or violated by terrorism, the first INSLM referred to the following rights:
   a. the right to life (Art 6(1))
   b. the right to liberty and security of person (Art 9(1)).

5.10. With regard to rights of individuals accused of terrorism or otherwise caught up in its prevention or investigation, the first INSLM referred to:
   a. the right to freedom from torture and from cruel, inhuman or degrading treatment of punishment (Art 7)
   b. the right to liberty and security of person and the right to freedom from arbitrary arrest or detention (Art 9(1))
   c. the right to judicial review of the lawfulness of detention (Art 9(4))
   d. the right of everyone lawfully within the territory of a State to freedom of movement within that territory (Art 12(1))
   e. the right to equality before the courts and to a fair trial (Art 14(1))
   f. the right to be presumed innocent until proven guilty (Art 14(2))
   g. the right to certain minimum guarantees in the determination of any criminal charge (Art 14(3))
   h. the right to freedom of thought, conscience, and religion (Art 18(1))
   i. the right to freedom of expression (Art 19(2))
   j. the right to peaceful assembly (Art 21)
   k. the right to freedom of association (Art 22(1))
   l. the right to equality before the law and to equal protection of the law without discrimination (Art 26)

39 A similar view was expressed by then-Attorney-General, the Hon Philip Ruddock MP, when he delivered his second reading speech for the Anti-Terrorism Bill 2004: ‘Security is not an anathema to freedom and liberties. I might say, if you read the Universal Declaration of Human Rights, it gives primacy, amongst other matters, to the responsibility of governments to secure a person’s right to life - a person’s entitlement to live in a situation of safety and security’: Parliamentary Debates (24 June 2004) 31701.
m. the right of persons belonging to ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, and to use their own language (Art 27).

5.11. Other rights that were not referred to by the first INSLM, but which are significant to the present review, include:

a. the right to certain minimum guarantees in the treatment of persons deprived of their liberty (Art 10)

b. the right to privacy (Art 17)

c. the right to the protection of family life (Art 23).

5.12. In considering Australia’s obligation to respect the rights recognised in the ICCPR, it is relevant to make two further observations. The first observation is that Art 4(1) of the ICCPR confers on States Parties the right to take measures that derogate from their obligations under the ICCPR in time of an officially declared public emergency which threatens the life of the nation. A State may only take such measures ‘to the extent strictly required by the exigencies of the situation’, and ‘provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin’. Moreover, no derogation may be made with respect to certain ‘non-derogable rights’. From the list in para 5.10 above, the following rights are non-derogable:

a. the right to life (Art 6(1))

b. the right to freedom from torture and from cruel, inhuman or degrading treatment of punishment (Art 7)

c. the right to freedom of thought, conscience and religion (Art 18(1)).

5.13. I am not aware of Australia ever exercising its right of derogation, nor of any occasion on which Australia has characterised the measures subject to the present review as a derogation from its obligations under the ICCPR.

5.14. It is relevant to note that, in the wake of the coordinated terrorist attacks in Paris on 13 November 2015 (sometimes referred to as the ‘Bataclan attacks’) and subsequent state of emergency, France did exercise its right of derogation. The United Kingdom also exercised this right for a time in the wake of the September 11 attacks.

5.15. The absence of any Australian derogation at present is an important indication that, while the National Terrorism Threat Level is ‘probable’, Australia does not face a threat of the scale justifying the most serious imaginable steps.

40 The first INSLM also referred to the requirement that the law prohibit any propaganda for war (Art 20(1)), and any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (Art 20(2)).


5.16. The second observation is that many of the rights recognised in the ICCPR are not absolute, in the sense that the ICCPR itself recognises that some limits may be placed on them (and therefore that a State does not contravene its obligation under Art 2(1), or need to derogate from those obligations pursuant to Art 4, if such limits are imposed). Most of the rights listed in para 5.10 above may be subject to certain limits. For example:

a. Art 9(1), which recognises the right to liberty and security of person and the freedom from arbitrary arrest or detention, also acknowledges that a person may be deprived of their liberty (whether by arrest or detention) ‘on such grounds and in accordance with such procedure as are established by law’ (provided that it is not ‘arbitrary’)

b. Art 12(1), which recognises the right to freedom of movement, also acknowledges that the right may be subject to restrictions ‘which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant’

c. Art 17, which recognises the right to privacy, also acknowledges that a person’s privacy may be subject to interferences that are not ‘arbitrary or unlawful’

d. Art 18, which recognises the right to freedom of thought, conscience, and religion (Art 18(1)), also acknowledges that the right to freedom to manifest one’s religion, which is part of the right to freedom of religion, may be subject to ‘such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others’ (Art 18(3))

e. Art 19, which recognises the right to freedom of expression (Art 19(2)), also acknowledges that the right may be subject to such restrictions ‘as are provided by law’, and which are necessary ‘for respect of the rights or reputations of others’, and ‘for the protection of national security or of public order (ordre public), or of public health or morals’ (Art 19(3))

f. Art 21, which recognises the right to peaceful assembly, also acknowledges that the exercise of this right may be subject to restrictions that are ‘imposed in conformity with the law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’

g. Art 22, which recognises the right to freedom of association (Art 22(1)), also acknowledges that the exercise of this right may be subject to restrictions that are ‘prescribed by law and which are necessary in a democratic society in the interests of national security or public safety, public order (ordre public), the protection of public health or morals or the protection of the rights and freedoms of others’.

5.17. It follows from these examples that limitations designed to address national security or public order concerns are capable of being consistent with a range of rights under the ICCPR if the limitations are prescribed by law, are not arbitrary, and conform to the principle of proportionality.\footnote{\textsuperscript{44}}

\footnote{\textsuperscript{44} See, eg, HRC, \textit{General Comment No 27}, UN Doc CCPR/C/21/Rev.1/Add.9 (1 November 1999) [14].}
5.18. UN agencies have reviewed Australia’s counter-terrorism legislation and practices against Australia’s obligations under the ICCPR on several occasions. However, to date, these reviews have not considered the legislation that I am considering as part of the present review.

5.19. The human rights impact of ss 119.2 and 119.3 has also been considered in domestic reviews. These reviews are considered in more detail in the next section of this chapter.

**CRC**

5.20. The civil and political rights recognised in the ICCPR are enjoyed by children, and indeed the ICCPR makes special provision for children. The CRC, to which Australia is party, recognises similar rights for children (up to the age of 17) and makes special provision for the protection of children. For example:

a. Art 3(2) obliges Australia to ‘ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her’

b. Art 19(1) obliges Australia to ‘take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child’

c. Art 36 obliges Australia to ‘protect the child against all other forms of exploitation prejudicial to any aspects of the child’s welfare’.

**ICESCR**

5.21. Australia is party to the ICESCR, which recognises an array of economic, social, and cultural rights. The ICESCR obliges Australia to ‘respect’ those rights and to ‘take steps… with a view to achieving progressively the full realization’ of those rights. Unlike the ICCPR, the ICESCR contains a general limitations clause in Art 4, which provides:

> The States Parties to the present Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, the State may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

5.22. ICESCR is not often invoked with respect to counter-terrorism measures, which are generally seen as limiting the civil and political rights recognised in the ICCPR.

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45 See, for example, Art 14(4), which requires criminal procedure in the case of juveniles to ‘be such as will take account of their age and the desirability of promoting their rehabilitation’. Art 24(1) also requires every child to have ‘the right to such measures of protection as are required by [their] status as a minor, on the part of his family, society and the State’.
48 Arts 6 to 27.
49 Art 2(1).
International obligations engaged by ss 119.2 and 119.3 of the Criminal Code

Human rights obligations

5.23. The human rights impact of ss 119.2 and 119.3 of the Criminal Code is addressed in the statement of compatibility with human rights that is set out in the Revised Explanatory Memorandum that accompanied the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014. The statement of compatibility was subsequently considered by the PJCHR during the passage of the Bill through Parliament.

5.24. According to the statement of compatibility, the offence established by s 119.2 engages several human rights recognised in the ICCPR. Most significantly, the statement refers to the right to be presumed innocent until proven guilty (Art 14(2)) and the right to freedom of movement (Art 12(1) and (2)), and concludes that the offence provision is compatible with each of these rights.

5.25. The PJCHR came to the opposite conclusion. With regard to the right to be presumed innocent until proven guilty, it noted that:

an offence provision which requires the defendant to carry an evidential or legal burden of proof will engage the right to be presumed innocent because a defendant’s failure to discharge the burden of proof may permit their conviction despite reasonable doubt as to their guilt.50

5.26. While it acknowledged that s 119.2 still requires the prosecution to establish the physical elements and fault elements for the offence, it noted that intent to engage in terrorist activity or some other illegitimate activity was not an element of the offence, and it was for the defendant to establish that they entered or remained in a declared area solely for a legitimate purpose in order to rely on the defence in s 119.2(3). The PJCHR characterised this as a reversal of the evidentiary burden, and noted that the statement of compatibility did not provide sufficient evidence to justify such a reversal. It concluded that the offence provision was likely to be incompatible with the right to a fair trial and the presumption of innocence.51

5.27. With regard to the right to freedom of movement, the PJCHR expressed concern that:

the offence provision will operate in practice to deter and prevent Australians from travelling abroad for legitimate purposes due to fear that they may be prosecuted for an offence.52

5.28. The PJCHR concluded that, as such, s 119.2 ‘unnecessarily restricts freedom of movement’ and is ‘therefore likely to be impermissible as a matter of international human rights.’

5.29. The PJCHR also noted that s 119.2 engages, and may be incompatible with:

a. the right to the right to equality before the law and to equal protection of the law without discrimination (Art 26), to the extent that s 119.2 has greater effect on certain individuals based on their ethnicity or country of birth

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50 PJCHR, Fourteenth Report of the 44th Parliament (28 October 2014), [1.176].
51 Ibid [1.182].
52 Ibid [1.203].
b. the right to the protection of family life (Art 23), to the extent that s 119.2 has the effect of deterring individuals from visiting family.53

5.30. In the context of the present review, I have received a number of submissions relating to the human rights impact of the declared area offence. For instance:

a. The LCA submitted that s 119.2 ‘has the potential to disproportionately impact on Australians’ freedom of movement, the right to a fair trial and the presumption of innocence’, and that there was ‘much in the argument’ that the declared area offence was incompatible with the range of human rights considered by the PJCHR54

b. The Joint Academic Submission noted that the offence ‘imposes a significant burden upon the freedom of movement by preventing individuals from travelling to areas designated by the Foreign Minister as ‘no-go zones’.55 While that submission acknowledged that ‘[s]uch a burden might be justified if there was evidence that restricting the freedom of movement was a necessary and proportionate response to the threat posed by foreign fighters’, it submitted that the offence was ‘not sufficiently targeted to the threat of terrorism’

c. ALHR suggested that the declared area offence impacted the freedom of association and assembly and freedom of movement56

d. The AHRC submitted that the relevant provisions ‘are likely to impermissibly infringe the freedom of movement and a number of other human rights’, including the right to the protection of family life (Art 23)57

e. Conversely, ASPI submitted that the areas of legislation that are the subject of the present statutory review provide ‘[e]ffective accountability and oversight measures to balance public security with the rights of the individual, including compliance with Australia’s international obligations’.58

5.31. I did not receive any submissions relating to the impact of ss 119.2 and 119.3 on the human rights recognised in either the CRC or the ICESCR. However, it was brought to my attention during the public hearing that some 70 Australian children are known to be in conflict zones where ISIL is engaged in hostile activity. One need only consider the images of the son of ISIL fighter Khaled Sharrouf posing in abhorrent abusive situations,59 and the recent, unconfirmed, media reporting that two of his children were killed in an air strike,60 to realise the grave impact that travelling to a declared area may have on a child’s safety and

53 Ibid [1.212]; see also note 74.
54 LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [27]-[28].
55 Joint Academic Submission, 2.
56 ALHR, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [4.8]-[4.9].
57 AHRC, Submission to the INSLM, Statutory Deadline Reviews, 15 May 2017, [43].
58 ASPI, Submission to the INSLM, Statutory Deadline Reviews, 18 May 2017, [2].
60 Dylan Welch and Suzanne Dredge, ’Khaled Sharrouf, Australian terrorist, believed to have been killed in air strike in Syria’, ABC Online (16 August 2017) <http://www.abc.net.au/news/2017-08-16/khaled-sharrouf-believed-to-have-been-killed/8812600>.
welfare. When evaluating the human rights impact of the declared area offence, the rights of the many children taken to (or born in) these conflict zones must be considered.

5.32. I accept that the declared area offence in s 119.2 of the Criminal Code engages a range of human rights. Prohibiting a person from travelling to a declared area clearly involves a restriction of that person’s rights, most notably the right to freedom of movement. That, however, is only the first part of the analysis. As noted above (para 5.16), this right is not absolute. Given that the prohibition is provided for in law, an assessment of whether it complies with the right to freedom of movement – and is therefore consistent with Australia’s international obligation to respect that right – ultimately depends on whether the prohibition is necessary to protect national security, and the risk of the prohibition being applied arbitrarily. In each case, proportionality between the nature and scope of the prohibition and the national security interests sought to be protected will be an important factor. Reviewing ss 119.2 and 119.3 having regard to Australia’s human rights obligations (as required by s 8(a) of the INSLM Act) therefore merges with my function under s 6(1)(b) of the INSLM Act. As noted above (para 1.9), I have decided to carry out this function in conducting the present review under s 6(1)(a) of the INSLM Act.

5.33. Admittedly, no limits may be placed on the right of the accused to be presumed innocent until proven guilty. However, I do not consider that the declared area offence is inconsistent with this right. While the physical elements of the offence cover a broad range of conduct, and intention to engage in some form of illegitimate activity is not a fault element of the offence, s 119.2 does not fundamentally alter the requirement that the prosecution prove the elements of the offence beyond reasonable doubt.

Counter-terrorism obligations

5.34. In its submission to the present review, ASPI noted that the declared areas offence supports Security Council Resolution 2178 (2014) ‘to enable prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges’. 61

5.35. Conversely, in his sixth annual report to the UN General Assembly, the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism indicated that bans on travelling to conflict areas such as the declared area offence may not be an appropriate measure to implement Resolution 2178. After noting that legislative measures to prevent the departure of foreign fighters to conflict areas in the form of restrictions on travel or entry to territory ‘can have a serious impact on a number of fundamental rights’, the Special Rapporteur stated that ‘specific intent to carry out, contribute to or participate in an act of terrorism should be an element of the crime’. The Special Rapporteur then referred to the declared area offence in Australia, and noted that provisions such as it:

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61 Ibid [10].
reverse the burden of proof, placing the onus on individuals to prove that their travel falls within an exception. Such legislative techniques may conflict with the right to a fair trial, in particular the respect for the presumption of innocence under article 14 of the [ICCPR], which is a non-derogable right.62

5.36. In my opinion, it is difficult to justify the declared area offence as a measure to implement Australia’s obligation to carry out the decisions contained in Resolution 2178. However, that does not mean of itself that the provision is inconsistent with Australia’s international human rights obligations. I return to this topic below.

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Constitutional arrangements

5.37. Section 8(b) of the INSLM Act recognises that counter-terrorism is a national issue that requires coordination between the various Australian jurisdictions. The types of arrangements contemplated relevantly include arrangements reflected in the National Counter-Terrorism Plan, as well as arrangements between police forces. Sections 119.2 and 119.3 of the Criminal Code do not appear to engage any particular arrangements between the Commonwealth, states and territories that are relevant to the present review.
6. USE OF DECLARED AREAS

6.1. At present, the Foreign Affairs Minister has declared the following two areas pursuant to s 119.3(1) of the Criminal Code:

a. Al-Raqqa province in Syria see (Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al Raqqa Province, Syria) – this declaration commenced on 5 December 2014 (see cl 2)

b. Mosul district, Ninewa province in Iraq (see Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2015 – Mosul District, Ninewa Province, Iraq) – this declaration commenced on 3 March 2015 (see cl 2).

6.2. The PJCIS has reviewed the declaration of al Raqqa province, Syria, and the declaration of Mosul district, Ninewa province, Iraq. On each occasion, the PCJIS recommended that the declaration not be disallowed.

6.3. To date, no person has been prosecuted for the declared area offence. However, as noted below, prosecutions are to be expected.

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7. **PREVIOUS CONSIDERATION**

7.1. The INSLM has not formally reviewed ss 119.2 or 119.3 previously. However, my predecessor, Bret Walker SC, did appear before the PJCIS in a private capacity (his term as INSLM having ended some six months earlier) to give evidence to assist its review of the Foreign Fighters Bill, which evidence I will consider in Part 9 of this report in the sentencing of persons convicted of a declared area offence. Moreover, Mr Walker, in his capacity as the first INSLM, did review the foreign incursion offences in the *Crimes (Foreign Incursions and Recruitment) Act 1978* in his 2014 annual report.

7.2. As noted above (paras 4.7-4.8), the offence provision was reviewed by several committees during its passage through Parliament. As it was enacted in 2014, it was not reviewed by the COAG Review Committee.
8. REVIEW OF SECTIONS 119.2 AND 119.3

8.1. The issues that I have considered as part of this review may be summarised under the following four broad categories:
   a. the repeal (or sunsetting) of s 119.2
   b. amendments to the legitimate purpose exception in s 119.2(3)
   c. the sentencing of persons convicted of the declared area offence
   d. an increased role for the PJCIS.

8.2. Before detailing my consideration of each of these issues, I wish to acknowledge that there is some ‘overlap’ between them. For instance, amendments to the content and operation of the legitimate purpose exception may assuage concerns about the continued operation of the declared area offence, as well as concerns about sentencing. To avoid confusion, I have sought to address each as a standalone issue as far as possible.

   The repeal (or sunsetting) of section 119.2

8.3. As noted above (para 3.15), the declared area offence will sunset on 7 September 2018. The first issue that I have considered is whether the provision should be allowed to sunset, or whether the sunset provision (s 119.2(6) of the Criminal Code) should be amended to continue the operation of the offence, at least for a defined period of time.

8.4. There are arguments for and against the continued operation of the declared area offence, which are replicated in the submissions received to the present review. Generally speaking, submissions arguing against the continued operation of the offence emphasise that there is no need for the offence, particularly given the operation of the other foreign incursion offences in div 119 of the Criminal Code.65 Submissions have also referred to:
   a. the absence of any prosecutions for the offence
   b. the lack of similar offences in comparable foreign jurisdictions.

8.5. With regards to the absence of prosecutions, the Joint Academic Submission notes:

   Since late 2014, around 50 people have been charged with terrorism and/or foreign incursions offences in Australia. In not one instance has the declared area offence been relied upon. What this clearly demonstrates is that – in contrast to the claim made in the Second Reading Speech – the declared area offence is not required in order for ‘law enforcement agencies to bring to justice those Australians who have committed serious offences, including associating with, and fighting for, terrorist organisations overseas’.66

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65 See LCA, Submission to the INSLM, Statutory Deadline Reviews, 12 May 2017, [7].
66 Joint Academic Submission, 3.
8.6. In its submission, AGD stated that, as at 3 May 2017, the consent of the Attorney-General in proceedings for offences against div 119 has been requested on 12 occasions, but that only on one of these occasions has the request included an offence against s 119.2.  

8.7. With regards to the lack of similar offences in foreign jurisdictions, I am aware that, on 1 July 2016, Denmark introduced an offence that is similar to the declared area offence (see §114j of the Danish Criminal Code, as inserted by Law No 642 of 8 June 2016). In broad terms, the offence operates as follows:

   a. The Minister for Justice may, after consultation with the Minister for Foreign Minister and Minister for Defence, prescribe an area in which a terrorist group is engaged in an armed conflict (sub§114j(3)).

   b. It is an offence punishable by up to six years imprisonment for a Danish citizen or resident to enter or stay in a prescribed area without the permission of the Minister for Justice (sub§114j(1)).

   c. The Justice Minister may only give permission if the entry or stay has a ‘creditable purpose’ (‘anerkendelsesværdigt formål’); permission may be for a group of persons associated with a particular organisation (sub§114j(4)).

   d. However, no offence is committed where the entry or stay is connected to the pursuit of Danish, foreign or international public service or duties (sub§114j(2)).

8.8. I note that the Special Adviser to the UK Independent Reviewer of Terrorism Legislation, Professor Emeritus Professor Clive Walker QC, has expressed the view, having regard to the declared area offence, that a comparable offence ‘would not be worthwhile for the UK’. His reasons for this view are threefold: first, the burden placed on the ‘honest and worthy’ defendant (which relates to the legitimate purpose exception discussed below); second, the main effect of the provision is to catch ‘jihadi brides’ rather than jihadi fighters, for which counselling rather than imprisonment is needed; third, the territory controlled by ISIL is ‘fluid’, so the declared areas will require constant reformulation.

8.9. Submissions arguing for the continued operation of the declared area offence emphasise that, given the current landscape and the present threat of returning foreign fighters, it is premature to allow the provisions to expire.

8.10. Several of the submissions I received highlighted that, despite the operation of other foreign incursion offences in div 119 of the Criminal Code, the declared areas offence remains necessary as it serves a unique purpose. Submissions noted that declared areas reflect an environment within which the ordinary processes and procedures for the collection and transfer of evidence are unlikely to be sustainable. The AFP submitted that s 119.2 provides an ‘additional tool in the toolbox’ that addresses the difficulties of

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67 AGD, Submission to the INSLM, Statutory Deadline Reviews, 16 May 2017, 10
obtaining foreign evidence from a declared area that is needed to prosecute the other offences in div 119:

[N]otwithstanding the 2014 changes to the *Foreign Evidence Act 1994* which simplified processes for adducing foreign evidence in terrorism-related cases, obtaining foreign evidence remains a challenge. This is particularly the case where the evidence is being sought from a conflict zone which may not have fully operational government in place.70

A similar view was expressed by ASPI, which noted that the offence provision ‘enable[s] prosecution of foreign fighters and their supporters, while acknowledging the difficulties of collecting evidence in conflict environments to support other criminal charges’.71

8.11. The AFP and AGD also submitted that the offence has 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,72 a submission that was ‘echoed’ by ASPI.73 During the public hearing, AGD stated that the reasoning underpinning the provisions is to:

*protect* people’s personal safety and [...] to discourage them from travelling to areas that are of high, high risk for individuals [...] Our view is that these provisions perhaps have also had an effect of very strongly discouraging people who might otherwise have considered going into the area to [sic] not to go there, that they have a powerful effect beyond just being utilised for prosecution.74

8.12. AGD added that the potential to protect personal safety extends to children by discouraging their parents or guardians from taking them to, or remaining with them in, a declared area.75 As noted above (para 5.31), some 70 Australian children are known to be in conflict zones where ISIL is engaged in hostile activity. Recent, unconfirmed, media reporting of the deaths of two of these children in an air strike serves to highlight the importance of measures that may prevent children from being exposed to the risks inherent in these areas.

8.13. It was also emphasised that the declared area offence may prevent financial assistance to terrorist organisations that control territory in a declared area. AUSTRAC submitted that the declared area offence appears to have had an impact on financial flows between Australia and the declared areas. AUSTRAC went on to explain that, while there is no direct prohibition under Australian law on sending funds to declared areas:

*It is likely, however, that banks and remitters have factored the declarations into their decisions about the regulatory, reputational and commercial risks associated with transactions involving Declared Areas.*76

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70  AFP, Submission to the INSLM, *Statutory Deadline Reviews*, 2 May 2017, [20].
71  ASPI, Submission to the INSLM, *Statutory Deadline Reviews*, 18 May 2017, [10].
73  ASPI, Submission to the INSLM, *Statutory Deadline Reviews*, 18 May 2017, [10].
75  Ibid, 25 (Katherine Jones).
76  AUSTRAC, Confidential Submission to the INSLM, *Statutory Deadline Review*, 4 May 2017, [5]. This extract of the submission was cleared for public release on 16 August 2017.
8.14. During the public hearing, Dr Shanahan gave evidence on the potential for an individual within in a declared area to, willingly or not, provide financial support or assistance to terrorist organisations. Dr Shanahan noted that ISIL carries out a range of revenue-raising activities in the territories that it controls, including through taxation, and kidnapping for ransom. Dr Shanahan noted ‘there is a very high possibility’ that individuals to whom the declared areas offences apply who travelled to one of these areas would be detained and ransomed.77

8.15. While noting the lack of prosecutions to date, the AFP gave evidence during the public hearing that ‘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.78

8.16. I am aware of a warrant issued in 2015 for the arrest of Tareq Kamleh, for charges including a declared area offence although this has not been executed because Mr Kamleh has not returned to Australia (and has reportedly indicated that he has no intention to return to Australia).79 I am also aware of a warrant issued in 2016 for the arrest of Neil Christopher Prakash for charges including a declared area offence. Mr Prakash is currently in custody in Turkey, and the Australian Government’s engagement with Turkish authorities on extradition has been the subject of significant media attention.80

8.17. I note that s 119.2 and 119.3 of the Criminal Code are relatively recent in their enactment. While there have been no prosecutions for the declared area offence, I am of the view that the offence responds to a continuing threat of returning foreign fighters and addresses needs that are not addressed by other offences in div 119.

**Amendments to the legitimate purpose exception in section 119.2(3)**

8.18. An issue that featured prominently in parliamentary debates on the Foreign Fighters Bill and in academic commentary has been the operation and content of the legitimate purpose exception in s 119.2(3) of the Criminal Code. In broad terms, this exception has been criticised on two levels:

a. First, by factoring in a legitimate purpose as an exception to the offence, rather than as an element of the offence, the offence effectively and unfairly shifts the burden on to the defendant, which burden is exacerbated by:

   – the requirement that the defendant enter or stay in the declared area ‘solely’ for a listed purpose

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77 Ibid, 32 (Rodger Shanahan).
78 Ibid, 9 and 26 (Michael Phelan).
79 See James Hancock, ‘Arrest warrant issued for Australian doctor Tareq Kamleh for alleged terrorist role with Islamic State in Syria’, ABC News (online), 18 June 2015.
80 See Mark Schliebs and Primrose Riordan, ‘Neil Prakash will be home to ‘face the music’, says Turnbull’, The Australian (online) 24 June 2017.
DECLARED AREAS

– the difficulties of obtaining evidence of conduct abroad (particularly in a conflict zone) to establish the defence.\textsuperscript{81}

\begin{itemize}
  \item b. Second, the list of legitimate purposes in s 119.2(3) is too narrow.\textsuperscript{82}
\end{itemize}

8.19. The submissions that I received as a part of this review echo these criticisms.\textsuperscript{83} The LCA submitted that, if the declared area offence is to be maintained, it should be amended to:

\begin{itemize}
  \item a. include as a fault element an intention of travelling to (ie, entering or remaining in) a declared area for an illegitimate purpose, which could be defined as a purpose other than a legitimate purpose that is listed (as it currently done in s 119.2(3) or is determined by a court to be legitimate (see para c below)
  \item b. include in the list of legitimate purposes the following: (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
  \item c. confer on the court the discretion to determine on a case by case basis whether the purpose for travel is legitimate, which discretion would replace the current power of the Governor-General to make regulations prescribing additional legitimate purposes (s 119.2(3)(h)).\textsuperscript{84}
\end{itemize}

8.20. During the public hearing, the LCA elaborated on the issues surrounding the requirement that travel to the declared area be ‘solely’ for a listed legitimate purpose:

> The word “solely” is problematic in terms of culpability[. ] [I]f a journalist went [to a declared area] to do a news report but was also writing a book, then it wouldn’t be solely[. ] It’s very unsatisfactory to define a crime in this way by reference to a list because there’ll be plenty of non-inculpatory things that are not in the list.\textsuperscript{85}

8.21. With regard to expanding the list of legitimate purposes, the Centre for Military and Security Law within the Australian National University submitted that the purpose of ‘providing aid of a humanitarian nature’ in s 119.2(3)(a) may not be ‘robust’ enough to protect the activities of individuals working for organisations such as the International Committee of the Red Cross or Geneva Call. It submitted that one possible measure to remedy this is a regulation made under s 119.2(3)(h) protecting persons engaged in the

\begin{itemize}
  \item \textsuperscript{81} While the INSLM has not previously considered the declared area offence, the first INSLM did note that the humanitarian aid exception in the \textit{Crimes (Foreign Incursions and Recruitment) Act 1978} was associated with ‘difficulties of proof […] not least because of the problems associated with collecting admissible evidence of activities in foreign jurisdictions’: \textit{Annual Report} (28 March 2014), 15.
  \item \textsuperscript{83} ALHR, Submission to the INSLM, \textit{Statutory Deadline Reviews}, 12 May 2017, [4.1]-[4.9]; Joint Academic Submission, 2.
  \item \textsuperscript{84} LCA, Submission to the INSLM, \textit{Statutory Deadline Reviews}, 12 May 2017, [8].
  \item \textsuperscript{85} \textit{Transcript of Proceedings}, Public Hearing, Canberra, 19 May 2017, 71 (Tim Game).
\end{itemize}
delivery of training that has a humanitarian purpose, such as compliance training on the laws of armed conflict.  

8.22. This is not the first time that excepting humanitarian training from the operation of Australia’s counter-terrorism laws has been raised. In the March 2013 report of its review of Australia’s counter-terrorism legislation, the COAG Review Committee recommended that s 102.5 of the Criminal Code (which creates the offence of training involving a terrorist organisation) be amended to ‘specifically exclude training for purposes unconnected with terrorist acts, such as training in IHL [international humanitarian law], human rights treaties, conflict mediation and first aid’. This recommendation was not supported by COAG, which noted:

While training provided in the context of humanitarian activities raises unique policy considerations, the practical difficulties of implementing a wholesale exemption in favour of such aid remain significant.

8.23. For its part, the AHRC recommended that, if the declared area offence should continue, the legitimate purpose exception be amended so that the offence does not apply where the defendant enters, or remains in, a declared area solely for a purpose or purposes not connected with engaging in hostile activities. In the alternative, it submitted that:

a. detailed consideration be given to expanding the list of legitimate purposes in s 119.2(3) to be as comprehensive as possible, including the purposes of visiting friends, transacting business, retrieving personal property and attending to personal or financial affairs

b. s 119.2 be amended so that it is a defence that the defendant entered or remained in a declared area for a purpose other than engaging in a hostile activity.

8.24. I received several submissions in support of the status quo.

8.25. On the issue of ‘replacing’ the legitimate purpose exception with an element of the offence that the defendant travel to the declared area for a stated ‘illegitimate purpose’ or otherwise to engage in hostile activities, a number of submissions acknowledged that this would result in substantial overlap between the declared area offence and other foreign incursion offences in div 119 of the Criminal Code. The Joint Academic Submission acknowledged it would be superfluous to ‘specify some illegitimate purpose as an element of the \textit{actus reus} of the offence’ given the overlap with these other offences, even though it did not support the continuation of the declared area offence.

8.26. On the issue of expanding the list of legitimate purposes, I also received evidence during the public hearing from Dr Shanahan and Mr Lawler that it is hard to conceive of a

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86 Centre for Military and Security Law, Submission to the INSLM, \textit{Statutory Deadline Reviews}, 1 May 2017, [10].


89 Ibid, recommendation 6, [5].
legitimate reason for a person to travel to an area in which a terrorist organisation is engaging in hostile activities.

8.27. In his evidence, Mr Lawler suggested that one way to balance concerns for safety and support for terrorist organisations on the one hand with legitimate desires to travel to areas in which such organisations are engaged in hostile activities on the other is the introduction of an ‘authorisation regime’, whereby a person seeking to travel to a declared area would apply for authorisation, outlining their reasons for travel. If authorisation was given, the person would not commit an offence if they entered or remained in the relevant declared area in accordance with the authorisation.

8.28. I note that a similar, pre-authorisation based, approach has been adapted in Denmark in its equivalent mechanism. The Migration Regulations 1994 also employee a pre-authorisation mechanism pursuant to conditions imposed on certain protection visas holders for travel outside of Australia.91

8.29. An objective of the declared area offence is to deter Australians from travelling to areas where terrorist organisations are engaged in a hostile activity. I accept that the deterrent effect of the offence may be reduced by opening up the list of legitimate purposes in s 119.2(3).

8.30. I have concluded that the circumstances in which an adult person would wish to travel to either of the current declared areas other than to provide support to the terrorist organisation engaged in hostile activities in the area are extremely narrow. This is reflected by the current drafting of the legitimate purpose exception in s 119.2(3) which acknowledges that some such reasons may exist.

8.31. While difficulty in conceiving reasons to travel is not sufficient grounds alone to criminalise that travel, I am satisfied that the operation and content of the legitimate purpose exception renders the declared area offence a sufficiently proportionate response to concerns of protecting the personal safety of Australians, and of preventing the support (directly or indirectly) of terrorist organisations in control of those areas. Admittedly, these exceptions have not yet been tested, and I will monitor closely any future prosecutions in which the legitimate purpose exception is raised.

8.32. I also accept that opening up the list of legitimate purposes has the potential to render the offence unworkable. This potential is significantly greater if the legitimate purpose exception were to be replaced altogether by a ‘positive’ element requiring the prosecution to prove that the defendant travel to the declared area for an illegitimate purpose. Such an amendment would also undermine the unique purpose that the offence serves.

91 Persons holding a Safe Haven Enterprise Visa or a Temporary Protection Visa are subject to condition 8570, which provides that the person must not enter a foreign country, other than country by reference to which the person was found to be a person in respect of whom Australia has protection obligations, unless: (i) the Minister is satisfied that there are compassionate or compelling circumstances justifying the entry; and (ii) the Minister has approved the entry in writing.
8.33. The idea of introducing an authorisation regime to allow the relevant Minister to authorise a person to travel to a declared area on a case by case basis has some appeal as it would allow for individual circumstances to be addressed if warranted.

8.34. However, an authorisation regime could only be effective to the extent that individual compliance with the authorisation could be properly monitored. In particular, whether the purposes and plans for travel on which the decision to give authorisation was based aligned with the individuals actions within the declared area.

8.35. I also have concerns about implementing the regime within the existing terms of the offence. Within these terms, the regime would need to be implemented by way of regulation made under s 119.2(3)(h), which contemplates that the regulations will prescribe ‘any other purpose’ for which a person enters or remains in a declared area. It is questionable whether this power extends to making a regulation that provides for the purpose to be determined by a Minister as a result of the authorisation process. This appears to raise questions about the sub-delegation of legislative power, and whether the regulation would be within power. Of course, such concerns could be overcome by appropriate legislative amendment. With these concerns in mind, should the Commonwealth conclude that an authorisation regime is capable of being effectively implemented and monitored, I recommend that the Commonwealth consider making a regulation under, or an amendment to, the 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 a period and on such conditions as the Minister may choose to impose.

The sentencing of persons convicted of the declared area offence

8.36. The first INSLM gave evidence in a private capacity to the PJCIS in which he noted that a sentencing court would be faced with an invidious task of determining a sentence for a person who enters a declared area for a legitimate purpose, but not solely for one of the purposes listed in s 119.2(3) of the Criminal Code:

The difficulty that then arises is, if the Crown succeeds in that[,] it will not have proved, of course, positively, any particularly bad conduct on the part of the defendant; simply that the meaning and entering was not solely for one of the permitted purposes.92

8.37. No submissions to this review raised these concerns for sentencing, although the LCA did cite this evidence to support its submission on amending the operation and content of the legitimate purpose exception (an issue that I have already addressed above).

8.38. Following a review of relevant authorities, I am satisfied that the sole purpose nature of the legitimate purpose exception does not create any unique difficulties for a sentencing judge, although I accept that it is accurately described as a ‘difficulty’. I note that, in this regard, s 16A of the Crimes Act requires the court to have regard to the nature and circumstances of the offence.

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92 Evidence to PJCIS, Parliament of Australia, Canberra, 8 October 2014, 38-9 (Brett Walker).
8.39. If it is established that the defendant entered, or remained in, the declared area for a legitimate purpose but the defendant is unable to establish that the legitimate purpose was their ‘sole purpose,’ the sentencing judge may take this into account in determining the sentence. This reflects the position, pithily stated by the High Court in *Cheung v The Queen*, that while ‘the decision as to guilt of an offence is for the jury’, ‘the decision as to the degree of culpability of the offender’s conduct, save to the extent to which it constitutes an element of the offence charged, is for the sentencing judge’.  

8.40. The 2010, sentencing remarks of the Victorian Supreme Court in *The Queen v Vinayagamoorthy* are illustrative of how a court might approach the task of sentencing a person who has successfully raised the legitimate purpose exception, but which the prosecution has successful disproved (for example, by establishing that the person travelled to the declared area for another purpose that, while not listed in s 119.2(2), does not demonstrate ‘necessarily any particularly bad conduct on the part of the defendant’, to use the words of Mr Walker). That case concerned the sentencing of three individuals found guilty of making assets available to the Tamil Tigers, an offence under s 21 of the *Charter of the United Nations Act 1945*.

8.41. In releasing the offenders on good behaviour bonds, the Court noted that, while they had assisted the Tamil Tigers, they did so for benign motives. Justice Coghlan said in remarks on sentence:

> I accept that your motivation was to assist the Tamil community in Sri Lanka and thought that the only real vehicle to do so was by dealing with the [Tamil Tigers]. I am satisfied that the general motivation, although having a humanitarian bent, was not solely confined to humanitarian work. I am satisfied that you did not intend to support any activity which you would have regarded as terrorist.

8.42. Difficult as it may be in practice, the courts are not strangers to handling the sentencing of persons in the circumstances foreshadowed by Mr Walker.

8.43. While the operation of the legitimate purpose exception has not yet been tested, I am not convinced that the declared area offence presents any unique or insurmountable challenges for a sentencing court. It goes without saying that I will monitor closely any future prosecutions in which the legitimate purpose exception is raised, including sentencing. This difficulty does not require amendment or alter my conclusion as to necessity or proportionality set out above.

### Increased role for the PJCIS

8.44. While I have so far focussed primarily on the declared area offence in s 119.2, I am aware of concerns about the operation of s 119.3. For instance, the AHRC recommended that s 119.3 be amended so that the Minister may declare an area only if satisfied that a listed terrorist organisation is engaging in a hostile activity to a significant degree in that area. The AHRC made a similar recommendation to the PJCIS in the context of its review of the Foreign

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93  Note that s 80 of the Constitution provides for a non-waivable right to trial by jury in circumstances that s 80 describes: see *Alqudsi v The Queen* [2016] HCA 24; (2016) 258 CLR 203.


95  *The Queen v Vinayagamoorthy* [2010] VSC 148, [59].
Fighters Bill (mentioned in para 4.7 above). In its submission, the AHRC explained the recommendation in the following terms:

The declaration power would be enlivened if the Minister were satisfied that a terrorist organisation were engaged in only a very small amount of ‘hostile activity’ in a particular area. It therefore cannot be assumed that entry into a declared area will necessarily found a strong inference that a person enters with the intent to engage in hostile activities or to engage in some way with a listed terrorist organisation.96

Similar concerns were expressed by the PJCHR in its examination of the Foreign Fighters Bill (mentioned in para 4.8 above).97

8.45. During the public hearing, I received evidence from Dr Shanahan that diplomatic considerations could militate against the Foreign Affairs Minister ‘over-declaring’ areas in a foreign country, although such considerations may not be so strong in countries such as Syria, where diplomatic relations with the ruling regime of Bashar al-Assad are strained or have ceased entirely.98 During the public hearing, the Human Rights Commissioner also acknowledged that this consideration would ‘quite probably’ act as a practical break on the exercise of power under s 119.3.99

8.46. Notwithstanding these concerns about the operation of s 119.3, most of the submissions and information that I considered for the purposes of this review addressed the operation and effectiveness of s 119.2 and not on the power or procedure for declaring areas for the purposes of that offence.

8.47. While the PJCIS has jurisdiction to review the initial making of the declaration (see para 3.7 above), in my opinion, as an additional safeguard, the decision to make a declaration under s 119.3 should be periodically rather than just initially examinable by the PJCIS, which will include a decision not to revoke a declaration.

96 AHRC, Submission No 7 to the PJCIS, Inquiry into the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, 2 October 2014, Recommendation 5.
97 PJCHR, Fourteenth Report of the 44th Parliament (28 October 2014) [1.180] (‘The committee is concerned that, for example, the minister would be able to declare an area in cases where a terrorist organisation was engaged in only minor or transitory “hostile activity” in that area. In such cases, the committee notes that there would be no necessary or strong link between travel to a certain area and proof of intent to engage in terrorist activity.’)
9. CONCLUSIONS

9.1. In his 2011 annual report, the first INSLM wrote:

The functions of the INSLM and the object of the 2010 Act may be paraphrased as the review of the effectiveness and appropriateness of the CT [counter-terrorism] Laws. The specific words of secs 3, 6 and 8 of the 2010 Act govern, but the paraphrase serves to emphasize the twin poles between which the CT Laws are to be considered.

As to whether the CT Laws are effective, the question concerns their part in deterring and preventing, and responding to, terrorism and terrorism – related activity including that which threatens Australia’s security.

As to whether the CT Laws are appropriate, the question concerns, first, their consistency with Australia’s international obligations including human rights obligations, counter-terrorism obligations and international security obligations. Second, it concerns the safeguards contained in them for protecting the rights of individuals. Third, it concerns their proportionality to any threat of terrorism or threat to national security or both.

Linking the questions whether the CT Laws are effective and appropriate is a further question drawing on all these inquiries. It is whether the legislation comprising the CT Laws ‘remains necessary’. Those two words in subpara 6(1)(b)(iii) of the 2010 Act compress all the issues to be examined by the INSLM. They seek a conclusion based on principle as well as overall policy.\(^{100}\)

I agree.

9.2. I recommend that these laws be continued, subject to any declaration being reviewable by the PJCIS at their discretion at any time prior to the declaration ceasing to have effect or being revoked by the Minister.

9.3. Increasing the role of the PJCIS, as recommended above, will assist in ensuring that the process for declaring areas under s 119.3 is judiciously applied and the situation in declared areas is monitored closely by the government with a view to the possible cessation of a declaration.

9.4. I also recommend that consideration be given (noting in particular the potential issues set out in paragraphs 8.18–8.35 of this report) to making a regulation under, or an amendment to, these 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.

9.5. Provided the review provision is amended as recommended above, I recommend that the laws be continued for a further period of five years.

9.6. In making the findings and recommendations set out in this report, I have considered the matters in s 6(1)(a) of the INSLM Act and I conclude that the laws have the capacity to be effective (noting that no prosecution of the declared area offence has occurred).

\(^{100}\) INSLM, Annual Report (16 December 2011), 4.
9.7. As to the matters in s 6(1)(b) of the INSLM Act, I have considered Australia’s human rights, counter-terrorism and international security obligations, and intergovernmental agreements within Australia, and I conclude that the laws are:

a. consistent with the obligations referred to above and contain appropriate safeguards for protecting the rights of individuals;

b. proportionate to the current threats of terrorism and to national security; and

c. necessary.

9.8. Finally, consistent with s 6(1)(d) of the INSLM Act, I have considered whether the legislation considered in this review is being used for any matter unrelated to counter-terrorism and national security. In the conduct of this review there was no evidence to suggest this.
APPENDIX A – CONDUCT OF REVIEW

An advertisement calling for submissions was placed in the following newspapers:

- *The Australian* on the 22 and 25 of March, 2017
- *The Canberra Times* on the 22 and 25 March, 2017
- *The Age* on the 22 and 25 March, 2017

Public submissions were received from (in order of receipt):

- the Rule of Law Institute of Australia
- the LCA
- Dr Jessie Blackbourn, Professor Andrew Lynch, Dr Nicola McGarrity, Dr Tamara Tulich and Professor George Williams AO
- the CDPP
- Liberty Victoria
- Centre for Military and Security Law, ANU
- NSW Department of Premier and Cabinet
- Australian Transaction Reports & Analysis Centre
- ALHR
- ASIO
- AHRC
- AFP
- AGD
- ASPI.

I held a public hearing on 19 May 2017. A transcript of the proceedings is available on the INSLM website www.inslm.gov.au.

I also held private consultations with the AFP, AGD, ASIO and the CDPP.