



Australian Government
Attorney-General's Department

Protocol for declaring an area in a foreign country where a listed terrorist organisation is engaging in a hostile activity under the Criminal Code Act 1995

This protocol provides guidance on the process for the declaration of areas for the purposes of section 119.2 of the *Criminal Code Act 1995*. Section 119.2 makes it an offence for a person to enter, or remain in, an area in a foreign country if the area is an area declared by the Minister for Foreign Affairs under section 119.3.

The areas targeted by the 'declared area' provisions are extremely dangerous locations in which listed terrorist organisations are engaging in hostile activities. The declared area offence is designed to act as a deterrent to prevent people from travelling to declared areas. This is particularly the case given the risk individuals returning to Australia who have fought for or been involved with listed terrorist organisations present to the community.

It is a defence for a person to enter, or remain in, a declared area solely for a legitimate purpose or purposes. Legitimate purposes for travelling to a declared area are provided at subsection 119.2(3) and are limited to providing humanitarian aid, making a genuine visit to a family member, working in a professional capacity as a journalist, performing official government or United Nations duties, appearing before a court or tribunal, and any other purpose prescribed by the regulations.

Declaration of areas for the purpose of section 119.2

Under section 119.3 of the Criminal Code the Minister for Foreign Affairs may, by legislative instrument, declare an area in a foreign country for the purposes of section 119.2.

Legislative test for deciding to declare an area in a foreign country

Before declaring an area in a foreign country for the purposes of section 119.2, the Minister for Foreign Affairs must be satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.

Listed terrorist organisations

Section 117.1 of the Criminal Code provides that a listed terrorist organisation has the meaning given by subsection 100.1(1). Subsection 100.1(1) provides that a listed terrorist organisation means an organisation that is specified in regulations for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1.

Listed terrorist organisations are set out in Part 2 of the *Criminal Code Regulations 2002*, available on the ComLaw website www.comlaw.gov.au.

The list of terrorist organisations and the current Statements of Reasons for each organisation are also available on the Australian Government National Security website www.nationalsecurity.gov.au.

Engaging in a hostile activity

Engaging in a hostile activity is defined at subsection 117.1(1) as engaging in conduct with the intention of achieving one or more of the following objectives (whether or not the objective is achieved):

- the overthrow by force or violence of the government of that or any other foreign country (or of a part of that or any other foreign country)
- the engagement, by that or any other person, in action that:
 - falls within subsection 100.1(2) but does not fall within subsection 100.1(3) (see below); and
 - if engaged in in Australia, would constitute a serious offence
- intimidating the public or a section of the public of that or any other foreign country
- causing the death of, or bodily injury to, a person who:
 - is the head of state of that or any other foreign country; or
 - holds, or performs any of the duties of, a public office of that or any other foreign country (or of a part of that or any other foreign country)

- unlawfully destroying or damaging any real or personal property belonging to the government of that or any other foreign country (or of a part of that or any other foreign country).

Action that falls within subsection 100.1(2) is conduct that:

- causes serious harm that is physical harm to another person
- causes serious damage to property
- causes another person's death
- endangers another person's life, other than the life of the person taking the action
- creates a serious risk to the health or safety of the public or a section of the public
- seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - an information system; or
 - a telecommunications system; or
 - a financial system; or
 - a system used for the delivery of essential government services; or
 - a system used for, or by, an essential public utility; or
 - a system used for, or by, a transport system.

Action that falls within subsection 100.1(3) is conduct that is advocacy, protest, dissent or industrial action; and is not intended to:

- cause serious harm that is physical harm to a person; or
- cause a person's death; or
- endanger the life of a person, other than the person taking the action; or
- create a serious risk to the health or safety of the public or a section of the public

is not conduct of engaging in a hostile activity.

A serious offence is defined at section 117.1 to mean an offence against a law of the Commonwealth, a state or a territory that is punishable by imprisonment for two years or more.

Areas that can and cannot be covered by a declaration

Subsection 119.3(2) provides that a single declaration may cover areas in two or more foreign countries if the Minister for Foreign Affairs is satisfied that one or more listed terrorist organisations are engaging in a hostile activity in each of those areas.

Subsection 119.3(2A) provides that a declaration must not cover an entire country.

Role of Commonwealth agencies

There are a number of Commonwealth agencies that will have a key role in the process of a declaration by the Minister for Foreign Affairs to declare an area in a foreign country.

The Australian Counter-Terrorism Centre (ACTC) is a multi-agency body including members from the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP), the Australian Secret Intelligence Service (ASIS), the Australian Signals Directorate, the Department of Defence, the Australian Geospatial—Intelligence Organisation, the Australian Customs and Border Protection Service, the Australian Crime Commission, the Department of Foreign Affairs (DFAT), the Department of Immigration and Border Protection and the Attorney-General's Department (AGD). The ACTC's role is to provide strategic direction to:

- set strategic counter-terrorism priorities
- drive counter-terrorism policy direction and coordination
- inform operational counter-terrorism priorities
- evaluate agencies' performance on priorities
- identify and fix impediments to effective coordination.

The ACTC has a role in identifying areas that may be suitable for declaration and coordinating key agencies (including but not limited to ASIO, ASIS, DFAT and AFP) to collect and provide relevant information and intelligence for inclusion in a Statement of Reasons.

The National Threat Assessment Centre (NTAC) within ASIO has the lead role in coordinating and collecting the relevant information and intelligence from key agencies and generating a Statement of Reasons nominating an area for declaration.

AGD has a lead role in providing support to the Attorney-General as the minister responsible for national security matters and the administration of the Criminal Code. DFAT has a lead role in providing support to the Minister for Foreign Affairs in relation to the declaration of an area, including advice on the foreign policy implications of such a declaration.

Role of the National Threat Assessment Centre

Nomination of an area for declaration

In considering the possible declaration, the NTAC will evaluate an area against the legislative requirements for declaration in subsection 119.3(1) of the Criminal Code.

To guide and prioritise the selection of areas in foreign countries for consideration the NTAC may also have regard to a range of other non-legislative factors. Key non-legislative factors are:

- links to Australia and Australians
- threats to Australian interests including the role of a particular area in the radicalisation of Australians and likely repercussions in Australia
- the enduring nature of the listed terrorist organisation's hostile activity in the area;
- the operational impact / utility of declaring the area
- factors relevant to Australia's international relations, including bilateral relations with countries including those in which an area may be declared, and engagement with international organisations such as the United Nations
- the listed terrorist organisation's ideology
- links to other terrorist groups
- engagement in peace or mediation processes.

Depending on available information, some factors may carry more weight than others in selecting an area for consideration. For example, information indicating links to Australia or threats to Australian interests may tend to prioritise consideration of declaring a particular area in a foreign country as a 'declared area'. However, a lack of information with respect to one or more factors will not preclude an area from being considered for declaration. In its nomination, NTAC will define the area within which the terrorist organisation is engaged in hostile activity as narrowly as possible.

Form of advice including description of the 'declared area'

The NTAC will consider and provide advice in the form of a Statement of Reasons that outlines that a listed terrorist organisation is engaging in a hostile activity in an area of a foreign country to AGD. AGD will provide the advice to the Attorney-General to consider. The Attorney-General will then provide it to the Minister for Foreign Affairs to consider.

The Statement of Reasons will outline why, in the NTAC's view, the area meets the legislative test for declaration as a 'declared area'. The Statement of Reasons may also include information that relates to any of the non-legislative factors outlined above. The inclusion of information relevant to the non-legislative factors is not required for the Minister for Foreign Affairs to be satisfied whether or not the area meets the legislative test for declaration. However, it may provide useful contextual information about the hostile activity the listed terrorist organisation is engaging in in that area of the foreign country for the Minister for Foreign Affairs and for the general public.

Whenever possible, the Statement of Reasons will be prepared as a stand-alone document, based on unclassified information about the hostile activity that a listed terrorist organisation is engaging in in

that area of the foreign country, which is corroborated by classified information. This enables the Statement of Reasons to be made available to the public, and provides transparency as to the basis on which the Minister for Foreign Affairs decision is made.

Key agencies may also provide a classified briefing to the Minister for Foreign Affairs.

The Statement of Reasons will include a description of the area recommended for declaration as a 'declared area'. Wherever possible the description will include a map showing the proposed 'declared area' and/or a detailed description that indicates clearly the area proposed to be declared. The area will be described in sufficient detail to ensure it is readily understood by members of the public.

Role of the Attorney-General's Department

The role of AGD is to provide support to the Attorney-General. AGD scrutinises the draft Statement of Reasons provided to it by the NTAC before it is provided to the Attorney-General. AGD also prepares the draft legislative instrument for the Minister for Foreign Affairs' declaration.

AGD prepares a submission to the Attorney-General asking that they consider and if appropriate, provide the Statement of Reasons and the draft legislative instrument under cover of a letter to the Minister for Foreign Affairs requesting that they consider declaring an area for the purposes of section 119.2 of the Criminal Code.

If the Minister for Foreign Affairs decides to declare an area and signs the legislative instrument, the legislative instrument is provided back to AGD which will lodge the instrument and its explanatory statement for registration on the Federal Register of Legislative Instruments (FRLI) as soon as practicable after it is signed.

Role of the Department of Foreign Affairs and Trade

The role of DFAT is to provide support to the Minister for Foreign Affairs. DFAT will facilitate the declaration process including providing advice to the Minister for Foreign Affairs on factors relevant to international relations and the foreign policy implications of a declaration, drawing on its network of overseas posts. DFAT also assists in ensuring the requirement to brief the Leader of the Opposition ahead of any declaration is met.

Once the Minister for Foreign Affairs has decided that an area in a foreign country meets the legislative criteria for declaration, DFAT will provide the legislative instrument to AGD for registration on the FRLI.

Monitoring and re-declaring declared areas and revocation of declaration

Monitoring declared areas

Intelligence and law enforcement agencies maintain a continuing focus on areas of high security concern. If circumstances arise which cause agencies to form a view that a declared area no longer meets the legislative test for declaration, advice from the NTAC, prepared in consultation with key agencies, will be provided to the Attorney-General who will subsequently advise the Minister for Foreign Affairs.

The Attorney-General or the Minister for Foreign Affairs may also ask the ACTC to task key agencies to provide them with a review of a 'declared area' including consideration of whether a declared area continues to meet the legislative test for declaration.

Re-declaring areas

Legislative instruments declaring an area cease to have effect three years after they take effect. This ensures that there is regular review and re-evaluation as to whether the area continues to meet the legislative criteria for declaration.

Before a declaration expires, the ACTC will coordinate key agencies to provide relevant information about the area to the NTAC for consolidation and evaluation. If the NTAC considers the area continues to meet the legislative criteria, the NTAC will prepare a new Statement of Reasons for the Attorney-General's and Minister for Foreign Affairs' consideration.

Revocation of declaration

If the Minister for Foreign Affairs ceases to be satisfied that a declared area meets the legislative criteria to remain declared, they must make a written declaration to this effect. The legislative instrument declaring that area will cease to have effect when that declaration is made.

Notification of decision to declare, re-declare or revoke declaration

When an area is declared, re-declared or a declaration is revoked the Attorney-General and/or the Minister for Foreign Affairs will issue a media release advising of this fact. The media release will

include a Statement of Reasons for the decision.

The declared area and the Statement of Reasons will also be available on the Australian Government National Security website www.nationalsecurity.gov.au.

The legislative instrument declaring an area will be available on the ComLaw website www.comlaw.gov.au.

Information about the declared area will also be available on the Australian Government Living Safe Together website www.livingsafetogether.gov.au and Smartraveller website www.smartraveller.gov.au.

Review and oversight

Disallowable instrument

Any legislative instrument declaring an area will be tabled in the Parliament and will also be subject to disallowance (veto) in full or in part by the Parliament for a period of 15 sitting days after they are tabled, and sunseting, that is, automatic repeal three years after they commence, unless the Parliament or First Parliamentary Counsel acts to change the sunseting date.

Reviews by the Parliamentary Joint Committee on Intelligence and Security (PJCIS)

After an area has been declared, the PJCIS may review the declaration, and report comments and recommendations to Parliament before the end of the parliamentary disallowance period. Should the PJCIS consider that there are insufficient grounds for an area to be declared or have other concerns with the declaration, it is open to the PJCIS to recommend that Parliament disallow the legislative instrument so that it ceases to have effect.

Review by the PJCIS provides openness, transparency and accountability in the declaration process. The PJCIS has expertise in reviewing security and intelligence matters and is well-placed to consider listing decisions, including where classified information may need to be examined.

Review by the PJCIS also provides an avenue for members of the public to raise any concerns and provide information to the PJCIS with respect to the declaring of particular areas. The manner in which inquiries are undertaken and advertised is a matter for the PJCIS.

Further information about the PJCIS is available on the Parliament of Australia website www.aph.gov.au/pjcis.

Judicial review by the courts

Judicial review of the legality of a decision to declare an area is available in the courts under the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. The general principles of administrative law require that the minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not flawed by irrelevant considerations, improper purpose or exercised in bad faith.

Oversight by the Inspector-General of Intelligence and Security (IGIS)

The IGIS is an independent statutory office holder who monitors and reviews the legality and propriety of the activities of Australia's intelligence and security agencies.

The IGIS has own motion inquiry powers and can also conduct inquiries in response to complaints from any person or requests from ministers. Should the IGIS decide to conduct an inquiry into an intelligence or security agency's role in the declaration of an area, the IGIS would consider whether the agency had followed appropriate processes when considering the area for declaration and when providing advice to the ACTC, the Joint Counter-Terrorism Board, the Attorney-General and Minister for Foreign Affairs.

Further information about the IGIS is available at: www.igis.gov.au.