

EXPLANATORY STATEMENT

Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria

The *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria* (the Declaration) is made under subsection 119.3(1) of the *Criminal Code*.

Background

Division 119 of the *Criminal Code* contains Australia's foreign incursions and recruitment offences. Section 119.2 of the Code makes it an offence for a person to intentionally enter, or remain in, a declared area in a foreign country where the person is reckless as to whether the area is a declared area. The maximum penalty for this offence is 10 years' imprisonment.

Under section 119.3 of the *Criminal Code*, the Minister for Foreign Affairs may declare an area in a foreign country for the purposes of section 119.2 if the Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area. The Islamic State of Iraq and the Levant (also known as the Islamic State), which is a listed terrorist organisation under the *Criminal Code*, is engaging in a hostile activity in al-Raqqa province in Syria.

Purpose

The Declaration makes it an offence under section 119.2 of the *Criminal Code* to enter, or remain in, al-Raqqa province in Syria except where the person has done so solely for a legitimate purpose or purposes.

Explanation and effect of provisions

Section 1 - Name of Declaration

Section 1 sets out the title of the Declaration as the *Criminal Code (Foreign Incursions and Recruitment – Declared Areas) Declaration 2014 – Al-Raqqa Province, Syria*.

Section 2 – Commencement

Section 2 provides that the Declaration commences on the day after it is registered.

Section 3 – Authority

Section 3 notes the Minister for Foreign Affairs has the power to make the Declaration under subsection 119.3(1) of the *Criminal Code*.

Section 4 – Declared area in foreign country

Subsection 4(1) provides that the area covered by the Declaration is al-Raqqa province in Syria. Subsection 4(1) attaches two maps (marked 'A') to show the

geographical area that the Declaration covers. Al-Raqqa province is east of the Syrian province of Aleppo and shares its northern border with Turkey.

Subsection 4(2) recognises that al-Raqqa province is also known as Ar Raqqah.

Statement of Compatibility with Human Rights

This statement has been prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Declaration is compatible with the human rights and freedoms recognised or declared in the international instruments listed under the definition of ‘human rights’ in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Declaration is compatible with these human rights because it is a lawful, necessary and proportionate response to protect Australia’s national security. The Declaration, which is made under section 119.3 of the *Criminal Code*, will result in the offence under section 119.2 applying to al-Raqqa province in Syria. The Minister for Foreign Affairs can make a declaration if the Minister is satisfied that a listed terrorist organisation is engaging in hostile activity in an area of a foreign country.

Islamic State of Iraq and the Levant (ISIL) is a listed terrorist organisation under the *Criminal Code*. It operates across much of Iraq and Syria, but is based in the Iraqi provinces of Ninewa and al-Anbar and the Syrian province of al-Raqqa, which serves as its de facto capital. ISIL’s activities in al-Raqqa province, and calls by ISIL’s leadership, have attracted thousands of ‘foreign fighters’, including Australians, who have travelled to Syria to join ISIL and engage in hostile activity.

It is appropriate for the Minister to declare al-Raqqa province under subsection 119.3(1) of the *Criminal Code* as ISIL is engaging in hostile activity in the area. The Declaration promotes the safety of Australians, both those seeking to travel to al-Raqqa province and those who may be at risk of harm posed by persons returning from al-Raqqa province. Consistent with subsection 119.3(2A) of the *Criminal Code*, the Declaration does not cover an entire country.

As a result of the Declaration, it will be a criminal offence under section 119.2 of the *Criminal Code* for a person to enter, or remain in, al-Raqqa province where the person is reckless as to whether the area has been declared. The Attorney-General’s consent to prosecute will be required before a prosecution under section 119.2 can commence and the Commonwealth Director of Public Prosecutions is required to consider the public interest in line with its prosecutorial policy prior to the commencement of a prosecution. The ‘declared area’ offence under section 119.2 addresses two pressing and substantial concerns. The first concern is that Australians who enter or remain in conflict areas put their own lives at risk; the Australian Security Intelligence Organisation has advised that at least 20 Australians have died in the Syria and Iraq conflicts in the past year. The second concern is that foreign conflicts provide a significant opportunity for Australians to develop the necessary capability and ambition to undertake terrorist acts overseas and within Australia.

A person prosecuted for an offence under section 119.2 of the *Criminal Code* for entering or remaining in al-Raqqa province will maintain the right to a fair trial and presumption of innocence in accordance with article 14 of the International Covenant on Civil and Political Rights (ICCPR). A defendant will bear no burden of proof unless they seek to raise facts constituting a defence. Should a defendant choose to rely on the defence, they bear an evidential burden to adduce or point to evidence that suggests a reasonable possibility that their travel to al-Raqqa province was solely for a legitimate purpose or purposes. The prosecution retains the legal burden and must disprove any legitimate purpose defence raised beyond a reasonable doubt, in addition to proving the elements of the offence.

Subsection 119.3(7) of the *Criminal Code* provides for the review of the Declaration by the Parliamentary Joint Committee on Intelligence and Security before the end of the disallowance period.

To the extent that the Declaration may limit the right to freedom of movement under article 12 of the ICCPR the limitation is lawful and proportionate. The Declaration does not remove the ability to enter or remain in al-Raqqa province for a legitimate purpose or purposes.

A limitation can be justified if it is in the interest of national security. The risk of a successful terrorist attack occurring in Australia is high and the limitation imposed by the Declaration is necessary to assist in the prevention of an attack on Australian soil. This is particularly so given that ISIL is using al-Raqqa province as a base of operations and Australians have travelled to Iraq and Syria to participate in the foreign conflict.

Conclusion

The Declaration is compatible with human rights because it is a lawful, necessary and proportionate response to protect Australia's national security.

Consultation

Consultation on this Declaration was undertaken with key stakeholders. Pursuant to section 17 of the *Legislative Instruments Act 2003* the Minister for Foreign Affairs is satisfied that appropriate consultation has occurred. In particular consultation was undertaken with:

- Attorney-General's Department
- Australian Customs and Border Protection Service
- Australian Crime Commission
- Australian Federal Police
- Australian Geospatial-Intelligence Organisation
- Australian Secret Intelligence Service
- Australian Security Intelligence Organisation
- Department of Defence
- Department of Foreign Affairs and Trade
- Department of Immigration and Border Protection
- Department of Prime Minister and Cabinet

The Minister for Foreign Affairs has also arranged for the Leader of the Opposition in the House of Representatives to be briefed in relation to this Declaration in accordance with subsection 119.3(3) of the *Criminal Code*.