Immigration Advice and Rights Centre

08 March 2019

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

Re: *Review into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*

The Immigration Advice and Rights Centre (**IARC**), established in 1986, is a community legal centre in New South Wales specialising in the provision of advice, assistance, education, training and law and policy reform in Australian immigration and citizenship law. IARC provides free and independent advice. IARC also produces client information sheets and conducts education/information seminars for members of the public.

We welcomes the opportunity to comment on the Committee's review into the *Counter-Terrorism (Temporary Exclusion Orders) Bill* 2019 (***Bill***). Below we set out a number of concerns about the Bill that ultimately informs our view that it should not be passed.

The Bill

The Bill seeks to allow the Minister to make an order that deters an Australian citizens from returning from abroad and allows for a court to incarcerate them should they conduct themselves contrary to the requirements of the order. The Bill permits the making of the Temporary Exclusion Order (***TEO*** *or* ***order***) where the Minister suspects on reasonable grounds that the making of the order would substantially assist in the prevention of a terrorism related activity or where the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security for reasons related to politically motivated violence. If the citizen being considered for a TEO is 14 to 17 years of age the Minister must have regard to the protection of the community as the "*paramount consideration*" and the best interest of a child as a "*primary consideration*".

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The Bill further allows for the Minister to revoke the TEO or issue a return permit which may be subject to pre-entry and post-entry conditions. Notably, the Bill does not limit the number of orders that may be made in respect of a citizen, does not allow for merits review, excludes the requirements of procedural fairness and does not require the Minister to provide written reasons justifying the making of the order.

The right of entry and abode

The committee would be mindful that the Bill, while creating a deterrence, does not prevent a citizen from entering Australia. Rather, it imposes a penalty of two years imprisonment for a citizen entering Australia in defiance of such an order. It may be observed, however, that the practical manner in which the Bill seeks to prevent a citizen from entering Australia is by making it an offence for the owner or operator of a vessel or aircraft from conveying the citizen to Australia.

In *Potter v Minahan* (1908) 7 CLR 277 O'Connor J stated that:

> *"A person born in Australia, and by reason of that fact a British subject owing allegiance to the Empire, becomes by reason of the same fact a member of the Australian community under obligation to obey its laws, and correlatively entitled to all the rights and benefits which membership of the community involves, amongst which is a right to depart from and re-enter Australia as he pleases without let or hindrance unless some law of the Australian community has in that respect decreed the contrary."*

Likewise in *Air Caledonie International v The Commonwealth* (1988) 165 CLR 462 the High Court famously observed that *"[t]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive*". If one accepts the premise that the status of Australian citizenship is accompanied by a right of entry and abode then it reasonably follows, in our view, that an attempt to penalise or prevent the exercise of that right would not be in harmony with the constitution.

International law

Article 12(4) of the International Covenant on Civil and Political Rights (ICCPR) provides that *"[n]o one shall be arbitrarily deprived of the right to enter his own country*". The UN Human Rights Committee provided the following guidance on Article 12 in its General Comment 27 of 1999:

> *"In no case may a person be arbitrarily deprived of the right to enter his or her own country. The reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable. A*

> *State party must not, by stripping a person of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country".*[1]

The Bill has a number of features that, in our view, makes its operation arbitrary. Firstly, by not limiting the number of orders that can be made in respect of a citizen the Bill permits the Minister to prevent a person's entry to Australia on an indefinite basis. Secondly, proposed s10(2) allows the Minister to make an order depriving the right of a citizen to enter his or her country on the basis of a state of satisfaction not exceeding that of a mere suspicion, albeit formed on reasonable grounds. It is of significant concern that the Bill permits the making of a TEO without the citizen being afforded the opportunity to contradict or test the evidence that is considered to be adverse to them. The denial of procedural fairness and access to merits review undermines confidence in the scheme and amounts to a breach of Article 14 of the ICCPR which requires that *"[I]n the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*".

Further, proposed s10(3) provides that if the person is 14 to 17 years of age, the Minister must, before making a TEO, have regard to the protection of the Australian community as a "*paramount consideration*" and the best interests of a child as a "*primary consideration*". Article 3 of the Convention on the Rights of a Child provides that *"[i]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration"*. By introducing a consideration that is to be regarded as "*paramount*" the Bill undermines the appropriate priority and weight that ought to be given to the best interests of a child.

Conclusion

It is our view that by depriving a citizen of the ability to enter and reside in their home country the Bill undermines the value of holding Australian citizenship and creates a second class of citizen with fewer rights and protections. The Explanatory Memorandum to the Bill provides the following justification for the Bill:

> *"Since 2014, the number of Australians travelling to join terrorist organisations overseas has increased significantly. This has driven the need to reform Australia's approach to managing individuals who may represent a threat to public safety. The collapse of the Islamic State's territorial control complicates the threat environment as more Australians participating in or supporting the conflict, leave the conflict zone and seek to return home. The purpose of this Bill is to ensure that if these Australians do return, it is with forewarning and carefully managed by authorities"*[2]

[1] See https://www.refworld.org/docid/45139c394.html accessed 08 March 2019.
[2] See the Statement of Compatibility with Human Rights attached to the Explanatory Memorandum to the Bill at page 16.

In light of the significant consequences this Bill has for diminishing the worth of Australian citizenship and being mindful that control orders and preventative detention orders are already at the disposal of the relevant agencies under Divisions 104 and 105 of the *Criminal Code Act* 1995, it is our view that the case setting out the need for a TEO has not been adequately made. The Committee should recommend that the Bill not be passed.

We would welcome the opportunity to expand on any aspect of our submission.

Kind regards,

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Principal Solicitor