Law Council
OF AUSTRALIA

Statutory review of the *Counter Terrorism (Temporary Exclusion Orders) Act 2019* (Cth)

Parliamentary Joint Committee on Intelligence and Security

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Table of Contents

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The Chief Executive Officer of the Law Council is Mr Michael Tidball. The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the contributions of the New South Wales Bar Association and the Law Society of New South Wales to this submission.

The Law Council also acknowledges the input of members of its National Criminal Law and National Human Rights Committees.

Introduction

1. The Law Council of Australia (**Law Council**) appreciates the opportunity to participate in the review by the Parliamentary Joint Committee on Intelligence and Security (**Committee**) of the operation of the *Counter Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) (**TEO Act** or **the Act**). This review is conducted pursuant to paragraph 29(cc) of the *Intelligence Services Act 2001* (Cth) (**ISA**), which requires the Committee to complete its review of the TEO Act by the third anniversary of its commencement (31 July 2022).

Background to the TEO regime and present review

2. The statutory terms of reference for the review are focused on the operation, effectiveness and implications of the regime of temporary exclusion orders (**TEOs**).

3. These orders prevent the re-entry into Australia's territorial jurisdiction by an Australian citizen (including a minor aged between 14 and 17 years) if the Minister for Home Affairs (**Minister**) reasonably suspects that the order would substantially assist in preventing the occurrence of certain terrorism-related activity in Australia. (This is principally the prevention of a terrorist act; participation in training with a listed terrorist organisation; or the provision of support to an organisation to enable it to directly or indirectly engage in conduct that is preparatory or ancillary to a terrorist act.)[1]

4. The Minister may alternatively issue a TEO in relation to an Australian citizen if the Australian Security Intelligence Organisation (**ASIO**) has assessed that the citizen presents a risk to Australia's security on the grounds of 'politically motivated violence' within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth) (**ASIO Act**).[2] ASIO's advice as relied upon by the Minister need not be furnished via a formal and merits reviewable security assessment (of an adverse or qualified nature) which has been conducted under Part IV of the ASIO Act.[3]

5. A TEO may remain in force for a period of up to two years, and there is no limit on the total number of TEOs that may be issued in relation to a person.[4] If a person re-enters Australia while a TEO is in force in relation to them, they commit an offence punishable by a maximum penalty of two years' imprisonment—with the extensions of criminal responsibility in Chapter 2 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**) also criminalising inchoate and ancillary actions such as attempt and conspiracy to re-enter in contravention of a TEO.[5] The TEO Act, additionally, contains discrete principal offences, which are also punishable by a maximum penalty of two years' imprisonment, for persons who knowingly permit the use of a vessel or an aircraft under their control to facilitate the re-entry to Australia of a person who is subject to a TEO.[6]

6. An Australian citizen who is subject to a TEO may re-enter Australia only if they have obtained a 'return permit' from the Minister for Home Affairs. If a return permit is sought, it must be granted. However, those permits may impose conditions on the timeframes for a person's re-entry to Australia (including preventing their re-entry for up to 12 months), and further conditions, which are in the nature of notification requirements, upon their post-entry movements, communications and other

[1] TEO Act, paragraph 10(2)(a).
[2] ibid, paragraph 10(2)(b).
[3] ibid, section 28.
[4] ibid, paragraph 10(6)(d) and subsection 13(3).
[5] ibid, section 8.
[6] ibid, section 9.

activities in Australia.[7] Contravention of the conditions of a return permit, where the person is reckless as to the circumstance of contravention, constitutes a criminal offence punishable by a maximum penalty of two years' imprisonment.[8]

7. The 'post-entry conditions' which may be imposed under a return permit are broadly similar to some of the existing 'notification-type' conditions which may be imposed on an individual under the separate regime of control orders (**COs**) in Division 104 of the Criminal Code.[9] However, the range of conditions available under COs will soon be expanded significantly by the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (which is awaiting Royal Assent at the time of writing, having passed both houses of Parliament on 22 November 2021) consequentially to the establishment of a regime of extended supervision orders (**ESOs**) for high-risk terrorist offenders who are released into the community after completing sentences of imprisonment. It remains to be seen whether there is an intention for TEO re-entry permit conditions to be expanded similarly to align with some of all of the new conditions available in relation to COs and ESOs, subject to the assent and commencement of the abovementioned amending legislation. For the reasons discussed in the body of this submission, the Law Council pre-emptively cautions against such alignment.

8. While the Law Council expressed serious reservations about the (then) proposed TEO regime in 2019, it generally welcomed various Parliamentary amendments to the originating Bill to the TEO Act, which inserted several additional safeguards, although these measures did not assuage all of the concerns the Law Council raised.[10]

9. Some of the most significant additional safeguards implemented, fully or partially, recommendations of the Committee in its advisory report on its review of the originating Bill, tabled in April 2019. Among the key safeguards are: mandatory review requirements for all TEOs by an independent 'reviewing authority' appointed by the Attorney-General who is a retired judge, or a legally qualified Deputy Presidential or Senior Member of the Administrative Appeals Tribunal (**AAT**);[11] additional requirements for the issuance of TEOs in relation to children aged 14 to 17 years;[12] and explicit criteria of necessity and proportionality with respect to the conditions that may be imposed upon return permits, taking into account both their individual and cumulative impact on the individual's personal circumstances, including impacts on any dependent persons.[13]

10. As explained below (see the discussion of review rights), the nature of the mandatory review mechanism established via the Parliamentary amendments raises significant policy and practical issues, which are additional to those raised the

[7] ibid, Part 2, Division 2, especially subsections 16(9)-(11) (re-entry permit conditions).

[8] ibid, section 20.

[9] ibid, subsection 16(10) cf Criminal Code paragraph 104.5(3)(i)

[10] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Temporary Exclusion Orders) Bill 2019*, (March 2019), especially 5-6 at [6] (list of key recommended amendments to address major concerns).

[11] TEO Act, sections 14 and 23.

[12] ibid, subsections 10(3)-(4).

[13] ibid, subsection 16(3).

Law Council's advocacy on the originating Bill as introduced and referred to the Committee in 2019.

Law Council position on the TEO regime

11. Despite several improvements resulting from Parliamentary scrutiny of the originating Bill, the Law Council continues to hold concerns about two overarching issues relevant to the TEO Act, namely:

- **Necessity**—there is insufficient evidence on the public record about the operation of the TEO regime, which is capable of substantiating findings with respect to its practical necessity and effectiveness, as an additional power to the suite of other powers that are already available to manage the security risks presented by persons inside Australia. (For example, preventive powers in the nature of COs and post-sentence detention; physical and digital surveillance powers for investigative and intelligence purposes; and offences against the security of the Commonwealth, including specific terrorism offences targeting merely preparatory conduct at its earliest stages.) The Law Council notes that only limited statistical information is available on the public record about the exercise of powers under the TEO Act, via unclassified annual reports which are required to be prepared and tabled in Parliament under section 31 of the TEO Act. This limited access to information makes it impossible for civil society stakeholders, and Parliamentarians who have not received classified operational briefings, to scrutinise effectively the operation of the regime; and

- **Proportionality**—even if the contemporary necessity of a TEO regime of some kind is established, on the basis of compelling evidence presented to the Committee during the present review, the Law Council remains of the view that there are critical gaps in the statutory safeguards and other procedural parameters governing the operation of the regime established under the TEO Act. These gaps are most pressing in relation to the issuing authority for TEOs, requirements in relation to procedural fairness, review rights, and the protections accorded to vulnerable persons (such as children), including:

  - **Issuing authority:** the Ministerial issuance of TEOs, rather than their issuance by a superior court (that is, in the exercise of the judicial power of the Commonwealth); or a judge of a superior court who is appointed *persona designata* (that is, in the exercise of executive power).[14] The retention of a Ministerial issuing model contradicted a recommendation of the Committee in its review of the originating Bill in 2019 for there to be judicial issuing of TEOs;[15]
  - **Issuing grounds:** overly broad in the grounds upon which a TEO may be issued, particularly as regards an assessment by ASIO that a person is a risk to 'security' on the grounds of 'politically motivated violence' as those terms are defined in the ASIO Act;[16]
  - **Exclusion of procedural fairness:** an express statutory exemption of the Minister from the common law duty to accord procedural fairness in relation to decisions to issue or revoke TEOs, and decisions to issue, vary or revoke re-entry permits;[17]

[14] ibid, section 10.

[15] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (April 2019), recommendation 7.

[16] TEO Act, paragraph 10(2)(b).

[17] ibid, section 26.

- **Limitations in review rights**: the absence of statutory judicial review and merits review rights of decisions in relation to TEOs and return permits, with only a much more limited review regime established under section 14 for the issuance of TEOs (and not refusals of revocation applications, or any decisions in connection with return permits). This statute-specific process effectively involves a retired judicial officer ('reviewing authority') conducting judicial review of the issuing decision,[18] but in circumstances where they are required to proceed without notice to, and in the absence of, the TEO subject, who has no opportunity to be heard.[19] The Minister also retains discretion to withhold material from the reviewing authority in relation to a TEO, despite the fact that such material was before the Minister when they made the decision to issue the TEO, if the Minister considers it is in the public interest to do so;[20]
- **Constitutionality of statutory review process:** some of the Law Council's membership are concerned that the review process for TEOs under section 14 of the Act raises an unacceptably high degree of constitutional risk, because it may purport to impermissibly invest non-judicial officers with the judicial power of the Commonwealth. (That is, in effectively requiring reviewing authorities to conduct judicial review of the Minister's issuing decision in relation to a TEO);[21]
- **Limitations in review rights concerning ASIO security advice which forms the basis of a decision to issue a TEO:** the exclusion of ASIO's assessments in relation to a person's engagement in, or risk of facilitating, politically motivated violence from the established decision-making and administrative review framework for security assessments under Part IV of the ASIO Act;[22] and
- **Safeguards for vulnerable persons:** inadequate protections for children aged between 14 and 17 years in the criteria and process for issuing TEOs and associated re-entry permits in relation to those children;[23] and the absence of dedicated protections for other categories of particularly vulnerable persons (especially persons with disabilities) who may be subject to TEOs.

12. Taken together, these gaps make it impossible to conclude that the extent of the incursions created by the TEO Act into the rights of citizens to enter their country of citizenship[24] are proportionate to the legitimate objective of abating any security

[18] ibid, subsections 14(4)-(5).

[19] ibid, subsection 14(6).

[20] ibid, subsection 14(3).

[21] ibid, section 14. See also the severability clause in section 30. See further: Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Temporary Exclusion Orders) Bill 2019* (TEO Bill), (March 2019), 12-13.

[22] TEO Act, section 28.

[23] ibid, subsections 10(3)-(5) and paragraph 10(8)(b).

[24] See especially, *International Covenant on Civil and Political Rights*, Article 12(4): '[n]o one shall be arbitrarily deprived of the right to enter his own country'. See further, the advisory comments of the United Nations Human Rights Committee (**UNHRC**) on Article 12(4), which observed that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable': UNHRC, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)* UN GAOR, UN Doc CCPR/C/21/Rev.1/Add.9 *)* (2 November 1999).

risks to Australia that may flow from the return of a citizen who has been assessed by agencies as having engaged in activities of security concern while abroad.

Key recommendations

13. The Law Council makes 15 recommendations for legislative improvements to the TEO regime, which seek to address the most serious of its concerns of the kind described above. In short:

- **recommendation 1** is directed to the foundational issue of improving transparency about the operation of the TEO regime, so that its necessity can be objectively assessed, and meaningfully contested, if necessary, by non-government stakeholders who are participating in a public-facing review process, including the present review. If adequate information cannot be provided publicly to substantiate the necessity of a TEO regime, it follows that the TEO Act should be repealed; and

- **recommendations 2-15** advocate for several specific amendments to the TEO Act to improve procedural safeguards, with the objective of strengthening the proportionality of the TEO regime, in the event the Committee is persuaded that it should remain in force. The Law Council's most pressing recommendations pertain to the matters identified above, concerning the issuance of TEOs, review rights, procedural fairness, and protections for vulnerable persons including minors. The Law Council also supports the conduct of further periodic reviews by the Committee of the TEO Act, in its entirety, having regard to its highly intrusive and extraordinary nature.

Necessity of the TEO regime

14. The Committee's terms of reference are focused on the operation of the TEO regime, including its continued necessity, effectiveness and implications. While the Law Council welcomes the practice of conducting public and participatory *ex post facto* reviews of laws conferring extraordinary and intrusive powers, such as those conferred under the TEO regime, it is important that there is sufficient evidence of the operation of that regime placed on the public record for the purpose of such scrutiny. This disclosure is required to enable contentions about the necessity and effectiveness of the regime under review to be independently and transparently tested and scrutinised.

15. The TEO Act imposes a highly significant limitation on the fundamental right of a person to enter their country of citizenship,[25] and consequently engages rights to freedom of movement, freedom of expression, freedom of association, liberty and security of the person and rights in relation to work, education and participation in cultural life.[26] By extension, the TEO Act creates a substantial risk that an Australian citizen who is subject to a TEO may not have any legal rights to enter other countries while the TEO is in force if they do not hold dual or multiple citizenship of one or more other countries. This could be a protracted period, given that there are no limits on the issuance of consecutive TEOs, and return permits issued under the TEO Act can impose conditions which effectively prohibit a person's re-entry to Australia for up to 12 months from the date of the TEO. All of these concerns are enlarged further in the context of the power to issue TEOs in relation to vulnerable persons to whom Australia owes additional human rights obligations under

[25] *International Covenant on Civil and Political Rights* (**ICCPR**), [1980] ATS 23, Article 12(4).

[26] See especially: ICCPR, Articles 9(1), 19, 22 and 27. See also: *International Covenant on Economic, Social and Cultural Rights* (**ICESCR**), [1976] ATS 5, Articles 6, 13 and 15.

international law. Such persons are principally children aged between 14 and 17 years, and persons with disabilities.[27]

16. Accordingly, given the nature and extent to which the TEO regime limits human rights, compelling evidence of its necessity and proportionality is required to be presented publicly if the regime is to remain in force. In particular, an assessment of the necessity of an intrusive power is not a 'one off' exercise to be completed only at the time of the passage of the originating Bill. Rather, the necessity of any such power is an enduring and evolving question, which must be periodically and transparently re-evaluated, on the basis of all evidence of its operation at each review point.

17. The Law Council acknowledges that security imperatives may prevent the public disclosure of the detailed factual circumstances of some, or all, of the individual TEOs issued to date. However, the aggregated statistical information required to be disclosed in annual reports prepared under section 31 of the TEO Act does not provide meaningful insight into the way in which the regime has operated in its first approximately 2.5 years of operation. The most that can be discerned from the information provided in these public reports, current to the 2019-20 reporting period, is that five TEOs were made (only in relation to persons 18 years or older), one of which was revoked, and one of which came into force as soon as it was made. One return permit was issued, and one person entered Australia pursuant to a return permit.[28] Aggregated statistical information for the 2020-21 reporting period was unavailable at the time of writing.

18. Further, under paragraph 31(3)(a) of the TEO Act, the Minister retains broad discretion to omit any information from their annual reports, if they consider that its disclosure is likely to cause prejudice (to any extent) to Australia's national security. There is no explicit requirement to disclose that information has been omitted from a report, or to explain the basis for its omission (that is, identifying the specific security interests said to be at risk of prejudice, and the degree of anticipated prejudice). Nor is statutory provision made for the external review or scrutiny of the basis upon which it is assessed that the public reporting of aggregated statistical information is likely to be prejudicial to security. There is also no provision for the deferred reporting of statistical information in public reports, to accommodate the fact that security issues existing at the reporting date may have abated with the passage of time (for example, due to changes in the geopolitical environment; the official disclosure of relevant information; or the death of the individual concerned). This is in contrast to deferred public-facing annual reporting provisions in other Commonwealth legislation conferring intrusive security-related powers, including reporting requirements for certain warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth).[29]

19. The Committee has recently made recommendations for all legislative proposals to expand security agencies' powers to be accompanied by sufficiently detailed unclassified explanations of their necessity, so that members of the public and the Parliament beyond the Committee's membership can obtain a clear and accurate understanding of that case, and if desired provide comment on that case as part of

[27] *Convention on the Rights of the Child* (**CRC**) [1991] ATS 4; and *Convention on the Rights of Persons with Disabilities* [2008] ATS 12.

[28] Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences: Annual Report, 2019-20*, (November 2020), 7.

[29] *Telecommunications (Interception and Access) Act 1979* (Cth), section 103B and Schedule 1, clause 132 (deferred reporting on certain interception warrants that would disclose information about control orders).

their participation in the democratic scrutiny process.[30] The Law Council recommends that similar expectations or requirements should apply to the provision of reports on the exercise of those powers once enacted, so that subsequent *ex post facto* reviews of their operation can be similarly informed, and contentions about their continued necessity or effectiveness can be tested rigorously, in a participatory way.

20. It is also notable that, in the UK, significant information about the circumstances of individual TEOs has been placed in the public domain, including through judicial review proceedings in relation to individual TEOs. For example, the judgment of the England and Wales High Court in *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (15 May 2020) disclosed that the TEO subject in that case had travelled to Syria with his wife and three toddler-age children, and had aligned with a group affiliated with Al-Qaeda, before being arrested in Istanbul in 2018 and subsequently being made the subject of a TEO after disclosing his intention to return to the UK. The judgment provided information about the return conditions of the TEO in that case, which included an obligation to give police 72 hours' notice of any change to his residence; as well as more onerous conditions available under the UK TEO legislation which have no equivalent under the Australian legislation. The latter included obligations to report daily to police, and to attend weekly appointments with a specified mentor and theologian as part of a deradicalization program.[31]

21. Similarly, in March 2020, the UK Independent Reviewer of Terrorism Legislation, Mr Jonathan Hall QC, provided the following summary of all TEOs issued for the 2017-18 reporting year under the relevant UK legislation, in his *Unclassified Report on the Terrorism Acts in 2018*:

> *The typical profile is a British mono-national who has travelled to Syria and spent time in Da'esh controlled areas and may therefore have been (i) further radicalised, (ii) de-sensitised through exposure to extreme violence, and (iii) provided with some terrorist training. TEOs are considered to be particularly appropriate for returning women.* [Notably, the report, at p. 165, also provided gender-based statistical breakdowns of all TEOs as at the reporting date.] *Despite the relatively limited obligations that may be imposed (compared to the broader TPIM* [Terrorism Prevention and Intervention Measure] *power), I am informed that the Home Office consider that TEOs are an effective response for a range of individuals returning from Syria and Iraq, especially in the absence of a criminal justice response. I have seen one file where a decision to impose a TEO was taken for an individual with dual nationality.*[32]

22. The fact that such information has been disclosed publicly in the UK suggests that disclosures beyond bare statistical information are not inherently inimical to the protection of security interests; and that a more nuanced approach is possible, particularly with respect to the deferred release of information (as occurred in the above examples from the UK). This tends in further support of the Law Council's below recommendation for more detailed disclosure, to the greatest extent that is consistent with demonstrable security imperatives to protect specific pieces of information. Such a proportionate approach is strongly preferable to retaining

[30] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Surveillance Legislation Amendment (Identify and Disrupt) Bill 2020*, (August 2021) , recommendation 5.

[31] See also: *Re M (Children)* [2019] EWCA 1364 (31 July 2019) concerning care proceedings for children whose parents were arrested on suspicion of terrorism offences outside the UK, and whose father was subject to a TEO. The judgment provides information about the basis for issuing the TEO and return conditions.

[32] Jonathan Hall QC, Independent Reviewer of Terrorism Legislation (UK), *Report on the Terrorism Acts in 2018 (unclassified)*, March 2010, 163 at [8.44].

statutory provisions which enable the wholesale and permanent suppression of information beyond bare statistics in relation to specific matters.

Recommendation 1—statutory reporting requirements under the TEO Act

- **Section 31 of the TEO Act should be amended as follows:**

  (a) annual reports should be required to provide a description of the circumstances in which TEOs were issued during the reporting period, in addition to the existing requirements to disclose aggregated statistical information;

  (b) the ability of the Minister to omit information from annual reports should be subject to additional statutory parameters. Namely:

    (i) the omission of information from a report should only be permitted if its disclosure is reasonably likely to cause significant prejudice to Australia's national security (not any degree of prejudice), and the public interest in non-disclosure outweighs the public interest in disclosure;

    (ii) if any information is omitted from a report presented to the Parliament, the fact of the omission must be disclosed in that report, together with a statement of reasons for making the omission. (That is, an explanation of the nature of the anticipated prejudice to security, and the application of the public interest test mentioned at paragraph (i) above); and

    (iii) there should be a requirement for the deferred reporting of information about TEOs, if disclosure would no longer be prejudicial to security in a subsequent annual reporting period. This would be consistent with existing deferred reporting requirements on certain investigative warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth) that would involve the disclosure of 'control order information' (per section 103B; and Schedule 1, clause 132). Statutory deferred reporting requirements should apply in preference to a legal power to permanently withhold information (thereby making the public reliant on discretionary, *ad hoc* disclosure at a later time).

Proportionality of the TEO regime

23. The Law Council made a range of recommendations in its submission to the Committee on the originating Bill in March 2019. The matters canvassed in that submission remain the Law Council's position on the TEO regime as ultimately enacted.[33] For the purpose of the present review, the Law Council focuses on three key areas, concerning:

- **the issuance of TEOs** (including the issuing authority, issuing grounds and exclusion of procedural fairness in relation to primary issuing decisions);

[33] Law Council of Australia, *Submission to the Parliamentary Joint Committee on Intelligence and Security Review of the Counter-Terrorism Legislation Amendment (Temporary Exclusion Orders) Bill 2019* (TEO Bill), (March 2019), 5-6 at [6].

- **arrangements for the review of issuing decisions** (including the grounds of review, the persons performing the review function, and matters relevant to procedural fairness); and
- **protections for vulnerable persons who are the subject or prospective subject of a TEO.** (This focuses, in particular, on the question of whether TEOs should be available in respect of children aged 14 to 17 years. It also addresses issuing criteria for TEOs, and the imposition of return permit conditions, which comprehensively encapsulate the matters recognised under international law as being relevant to an assessment of the best interests of the child, and the interests of a person with one or more disabilities).

24. In addition, the Law Council also makes certain recommendations about the conditions of re-entry permits and legal assistance for TEO subjects. These recommendations seek to complement and align with recent recommendations of the Committee directed to other extraordinary powers in national security legislation under review.

Issuance of TEOs

Issuing authority

25. One of the core recommendations in the Law Council's submission to the Committee on the originating Bill in 2019 was for TEOs to be subject to judicial, rather than Ministerial, issuance.[34] While the Committee also made recommendations supporting judicial issuance,[35] the Government did not adopt that model and instead retained a Ministerial issuing model, with the addition of the review process contained in section 14 of the TEO Act.

26. The Law Council continues to support the adoption of a judicial authorisation model in the TEO Act, reflecting its concern to ensure that the primary decision to issue a TEO attracts the independence, rigour and standing of decision-making by judicial officers. The more extraordinary the power, the more important that it is subject to judicial authorisation which is demonstrably at arm's length from the executive government (and not simply conducting a review of the process by which a Ministerial authorisation decision is made, by reference to the established grounds of judicial review, as codified).

27. The potential for the protracted exclusion of an Australian citizen from Australia is a highly extraordinary power, particularly as the person need not have been convicted of an offence, or have personally been involved in the commission of, or preparation or planning for, a terrorist act or acts outside Australia. The power is even more extraordinary in its potential application to Australian children as young as 14 years of age, who may be separated from their parents or guardians in Australia or another country. To avoid doubt, depending on the outcomes of a detailed consideration of the issues arising from Chapter III of the *Constitution*, judicial authorisation could be given effect via either the statutory conferral of judicial power on courts; or the enactment of a regime for the appointment of judicial officers in their personal capacities ('*persona designata*').

28. The Law Council acknowledges that there may be a preference for the Ministerial issuance of TEOs (subject to the *ex post facto* review regime in section 14) in view of the likelihood that information about the current, recent or anticipated activities and movements of persons of security concern is likely to be highly classified. There

[34] ibid, 15.

[35] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (April 2019), recommendation 7.

may also be a desire for the relevant issuing authority to have comprehensive and detailed knowledge of the overall security environment, and related cases to the individual in question (such as knowledge of other individuals who have travelled overseas to fight with or support a particular terrorist organisation, or related organisations).

29. However, such factors do not dictate against adopting a model of primary judicial authorisation (in the sense of a judicial officer making the primary authorisation decision, whether as a court exercising judicial power; or an individual appointed in a personal capacity). As the recommendations of the third Independent National Security Legislation Monitor (**INSLM**) made clear in relation to other extraordinary security powers, various options are available to facilitate specialisation and ensure that security is maintained, while also leveraging the considerable assurance of a judicial authorisation model. For instance, the third INSLM supported the establishment of a dedicated division of the AAT, headed by a retired judge, to issue extraordinary coercive powers under Part 15 of the *Telecommunications Act 1997* (Cth) (noting also that judicial officers can be appointed concurrently as tribunal members).[36] Other administrative options are also open to ensure that judicial officers performing functions as independent issuing authorities for TEOs would have access to appropriate briefings about the security environment (in addition to being furnished with all relevant information to perform their functions in determining individual TEO applications); and are supported by appropriate physical and information security infrastructure, advice and personnel.

30. Moreover, the case for an issuing authority possessing an intimate and comprehensive knowledge of the contemporary domestic and global security environment is arguably less critical in the context of TEOs as compared with other covert security operations, which may endure over a much longer period of time (such as intelligence operations designed to build a comprehensive picture of longstanding threats and other security matters, like specific organisations or foreign governments of security concern). In contrast, a TEO is an order issued in relation to an individual to address an imminent or short-term security threat of a very specific kind, which arises from that person's anticipated return to Australia.

31. In addition to this distinction, once a TEO enters into force, it has the immediate effect of removing a fundamental right of an Australian citizen to enter their country of citizenship, and can potentially do so in relation to vulnerable persons, including children as young as 14 years. This makes it particularly important that the highest degree of rigour and independence, both perceived and substantive, should be brought to bear upon decisions to issue TEOs which enliven these extremely severe consequences. Judicial authorisation would provide that degree of assurance.

32. To be clear, the Law Council's recommendation for the judicial issuance of TEOs goes beyond an overarching policy preference for judicial authorisation generally. It is calibrated to the nature of, and circumstances attending, TEOs. Just as the Committee has recognised the need for judicial authorisation, by superior court judges, of other security-related powers of the most exceptional kind,[37] the Law

[36] Dr James Renwick CSC SC, Third INSLM, *Trust but Verify: a Report Concerning the Telecommunications and Other Legislation (Assistance and Access) Act 2018 (Cth) and Related Matters*, (30 June 2020), recs 3-6.

[37] See, for example, Parliamentary Joint Committee on Intelligence and Security, *Report on the review of police powers in relation to terrorism: the control order regime, the preventative detention order regime and the continuing detention order regime*, (October 2021), recommendation 15 (in relation to issuing authorities for preventative detention orders under Division 105 of the Criminal Code).

Council submits that TEOs similarly fall at this end of the spectrum and should be treated consistently.

Recommendation 2—judicial rather than Ministerial issuing of TEOs

- **Section 10 and related provisions of the TEO Act should be amended to provide that only superior court judges may issue TEOs (not the Minister for Home Affairs).**
- **Further consideration (including of constitutional issues) should be given to whether that power should be conferred on superior courts, or on individual superior court judges who are appointed (by consent) as issuing authorities under the TEO Act in their personal capacities.**

Issuing grounds

33. Subsection 10(2) of the TEO Act creates two discrete issuing grounds for TEOs, both of which raise issues with respect to their proportionality, as discussed below.

Ground 1: prevention of terrorism-related activities

34. The first ground, in paragraph 10(2)(a), is connected explicitly with the objective of preventing the commission of specified terrorism-related activities. It is enlivened if the Minister suspects, on reasonable grounds, that making the order would substantially assist in achieving the following preventive outcomes (with the component terms 'terrorist act' and 'terrorist organisation' taking their meaning from the Criminal Code):

- preventing a terrorist act;
- preventing the provision of training to a listed terrorist organisation (or preventing participation in training with such an organisation);
- preventing the provision of support for, or the facilitation of, a terrorist act; or
- preventing the provision of support or resources to an organisation that would enable that organisation to directly or indirectly engage in conduct that is preparatory or ancillary to a terrorist act.

Risk assessment is not limited to the TEO subject's future actions

35. The grounds in paragraph 10(2)(a) do not require the Minister to suspect that the person is likely to personally engage in one or more of those activities in the future. This is one potential basis upon which the Minister could form the requisite suspicion that the TEO would 'substantially assist' in preventing the commission of one or more of those activities. However, it would also be open to the Minister to form the requisite suspicion that the issuance of a TEO preventing the re-entry to Australia of one of its citizens could 'substantially assist' in preventing *another person or persons* (whether identifiable or otherwise) from engaging in those activities.

36. To be clear, the Law Council readily acknowledges that, if it is reasonably suspected that a person may be directly or indirectly influencing others to engage in terrorism-related activities (or may be likely to do so in future), then it is legitimate and important that they are the subject of investigation. However, the Law Council questions whether the specific power to impose a TEO in relation to such a person is a proportionate response, noting the range of existing powers available to conduct covert surveillance of that person; and if necessary, intervene though the exercise of overt powers. This may include arresting and charging a person with a suspected offence (such as advocating terrorism or inciting violence, or providing support to a terrorist organisation. It may alternatively or additionally involve the exercise of one

or more preventive powers, such as applying to a court for a CO, or cancelling or suspending travel documents.

37. The Law Council suggests that further information is needed about the operational context in which TEOs have been issued, or contemplated, in order to scrutinise the proportionality of a power to issue TEOs in relation to one person, to prevent the commission of terrorist-related activities by one or more other persons. If the Committee is persuaded that the security threat presented by persons who may not themselves be assessed as likely to carry out a terrorism-related activity is sufficiently serious as to justify a TEO power, then the Law Council submits that the implementation of its recommended amendments to the regime will assume an even higher degree of importance. This is particularly the case with recommendations directed to judicial authorisation and review rights.

No requirement to suspect the TEO subject has engaged in terrorism-related activities

38. In addition, as the Committee observed in its 2019 review of the originating Bill, there is no requirement for the Minister to be satisfied that the person who is subject to the prospective TEO has, themselves, engaged in one or more of the terrorism-related activities specified in paragraph 10(2)(a) outside Australia. The Committee's recommendation for paragraph 10(2)(a) to include an additional, explicit issuing criterion to this effect was not implemented.[38]

39. This is in contrast to the issuing grounds for a TEO in the UK, which require the Secretary of State for the Home Department to reasonably suspect that the individual is, or has been, involved in terrorism-related activity outside the UK. This is in addition to the requirement that the Secretary of State must reasonably consider that it is necessary, for purposes connected with protecting members of the public in the UK from a risk of terrorism, for a TEO to be imposed on the individual.[39]

40. The Law Council supports the implementation of the Committee's outstanding recommendation for an additional issuing criterion in paragraph 10(2)(a), requiring the Minister to form a reasonable suspicion that the individual has engaged in one or more of the specified terrorism-related activities outside Australia. As the Committee recognised in 2019, this would be an important safeguard to ensure that the TEO regime cannot operate in a broader, potentially unintended, context than the stated objective of the TEO regime to respond to the threat of returning 'foreign terrorist fighters'. For example, an individual who leaves Australia on business or personal travel, for purposes wholly unconnected with terrorism, could potentially find themselves subject to a TEO.[40]

Ground 2: ASIO terrorism threat assessments

41. The second ground for issuing a TEO, in paragraph 10(2)(b), is considerably broader than the first ground, as it imports certain concepts in the ASIO Act, which delineate ASIO's security intelligence collection and assessment functions. Namely, the Minister may make a TEO if ASIO has made an assessment that the subject of the prospective TEO is directly or indirectly a risk to 'security' on the grounds of

[38] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (April 2019), [2.26] and recommendation 12.

[39] *Counter-Terrorism and Security Act 2015* (UK), subsection 2(3). See also subsection 2(4).

[40] Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (April 2019), [2.26].

'politically motivated violence' (as both of those terms are defined in section 4 of the ASIO Act).

42. Importantly, the definition of 'security' in the ASIO Act significantly extends the ordinary meaning of that term. It covers the protection of Australia and Australians from a series of enumerated threats, which include 'politically motivated violence' in subparagraph (a)(iii). The component term 'politically motivated violence' is defined separately in section 4 of the ASIO Act to mean the following acts:

> *(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or*
>
> *(b) acts that:*
>
> *(i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and*
>
> *(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or*
>
> *(ba) acts that are offences punishable under Subdivision A of Division 72* [international terrorist activities using explosives or lethal devices, implementing Australia's international obligations under sectoral anti-terrorism conventions]*, or Part 5.3, of the Criminal Code* [terrorism offences]*; or*
>
> *(c) acts that are offences punishable under Division 119 of the Criminal Code* [foreign incursions and recruitment]*, the Crimes (Hostages) Act 1989 or Division 1 of Part 2, or Part 3, of the Crimes (Ships and Fixed Platforms) Act 1992 or under Division 1 or 4 of Part 2 of the Crimes (Aviation) Act 1991* [implementing Australia's international obligations under sectoral anti-terrorism conventions, principally concerning the hijacking of aircraft and vessels and taking of hostages]*; or*
>
> *(d) acts that:*
>
> *(i) are offences punishable under the Crimes (Internationally Protected Persons) Act 1976* [implementing Australia's international obligations under a sectoral convention for the protection of heads of governments and other diplomatic agents against violence or attack]*; or*
>
> *(ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.*

43. The Committee, as constituted in 2019, was not convinced that the second issuing ground in paragraph 10(2)(b) of the (then) originating Bill was necessary or proportionate to the protection of Australia and Australians from the terrorism or other security threats presented by returning Australian 'foreign fighters', or Australian citizens who had engaged in other kinds of hostile activities overseas. The Committee placed weight on the submissions of civil society stakeholders, including the Law Council, which observed that the Minister would not be subject to

a statutory obligation—as a legal precondition to the exercise of their power to issue a TEO—to independently scrutinise ASIO's assessment. The Committee also gave weight to stakeholder submissions that there were no statutory requirements for ASIO's assessments furnished to the Minister for the purpose of making a TEO decision to meet an objective standard of proof, or to satisfy traditional evidentiary rules. On this basis, the Committee recommended the omission of the issuing ground in paragraph 10(2)(b) so that the TEO regime was limited to the highest risk circumstances as set out in paragraph 10(2)(a).[41]

44. In rejecting the Committee's recommendation, the Government indicated that there was a policy intention that TEOs should not solely be available to deal with the 'urgent or high-risk cases' of the kind covered by paragraph 10(2)(a) (which could include circumstances in which ASIO had not already provided a threat assessment in relation to that individual, potentially because of the rapid speed with which the threat emerged). In these circumstances, it would be open to the Minister to rely on a range of information from multiple sources, including from law enforcement and intelligence agencies.[42]

45. The Government also indicated that the policy intent underpinning the additional issuing ground in paragraph 10(2)(b) was to enable the issuance of TEOs where ASIO had provided a terrorism threat assessment in relation to an individual pursuant to its function in paragraph 17(1)(b) of the ASIO Act to communicate intelligence relevant to security, for purposes relevant to security. The apparent intention was for TEOs to be capable of being issued on the sole basis of such an assessment by ASIO, whenever the Minister considered it appropriate to do so, at their complete discretion.[43]

46. However, this reasoning does not engage with the substantive concern raised by the Committee in 2019 that paragraph 10(2)(b) allows for the issuance of a TEO in a much wider (and undisclosed) range of circumstances than the prevention of an immediate or short-term terrorism risk of the kind specified in subparagraphs 10(2)(a)(i)-(iv); and that no clear justification has been given for the perceived need for the power to exist in the wider circumstances covered by paragraph 10(2)(b).

47. In particular, the concept of 'politically motivated violence' in section 4 of the ASIO Act includes, but also far exceeds, the specific terrorism-related activities listed in subparagraphs 10(2)(a)(i)-(iv) of the TEO Act. If paragraph 10(2)(a) was the sole issuing ground for a TEO, it would be open to the Minister to rely on any intelligence communicated by ASIO about a person's terrorism risk (either exclusively or alongside any other relevant information from other sources, such as information held by the AFP or other intelligence agencies) for the purpose of determining whether the issuance of a TEO would substantially assist in the occurrence of a terrorism-related activity under paragraph 10(2)(a). There would be no need for the discrete issuing ground in paragraph 10(2)(b).

48. To the extent that paragraph 10(2)(b) is evidently intended to enable TEOs to be issued in response to security threats which are additional to the specific terrorism-related activities listed in paragraph 10(2)(a), no information has been placed on the public record about the nature of those additional threats, and why the power to issue a TEO is considered a necessary and proportionate response to them. The

[41] ibid, [2.30]-[2.23] and recommendation 12.

[42] Australian Government, *Response to the PJCIS Advisory Report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (July 2019), 7.

[43] ibid.

Law Council considers that the provision should not be retained in the absence of such explanation, and an opportunity for detailed scrutiny of its adequacy.

Related issue: impact of section 28 on advice provided by ASIO

49. As a related issue, the Law Council notes that the originating Bill was amended during Parliamentary debate to insert section 28, which effectively excludes any assessment that ASIO has provided for the purpose of subsection 10(2) of the TEO Act from the statutory framework for the making and merits review of formal 'security assessments' under Part IV of the ASIO Act.

50. It was suggested that this provision was inserted merely to avoid doubt or confusion about the interaction of the TEO Act with Part IV of the ASIO Act. It was further noted that, in any event, the subjective policy intention was that any information furnished by ASIO for the purpose of a TEO decision would be a simple communication of intelligence by ASIO for the purpose of performing its statutory function to do so in paragraph 17(1)(b) of the ASIO Act, rather than constituting the performance by ASIO of its separate function in paragraph 17(1)(c) of the ASIO Act to provide advice to Commonwealth authorities and Ministers on matters relevant to security (which provides the basis for ASIO's security assessment function under Part IV of the ASIO Act).[44] That is, it was intended that ASIO's provision of information to the Minister, for the purpose of the Minister exercising the power to issue a TEO under paragraph 10(2)(b) of the TEO Act, would not amount to the furnishing of a formal 'security assessment' by ASIO.

51. A 'security assessment' is defined in the ASIO Act in functional terms, and does not depend on ASIO explicitly labelling a document, or the process by which it is prepared, as a 'security assessment'. Rather, this term is defined as a statement prepared by ASIO containing 'any recommendation, opinion or advice on, or otherwise referring to the question of whether it would be consistent with the requirements of security' for an administrative decision-maker to take certain administrative action (referred to in the ASIO Act as 'prescribed administrative action') in respect of a person.[45]

52. It is correct that section 28 of the TEO Act would simply provide clarification of the pre-existing legal position where ASIO's threat assessment in relation to a prospective TEO subject *did not* address the question of whether the Minister should issue a TEO in relation to a person in the interests of security, but rather was confined to the question of whether the person was a threat to 'security' on the grounds of 'politically motivated violence' within the meaning of the ASIO Act.

53. However, if a threat assessment furnished by ASIO specifically addressed the question of whether a TEO should be issued to mitigate an identified security threat—which could conceivably occur if, for example, the Minister or Department sought ASIO's recommendations about whether making a TEO in relation to a person would be consistent with security—then it may otherwise be capable of falling within the definition of a 'security assessment' in section 35 of the ASIO Act.[46] In

[44] Ibid, 7. See also: Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (April 2019), [2.33]-[2.36].

[45] ASIO Act, section 35.

[46] See the definition of the component term 'prescribed administrative action' in section 35 of the ASIO Act, especially paragraph (a)(i) (covering administrative action that relates to, or affects, access by a person to any information or place, access to which is controlled or limited on security grounds). In particular, Australian territory is arguably a 'place', and the TEO regime itself is arguably a security ground which 'limits access' to that place (noting that a person is under pain of criminal penalty if they return or attempt to return to Australia in contravention of a TEO, or a 12-month exclusion condition on a return permit). This literal reading of the relevant provisions suggests that a decision to issue a TEO would be capable of satisfying the definition of 'prescribed administrative action' for the purpose of the security assessment regime under the ASIO Act.

that event, section 28 of the TEO Act would operate to exclude the important procedural requirements and review mechanisms which are generally applicable to security assessments under Part IV of the ASIO Act. But for section 28 of the TEO Act, those requirements would otherwise have applied to any advice of this kind which ASIO gave to the Minister in relation to a prospective TEO.

54. The Law Council submits that, in the absence of acknowledgement and justification of this outcome, the TEO Act should not be capable of excluding the application of Part IV of the ASIO Act where it would otherwise have applied to ASIO's advice provided for the purpose of the Minister's decision-making under subsection 10(2) of the TEO Act. This result would be anomalous with the treatment of ASIO's security advice given for the purpose of other administrative decisions, including refusal or cancellation decisions in relation to passports on security-related grounds. That advice is generally required to be provided via the furnishing of a security assessment pursuant to Part IV of the ASIO Act, as part of the performance by ASIO of its security advice function under paragraph 17(1)(c) of the ASIO Act.[47]

Recommendation 3—issuing grounds for TEOs

- **Subsection 10(2) of the TEO Act should be amended as follows:**
  - **(a) paragraph 10(2)(a) should include an additional issuing criterion, requiring the Minister to suspect on reasonable grounds that the person has engaged in a terrorism-related activity of the kind specified in subparagraphs (i)-(iv) outside Australia (in line with recommendation 12 of the Committee's advisory report on the originating Bill);**
  - **(b) further public explanation should be provided about the necessity and proportionality of the Minister's power in paragraph 10(2)(a) to issue a TEO in relation to one person, for the purpose of substantially assisting in the prevention of a terrorism-related activity by one or more other persons. Consideration should be given to publicly disclosing information about whether any of the TEOs issued to date have been issued on this basis. If so, every effort should be made to provide unclassified case studies illustrating this application, so as to inform a public-facing assessment of its necessity and proportionality.**
  - **(c) paragraph 10(2)(b) should be repealed, in line with recommendation 12 of the Committee's advisory report on the originating Bill, so that the only ground for issuing a TEO is that in paragraph 10(2)(a). (That is, the making of a TEO in relation to the person is likely to substantially assist in the prevention of specified terrorism-related activities, with the additional requirement set out in paragraph (a) of this recommendation)**
- **Section 28 of the TEO Act should be repealed, so that if ASIO provides advice to the Minister in the nature of a recommendation about the exercise of the power in subsection 10(2) to make a TEO in relation to**

[47] See paragraph (c) the definition of 'prescribed administrative action' in section 35 of the ASIO Act, which explicitly covers decisions under the *Australian Passports Act 2005* (Cth). See further, *Australian Passports Act 2005* (Cth), sections 12, 18, 22 and 22A. Note, however, that while ASIO furnishes security assessments for the purpose of the suspension of a passport under section 22A of the Australian Passports Act, paragraph 36(1)(ba) of the ASIO Act provides that these security assessments are non-reviewable.

a person, then that advice should be capable of being treated as a 'security assessment' under Part IV of the ASIO Act (and thereby subject to the applicable procedural and review requirements).

Minister's exemption from the duty to accord procedural fairness

55. The Law Council continues to oppose section 26 of the TEO Act, which exempts the Minister from the common law duty to accord procedural fairness to TEO subjects, or prospective TEO subjects,[48] in relation to the performance of all of the Minister's functions and exercise of all their powers under the TEO Act. This complete exclusion covers the Minister's decisions to issue or revoke a TEO; and decisions to impose, vary or revoke the conditions of a return permit.

56. The content of the common law duty of a decision-maker to accord procedural fairness to the subject of their decision takes its substance from the circumstances of the individual administrative decision in question.[49] For example, it will not always mandate the complete, or near complete, disclosure to the subject of all information before the decision-maker; or the convening of a formal hearing to enable the person to make representations. In the specific context of decisions which are reliant on highly classified information, such as security intelligence, it has been held that the content of the duty to accord procedural fairness can be reduced, in practical terms, to 'nothingness' in appropriate circumstances. For example, in the context of ASIO's decision-making about the furnishing of adverse security assessments for the purpose of giving security advice on the issuance or refusal of a visa, the level of anticipated harm in disclosing intelligence and other sensitive information on which the assessment is based tends against a conclusion that the duty to accord procedural fairness requires disclosure of that information in order to give the person an opportunity to respond.[50] In other words, it is evident that the common law principles of procedural fairness already recognise the disclosure risk sought to be addressed by section 26 of the TEO Act. Those common law principles contain inbuilt protections for classified information, whose disclosure to the subject (and potentially its subsequent disclosure to other persons) would be reasonably likely to cause significant harm to Australia's national security interests.

57. A wholesale statutory exclusion of the duty to accord procedural fairness therefore does not appear to provide any further, substantive protection to those pieces classified information which demonstrably and legitimately require protection against disclosure to a TEO subject, because of the risk of serious harm to Australia's national security. In this regard, section 26 is arguably unnecessary because the common law already provides protection against disclosure. More problematically, however, the wholesale exclusion granted by section 26 also has the effect of eliminating the duty to accord procedural fairness in circumstances where there is, in fact, no legitimate security-related need for the suppression of relevant information from a TEO subject.

58. In other words, the exclusion in section 26 can fairly be described as an unduly blunt instrument, because it conflates the legal position in relation to the protection of genuinely sensitive information with the suppression of other pieces of information whose disclosure presents no substantial risk of harm to the national interest. A more nuanced approach is needed to achieve proportionality. It is the submission

[48] The High Court has held that, in the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to the persons affected by their proposed decision. Hence, the duty applies unless it is clearly abrogated by statute: *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40, (4 November 2015) at [30] (Kiefel, Bell and Keane JJ).

[49] *Kioa v West* (1985) 159 CLR 550 at 585 (per Mason J).

[50] *Leghaei v Director General of Security* [2005] FCA 1576 (10 November 2005) at [83], upheld on appeal in *Leghaei v Director-General of Security* [2007] FCAFC 37 (23 March 2007) at [51]-[55].

of the Law Council that the common law principles governing procedural fairness already provide this nuanced and proportionate approach. Statutory abrogation or other modification is unnecessary and counter-productive.

Recommendation 4—procedural fairness obligations should apply to the TEO Act

- **The TEO Act should be amended to repeal section 26, so that all of the Minister's decisions under the TEO Act are subject to the duty to accord procedural fairness, and the content of that duty will be determined by reference to the circumstances of the particular case.**

Review rights

The need for comprehensive statutory judicial review and merits review rights

59. The Law Council's preference remains for there to be full statutory judicial review and merits review rights of all decisions in relation to TEOs and return permits.[51]

60. That is, the following decisions should be reviewable under the *Administrative Decisions (Judicial Review) Act 1997* (Cth) (**ADJR Act**) and merits reviewable by the AAT (ideally in the Security Division, having regard to the established procedures for taking classified evidence of the kind likely to arise in decisions about TEOs):

- a decision to issue a TEO;
- a decision to refuse to revoke a TEO;
- a decision to impose a condition on a return permit;
- a decision to vary a condition on a return permit;
- a decision to refuse to vary a return permit; and
- a decision to refuse to revoke a return permit.

Inadequacies in placing reliance on Constitutional judicial review

61. As the Law Council observed in its evidence to the Committee during the review of the originating Bill in 2019, placing sole reliance on the inalienable judicial review right under section 75(v) of the *Constitution,* as mirrored in section 39B of the *Judiciary Act 1903* (Cth), is unlikely to offer meaningful practical assistance to a TEO subject. This is because:

(a) the person will be outside of Australia when the order is made and prevented from returning to Australia to access judicial review, to seek legal advice or to obtain support from family members;

(b) the Minister's powers are extensive in scope, broadly defined and concern matters of national security upon which the courts have little choice but to defer to the Executive and its agencies;

(c) TEOs are not subject to procedural fairness guarantees or any other safeguards or prescribed criteria that could be relied upon by an applicant to challenge a TEO; and

(d) the person subject to a TEO is not entitled to reasons and, even if such information were requested, meaningful information is unlikely to be provided because of claims concerning the impact on national security.[52]

[51] Law Council of Australia, *Submission to the PJCIS Review of the TEO Bill 2019*, (March 2019), 13 at [39] and 13-14 at 13-14 at [34]-[45].

[52] ibid, 14 at [44].

Inadequacies in the review mechanism established by section 14 of the TEO Act

62. The Law Council's concerns are not addressed by the Parliamentary amendments to the originating Bill, which inserted the mandatory internal review framework in section 14 of the TEO Act for all decisions of the Minister to issue a TEO. The Government moved these amendments in the alternative to removing the exclusion of statutory judicial review rights under the ADJR Act and conferring merits review rights to the AAT.[53]

63. In effect, the section 14 review mechanism involves the appointment of retired judges as reviewing authorities, who scrutinise all decisions to issue TEOs against the grounds of judicial review that have effectively been codified in section 14 of the TEO Act (for example whether the decision was an improper exercise of power, or was infected by fraud, or whether there was no material before the Minister upon which they could have formed the requisite state of mind to make the TEO).[54] The review function is subject to statutory requirements to conduct all reviews in the absence of, and without notification to, the TEO subject.[55] In most cases, a TEO will not take effect until it has been upheld on review.[56] A TEO will not take effect at all if the reviewing authority concludes that the decision is legally flawed (that is, because it has contravened one of the enumerated grounds of judicial review listed in the TEO Act).[57]

Constitutional risk

64. The Law Society of New South Wales (**Law Society**) has noted a risk that the arrangements under section 14 of the TEO Act may impermissibly confer judicial functions (that is, the conduct of judicial review) on non-judicial entities, contrary to the separation of judicial and non-judicial power established via Chapter III of the *Constitution*. The Law Council encourages the Committee to seek assurances from the Government with respect to matters of constitutional risk arising from the section 14 review mechanism, noting that there was no opportunity to interrogate this matter in the Committee's review of the originating Bill in 2019, because the section 14 mechanism was not then part of the proposed legislation before the Committee. The existence of such constitutional risk is a further factor tending in favour of subjecting decisions relating to TEOs to the established mechanisms for statutory judicial review under the ADJR Act, together with merits review by the AAT, which would avoid entirely that risk.

65. The inclusion of a 'severability clause' in section 30 of the TEO Act indicates that the executive government was aware that the section 14 mechanism entailed a credible risk of constitutional invalidity. Section 30 attempts to preserve extant TEOs if a court were to find the section 14 review mechanism unconstitutional. As a related matter, the Law Society has observed that the operation of section 30, in the event of a successful constitutional challenge to section 14, creates an arbitrary and oppressive result, which is unlikely to be compatible with Australia's international human rights obligations (especially as regards the right to a fair hearing). That is, section 30 would operate to provide that all TEOs which are already issued are deemed to have taken effect immediately after being granted by the Minister, without any independent oversight or opportunity for the subject to be heard, and without any obligation on the Minister to accord procedural fairness because of the statutory

[53] Australian Government, *Response to the PJCIS Advisory Report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, (July 2019), 5.

[54] TEO Act, subsections 14(4)-(5).

[55] ibid, subsection 14(6).

[56] ibid, section 13.

[57] ibid, subsection 14(7).

exclusion in section 26 of the TEO Act. As the Law Society commented, this is disproportionate to the degree of deprivation of liberty that is a consequence of the TEO regime (namely, the prolonged exclusion of an Australian citizen from entering their country of citizenship, in potentially unlimited two-year increments).

Limitations in the scope of, and procedures for conducting, section 14 reviews

66. The Law Council further submits that the applicable scope of, and procedures for, the section 14 review function are flawed and should be replaced with statutory judicial and merits review rights. (Ideally, those review rights should be conferred in addition to the independent judicial issuing of TEOs, so that the Minister is the applicant for such an order, rather than the primary decision-maker.)

67. In particular, there are no compelling legal or policy-based reasons that review rights should be limited to judicial review grounds (to the exclusion of the merits of the decision itself). There are also no compelling reasons that the TEO subject should be denied procedural fairness on review, via the imposition of a statutory rule requiring all reviews to take place in the absence of that person, and without that person being given an opportunity to make representations to the reviewing authority.

68. The Law Council endorses the concern of the New South Wales Bar Association that limiting review rights in this way may be incompatible with the right to a fair hearing under Article 14 of the ICCPR. The Law Council further endorses the submissions of the New South Wales Bar Association that the conferral of merits review functions on the Security Division of the AAT in relation to all TEO-related decisions could significantly assist in remedying the limitations of the section 14 review mechanism. The Security Division has established arrangements for the protection of information and receipt of confidential evidence (noting, for example, that certain of ASIO's security assessments are subject to merits review in the Security Division).[58]

69. It should be noted that, in the UK, the England and Wales High Court has held that persons subject to TEOs made under the *Counter-Terrorism and Security Act 2015* (UK) are entitled to a minimum degree of disclosure in review proceedings in relation to a TEO, by reason of the right to a fair hearing under Article 6 of the European Convention on Human Rights (**ECHR**). It has been held that the content of the duty of disclosure is dependent on the context and all of the circumstances of the case—including the degree of interference with the person's human rights. The court reached this decision notwithstanding that the UK TEO legislation provided for a specific regime of 'closed-material procedures' to govern reviews of TEOs. (While the closed-material procedures were alleged to be inadequate in that case, it is notable that those procedures would still have accorded a greater degree of disclosure than the Australian regime, which prohibits the notification of the TEO subject of the fact of review; and, by extension, precludes their involvement in it.)[59]

70. While it is acknowledged that Article 6 of the ECHR and associated jurisprudence on that Article do not apply automatically to the discrete right recognised under Article 14 of the ICCPR, the substantive similarity of the two rights means that this decision holds significant persuasive value, in the context of the present legislative review of the Australian legislation. (That is, the UK case law holds persuasive value in considering the risk that the section 14 review mechanism under Australia's TEO

[58] *Administrative Appeals Tribunal Act 1975* (Cth), section 39A. See also ASIO Act, section 54.

[59] *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (Admin), (15 May 2020).

Act may be incompatible with Australia's international human rights obligations to accord all persons a fair hearing in proceedings brought against them.)

Recommendation 5—replacement of section 14 review mechanism with ADJR Act and statutory merits review rights in the AAT

- **The TEO Act should be amended to remove the section 14 review mechanism and replace it with statutory judicial review rights under the ADJR Act, and merits review rights (with merits review functions conferred upon the Security Division of the AAT).**
- **The decisions subject to ADJR Act and AAT merits review should be as follows:**
  - **a decision to issue a TEO;**
  - **a decision to refuse to revoke a TEO;**
  - **a decision to impose a condition on a return permit;**
  - **a decision to vary a condition on a return permit;**
  - **a decision to refuse to vary a return permit; and**
  - **a decision to refuse to revoke a return permit.**

Alternative improvements to the section 14 review mechanism

71. If there is no intention to replace the section 14 review mechanism with the established statutory judicial review and merits review rights outlined above, then the Law Council alternatively recommends several changes to the section 14 regime to address its most problematic elements. These matters are discussed below.

Reviewing authority

72. Section 23 of the TEO Act provides that a reviewing authority may be a retired judge of the High Court, a State or Territory Supreme Court, or a court established by the Parliament. The latter covers both the Federal Court (as a superior court) and inferior courts (such as the Federal Circuit Court). Section 23 further enables the appointment of a non-judicial Deputy Presidential or Senior Member of the AAT as a reviewing authority, provided that the person has been admitted as a lawyer in Australia for at least five years (with no further conditions directed to their actual post-admission experience in legal practice, or expertise in relevant fields of law).

73. The Law Council is supportive of judicial involvement in the review regime established under section 14, if it is to be retained (contrary to the Law Council's preferred approach). However, the Law Council considers that the intrusive and potentially severe consequences of a TEO, together with the potential complexity of factual matters involved, merit a smaller pool of eligible persons—namely, retired superior court judges. (However, this should exclude former judges of Division 1 of the Federal Circuit and Family Court of Australia, and the former Family Court of Australia, noting the discrete and specialised nature of that jurisdiction, which does not have a meaningful subject matter-based connection with the security and criminal or quasi-criminal law issues that would be germane to TEOs. This is consistent with the approach taken in provisions of Division 105 of the Criminal Code, which prescribe the eligibility requirements for superior court judges to be appointed *persona designata* as issuing authorities for preventative detention orders

made under that Division. The eligibility requirements were amended in 2016 to exclude retired and serving judges of the then Family Court of Australia.)[60]

74. The Law Council also notes that there is no requirement for the public disclosure of information about the number or qualifications of persons appointed as reviewing authorities (including the qualifications of reviewing authorities to whom the Minister referred TEO decisions as made under section 10 of the TEO Act). The Law Council is also unaware of any pro-active public disclosures of that information. The Committee may wish to seek this information as part of the present review, and consider making recommendations for its pro-active disclosure in future, to aid transparency about the operation of the TEO regime.

Recommendation 6—persons eligible for appointment as reviewing authority

- **Section 23 of the TEO Act should be amended to provide that only retired judges of a superior court of record are eligible for appointment as a reviewing authority. Non-judicial AAT members and retired inferior court judges should not be eligible for appointment.**
- **The Committee may wish to seek information from relevant Departments about the numbers and qualifications of the reviewing authorities who have been appointed to date under section 23 of the TEO Act, and the qualifications of those reviewing authorities who have performed functions under section 14 in relation to the TEOs issued to date. Consideration could be given to further recommendations for pro-active disclosure in future, potentially as part of annual reports prepared under section 31 of the TEO Act.**

Reviewable decisions

75. As noted above, the review mechanism established under section 14 of the TEO Act is limited to the Minister's decision to issue a TEO. This means that numerous decisions of the Minister made under the TEO Act are not subject to that process, including:

- decisions not to revoke TEOs;
- decisions to impose particular conditions on a return permit;
- decisions to vary the conditions of a return permit; and
- decisions not to vary or not to revoke conditions on a return permit, following the Minister's consideration of an application by or on behalf of the subject.

76. The decisions listed above are not merits reviewable (for example, in the Security Division of the AAT) and are subject to the exclusions of procedural fairness and statutory judicial review rights in sections 26 and 27 of the TEO Act. They are subject only to constitutional judicial review which, as explained above, is unlikely to provide practical assistance to a TEO subject who is aggrieved by the issuance or non-revocation of a TEO, or the inclusion of particular conditions in a return permit.

77. The absence of practically accessible and meaningful review rights in relation to these decisions has the effect of creating a 'void', in that a decision which may be defective could remain in force for the duration of a TEO, unless the Minister made a discretionary revocation or variation decision. The Law Council therefore submits that, if the internal review regime in section 14 is to be maintained, contrary to its preferred approach, that regime should be expanded to cover all of the decisions

[60] *Counter-Terrorism Legislation Amendment Act (No 1) 2016* (Cth), Schedule 6 (amending section 105.2 and associated definitional provisions in section 100.1 of the Criminal Code).

listed at paragraph [73] above. This is in contrast with the statutory judicial review right conferred under the UK TEO legislation, which explicitly applies to decisions in relation to return conditions, as well as decisions in relation to the issuance of TEOs.[61]

Recommendation 7—decisions subject to review under the TEO Act

- **The TEO Act should be amended to extend the functions of reviewing authorities to conduct mandatory reviews of the following Ministerial decisions under the TEO Act:**
  - (a) **a refusal to revoke a TEO, upon the application of the subject**
  - (b) **a decision to impose a condition on a return permit;**
  - (c) **a decision to vary a condition on a return permit (whether on the application of the subject or the Minister's own initiative); and**
  - (d) **a decision to decline to vary, or to decline to revoke, a condition on a return permit on the application of the subject.**

Grounds of review

78. Subsections 14(4) and (5) of the TEO Act essentially limit the grounds of review available under that regime to those of judicial review. (That is, an improper exercise of power, fraud, or the absence of material before the Minster from which they could form the requisite state of mind.) This means that a reviewing authority can only assess the legality of the decision against these enumerated grounds. There is no ability to review the merits of a decision, with a view to determining whether it was the correct and preferable decision.

79. The Law Council considers that, if the statute-specific review regime is to remain in place, the merits of the decision should also be capable of review under this regime, particularly as regards the conditions of return orders, for the reasons set out above.

80. The Law Council's preferred approach is to subject these decisions to the established merits review regime in the AAT (potentially in the Security Division, using the established processes for the protection of classified information). However, if this approach is not supported, then expanding the statute-specific review mechanism under section 14 could provide a workable alternative which goes some way towards alleviating the concerns outlined above.

81. The Law Council further submits that, if the primary issuing function in relation to TEOs and return permits is to remain with the Minister—contrary to explicit recommendations of the Committee in 2019 for judicial authorisation—then this makes it even more important for merits review rights to be conferred in relation to those issuing decisions.

Recommendation 8—review grounds should include merits of the decision

- **Section 14 of the TEO Act should be amended to extend the grounds of review in relation to decisions to issue TEOs to cover the merits of the decision (that is, whether it is the correct and preferable decision) in addition to the effective codification of judicial review grounds in subsections 14(4) and (5) (that is, matters relevant to the lawfulness of the decision, generally with regard to the process by which that decision was made).**

[61] *Counter-Terrorism and Security Act 2015* (UK), subsection 11(2) especially paragraph (d) concerning the review of post-return conditions imposed under a TEO.

Information given to the reviewing authority

82. Subsection 14(3) of the TEO Act invests the Minister with a broad discretion to withhold from the reviewing authority any material which was before the Minister when the Minister made the original TEO decision. The Minister is entitled to withhold that material from the reviewing authority if they consider its disclosure would be contrary to the public interest. No statutory guidance is provided about the conduct of an assessment of the public interest in this highly specific context, such as a non-exhaustive list of matters that must be taken into account in all instances.

83. The Law Council has significant concerns about this provision, which was not part of the originating Bill as introduced and referred to the Committee for review in 2019, and was inserted as a matter of urgency during the Parliamentary debate of that Bill.

84. The Law Council urges the Committee to recommend the repeal of subsection 14(3). It creates a significant risk that a reviewing authority will be under an obligation to conduct a review of a TEO decision, but will not have access to the information necessary to discharge that function (being information on which the Minister's decision was based). Subsection 14(3) may further prevent the issuing authority from independently testing the accuracy of the information provided in the Minister's written statement of reasons for the TEO decision, which the Minister is obliged under paragraph 14(2)(a) to prepare and give to the issuing authority. For example, if the Minister exercises the power under subsection 14(3) to withhold certain information, then the reviewing authority may be unable to independently test the accuracy of summaries of evidence in the Minister's statement of reasons, by cross-checking it with the relevant documentary evidence, such as intelligence reports or other 'raw information' cited in the statement of reasons.

85. The Law Council submits that the breadth of the discretion to withhold potentially critical information from the reviewing authority creates an unacceptably high risk to the integrity of their conclusions on review. It is one matter to withhold particularly sensitive material from a party to administrative review proceedings—in this case, the TEO subject—where this is done in strict accordance with the established common law principles of procedural fairness. However, it is an entirely separate and even more serious matter to confer a broad discretionary power on the primary administrative decision maker to withhold relevant information from the reviewing authority themselves, especially when that power is enlivened by the primary decision-maker's personal assessment of the public interest in making disclosure.

86. As the UK House of Lords has observed in the context of 'closed-material procedures' established under UK counter-terrorism legislation (which enable the suppression of certain evidence from a person who is party to proceedings, rather than suppression from the court or other adjudicative body): 'reasonable suspicion may be established on grounds that establish an overwhelming case of involvement in terrorism-related activity, but because the threshold is so low, reasonable suspicion may also be founded on a misinterpretation of facts … A system that relies upon the judge to distinguish the two is not satisfactory, however able and experienced the judge'.[62]

87. The above remarks were made in the context of a decision requiring there to be a minimum degree of disclosure to the person who is the subject of an application for an extraordinary preventive order—in that case, a CO under the former UK CO regime. Importantly, and in contrast to the Australian TEO regime, any such disclosure to the CO subject would be *additional to* the ability of the presiding judge considering the application to access relevant evidence relied upon by the

[62] *Secretary of State for the Home Department v AF & Anor* [2009] UKHL 28 (10 June 2009) at [62] (per Lord Phillips of Worth Matravers).

Government in support of the proposed order. Consequently, Law Council submits that the remarks quoted above apply with even stronger force to the statutory review procedure for a TEO issuing decision in subsection 14(3) of the TEO Act, which enables relevant material to be withheld from a judicial officer who is performing functions to review the Minister's decision to issue a TEO.

88. In other words, by empowering the Minister to suppress any relevant material from the reviewing authority, in addition to the suppression of that information from the TEO subject, the TEO Act creates an even higher risk that any inaccuracies or misinterpretations in the Minister's assessment of relevant factual material before them when making a decision on a TEO (such as 'raw intelligence') may go undetected in mandatory section 14 reviews. This could neutralise any value that the section 14 mechanism may provide as an additional check and balance on the Minister's power to issue a TEO, and thereby exclude the return of an Australian citizen to their country of citizenship for a lengthy period of time.

89. More specifically, the vice in subsection 14(3) is two-fold. First, a power to withhold any material from the reviewing authority, based upon a discretionary and unguided assessment of the public interest, is inimical to the integrity of an independent review function. The conferral of such a power substantially limits the degree of assurance that can reasonably be derived from the section 14 review mechanism, in comparison with general statutory judicial review rights under the ADJR Act, and statutory merits review rights to the Security Division of the AAT.

90. Secondly, subsection 14(3) provides that the power to conduct the requisite public interest assessment, and to make the ultimate decision to withhold material under subsection 14(3), is exercisable by the primary decision-maker in relation to the TEO—that is, the Minister for Home Affairs. At the very least, this could reasonably create a perception, on the part of a fair-minded observer, that the person exercising the power to suppress information from the reviewing authority may not be sufficiently at arm's length, so as to be impartial in the identification and assessment of all relevant public interest considerations.

91. In addition to the Minister for Home Affairs being the primary decision maker on the TEO under review, it is also material that the Minister would have portfolio responsibility for most, if not all, the security agencies which are likely to have provided advice to the Minister in relation to the issuance of the TEO (and the suppression of information from the reviewing authority on security grounds). Accordingly, there is also a risk that, in practical terms, the focus of the Minister's portfolio responsibilities on national security interests could potentially limit their ability to conduct a comprehensive and complete identification of all relevant public interest considerations, especially countervailing considerations tending in favour of the full disclosure of all materials to the reviewing authority. Similarly, there is a risk that, in practice, the security focus of the Minister's portfolio responsibilities could potentially lend colour to the degree of weight given to security interests in the balancing of competing considerations as part of the public interest assessment.

92. Consequently, if there are security-related concerns about the disclosure of particularly sensitive information to an appointed reviewing authority (as distinct to disclosure to the TEO subject or other third parties) then the basis for those concerns should be articulated clearly and publicly, and tested rigorously.

93. The Law Council further submits that any such concerns should be managed via alternative, less restrictive means to a wholesale refusal of access. For example:

- reducing the pool of persons eligible for appointment as reviewing authorities to former superior court judges, as recommended by the Law Council in the

alternative to its primary recommendation for judicial issuance. This would serve to reduce the number of individual to whom such information is disclosed. It would also limit appointments to persons who are demonstrably of the highest possible standing and integrity within the community, as reflected in their appointment to, and record of service in, high judicial office; and

- implementing (and resourcing) the necessary administrative and logistical arrangements for information and physical security, consistent with the requirements of the *Commonwealth Protective Security Policy Framework.* In this regard, it is notable that the Security Division of the AAT has well-established arrangements for the receipt of classified evidence, and that arrangements are made routinely under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) in federal judicial proceedings. Similarly, in other Five Eyes jurisdictions, the issuance and review of intelligence warrants, and the authorisation of other extraordinary and intrusive security-related powers, is a judicial function. This strongly suggests that the issue of security risk arising from disclosure of certain information to reviewing authorities outside the executive government is not an insurmountable obstacle, and as such, does not require the conferral of a broad discretion on the Minister (whose decision is the subject of review) to withhold relevant material, on the basis of the Minister's assessment of the public interest; and

94. If there remains a policy preference for certain material to be capable of being withheld from the reviewing authority, despite the availability of the above measures, consideration should be given to imposing the following additional statutory safeguards on the power to withhold materials under subsection 14(3) of the TEO Act:

- placing more precise parameters on the applicable statutory grounds for withholding materials. (For example, limiting the power to circumstances in which the Minister believes, on reasonable grounds, that the disclosure of certain material to the reviewing authority would cause serious prejudice to national security, and that withholding the material is the last resort to manage that risk);
- requiring the Minister to inform the reviewing authority that material which was before the Minister has been withheld from the reviewing authority, and to provide the reviewing authority with a written summary of the material withheld, and the reasons for withholding it; and
- the potential insertion of a provision in the TEO Act which empowers the reviewing authority to provide an opinion to the Minister that it is impossible to perform the review function in the absence of access to the material which has been withheld by the Minister. The TEO Act should further provide that, if the Minister does not furnish the withheld material to the reviewing authority, the TEO is deemed never to have never taken effect (on the basis that meaningful review is impossible). This is the same consequence as presently applies to a decision of a reviewing authority that the Minister's issuing decision was legally defective, on the basis of one or more statutory review grounds.

Recommendation 9—no power to withhold information from reviewing authority

<u>Primary recommendation</u>

- **The TEO Act should be amended to repeal subsection 14(3) so that the Minister is, in all instances, obliged to furnish the reviewing authority**

with all material that was before the Minister at the time the TEO decision was made.

- **Perceived security risks arising from the disclosure of certain materials to the reviewing authority should be managed via less restrictive alternatives. This should include by limiting the pool of persons eligible for appointment as reviewing authorities to superior court judges as recommended by the Law Council; and via the implementation (and commensurate resourcing) of information and physical security arrangements in line with the *Commonwealth Protective Security Policy Framework*.**

Alternative recommendation

- **If there is a policy intent to confer a power on the Minister to withhold material from the reviewing authority, subsection 14(3) of the TEO Act should be amended to restrict the grounds upon which that information can be withheld, and to establish safeguards to ensure that the withholding of material does not undermine the integrity and accuracy of the review function. Namely:**
  - (a) **the Minister should only be able to withhold information if satisfied on reasonable grounds that disclosure to the reviewing authority would cause serious prejudice to Australia's national security, and that this risk cannot be mitigated through practical information and physical security arrangements, such that withholding the information is the last resort;**
  - (b) **the Minister must inform the reviewing authority, via written notice, that certain material has been withheld. That notice must also provide a general description of the material withheld, explain how the material was treated by the Minister in making the TEO decision, and explain the basis for the decision to withhold it (that is, how its disclosure to the reviewing authority would cause serious prejudice to Australia's national security, such that withholding it from the reviewing authority is a last resort); and**
  - (c) **provision should be made in the TEO Act for the reviewing authority to inform the Minister that, after considering the summary and explanations provided in paragraph (b) above, it is not possible to perform the review function without access to the material withheld. The TEO Act should further provide that, in this event, the TEO is taken to have never come into force in relation to the person, unless the Minister furnishes the reviewing authority with the withheld materials.**

Procedural fairness in the conduct of section 14 reviews

95. If the section 14 review mechanism is to continue in force, the Law Council submits that the limitations on procedural fairness in subsection 14(6) should be removed (which require reviews to be conducted in the absence of the TEO subject, and without giving notice to that person or providing an opportunity for the subject to make representations to the reviewing authority). For the reasons discussed above, these limitations are inimical to the right to a fair hearing under Article 14 of the

ICCPR, and no cogent explanation has been provided as to why a less restrictive alternative would not be effective.

96. For example, subsection 3(3) of the *Counter-Terrorism and Security Act 2015* (UK) provides that courts providing 'prior permission' to the Secretary of State for the issuance of a TEO under UK law (as a precondition to the TEO entering into force) may, but are not required to, proceed in the absence of the subject and without notification to them. This judicial function of 'prior permission' is also additional to express statutory judicial review rights under section 11 of the UK Act, and under the *Human Rights Act 1998* (UK), which are subject to minimum standards of disclosure.[63]

97. In the absence of any such justification, it should be open to reviewing authorities to determine the requirements of procedural fairness in individual cases, so as to identify precisely, and take account of, any specific security risks arising from disclosures of specific pieces of information to the individual TEO subject.

Recommendation 10—removal of limitations on procedural fairness

- **The TEO Act should be amended to repeal subsection 14(6) which require all reviews to be conducted in the absence of the TEO subject and without notice to that person, and without provision of an opportunity to make representations to the reviewing authority.**

Specific safeguards for vulnerable persons

Children

98. The Law Council continues to hold the view expressed in its submission to the Committee on the originating Bill in 2019 that TEOs should not be available in relation to children, in recognition of a child's developmental status and special vulnerabilities if they were to be excluded from returning to Australia, where their family, education and home lives and communities may be based.[64]

99. However, the Law Council recognises that the Committee has taken a different view in relation to the minimum ages of persons eligible for COs and ASIO questioning warrants (among other matters). If this view is also preferred in relation to TEOs, then the Law Council supports the inclusion of various safeguards of the kind for which it has previously recommended, in its submissions to the Committee on the originating Bill to the TEO Act,[65] and more recently the Australian Security

[63] Section 11 of the UK Act provides that the court may (on the application of the TEO subject) conduct judicial review of an issuing decision in relation to a TEO once it is issued and commences, as well as judicial review of decisions to impose post-return conditions under a TEO. This is additional to the 'prior permission' function performed under section 3 (which is generally a perquisite to the commencement of a TEO against the person). Importantly, the section 11 judicial review mechanism **does not** contain a statutory requirement that the court must proceed in the absence of the TEO subject (and the section 3 'prior permission' function only confers the court with discretion to do so, and does not mandate this). While Schedule 3 to the UK Act provides that the requirements governing 'closed-material proceedings' involving classified evidence would apply to judicial review under section 11 (which may result in the withholding of certain material from the TEO subject) these procedures are subject to the right to a fair hearing Article 6 of the European Convention on Human Rights, which will require minimum standards of disclosure. Item 5 of Schedule 3 to the UK Act states that the statute-specific protective procedures for classified information in proceedings concerning the judicial review of TEOs are not intended to require the court to act inconsistently with Article 6 of the ECHR. It has been held that TEO subjects are entitled to the same degree of disclosure as persons who are subject to TPIMs, for the purposes of Article 6. That is, sufficient information to know and respond to the case against them (with sufficiency objectively ascertained in the circumstances of the particular case): *QX v Secretary of State for the Home Department* [2020] EWHC 1221 (15 May 2020).

[64] Law Council of Australia, *Submission to the PJCIS Review of the TEO Bill 2019*, (March 2019), 11-12 at [31]-[33].

[65] ibid, 12.

Intelligence Organisation Amendment Bill 2020.[66] (These are listed in the below recommendation.)

Recommendation 11—safeguards in relation to children

Primary recommendation

- **Section 10 of the TEO Act (and related provisions) should be amended to provide that a TEO cannot be issued in relation to a person who is under 18 years of age.**

Alternative recommendation

- **If TEOs are to remain capable of being issued in relation to children, section 10 of the TEO Act should be amended as follows:**

  (a) **consistent with Australia's obligations under the *Convention on the Rights of the Child,* the best interests of the child should be the paramount consideration, not a primary consideration;**

  (b) **the enumerated list of factors in subsection 10(4) that must be assessed in considering the child's best interests should be expanded to explicitly include the following, to ensure that there is consistent consideration of the key factors relevant to an assessment of the child's best interests:**

    (i) **whether the child has a physical or an intellectual, cognitive or developmental disability, not only their 'physical and mental health' per paragraph 10(4)(b)**

    (ii) **the child's developmental status, including evidence of any developmental delays in speech, literacy or other aspects of cognitive development, not only their 'maturity' per paragraph 10(4)(a); and**

    (iii) **whether the child belongs to a minority group, not only potentially as part of a generalised assessment of the child's 'background' per paragraph 10(4)(a) or 'any other matter the Minister considers relevant' per paragraph 10(4)(f); and**

  (c) **the assessment of the child's best interests must be conducted on the basis of sufficient evidence to make an informed and accurate assessment of the child's circumstances, not merely to the extent that those matters are known to, and are regarded as relevant by, the Minister, as is presently required under subsection 10(5).**

  If insufficient evidence is provided to inform a credible assessment, then it should not be possible to issue the TEO in relation to the child. In this event, any security risk presented by the child's return to Australia should be managed using the extensive suite of existing powers available to security agencies, as well as non-intrusive and non-coercive measures to support the child's reintegration to the community.

[66] Law Council of Australia, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (July 2020) 26-30 at [85]-[99].

Persons with disabilities

100. The provisions governing the issuance of TEOs and imposition of conditions on return permits do not make explicit reference to the circumstances of persons with disabilities. In addition to minors, persons with disabilities are also recognised under international human rights law as potentially being under a special vulnerability in their dealings with the State, so as to merit the conferral of discrete rights to ensure non-discrimination and substantive equality of treatment and opportunity.[67]

101. The Law Council is therefore supportive of amendments to the TEO Act, which insert a specific prompt for the issuing authority to consider whether there is evidence that the prospective subject of a TEO may have a disability; and requiring the issuing authority to take this matter into consideration when assessing the necessity and proportionality of the conditions of a return permit.

102. While it would be possible to consider this matter in the exercise of general discretion, a specific statutory requirement would provide demonstrable assurance about consistency of decision making. It would also have significant value in guiding the development of the underlying intelligence case in support of a prospective TEO or conditions of a return permit, by ensuring that due diligence is routinely performed in considering whether the person may have a physical or cognitive disability. The protections accorded to vulnerable persons, including persons with disabilities, should not be left to unguided discretion on a case-by-case basis, or internal administrative documentation to aid the operation of the TEO regime, which has no legal status.[68]

Recommendation 12—safeguards for persons with disabilities

- **Sections 10 and 16 of the TEO Act should be amended to require the Minister for Home Affairs to consider whether there is information indicating that a TEO subject may have a disability, in the course of making decisions about the issuance or revocation of a TEO, and the conditions of a return permit (making, variation and revocation).**
- **There should be an explicit statutory obligation for the Minister to take into account this circumstance when making the relevant decision.**

Other matters

Post-entry conditions on return permits

103. There are some similarities between the range of post-entry conditions that can be imposed upon a return permit pursuant to subsection 16(10) of the TEO Act, and 'notification type' conditions that could be imposed under a CO pursuant to paragraph 105.4(3)(i) of the Criminal Code. Conditions able to be imposed under subsection 16(10) of the TEO Act include, for example, obligations to provide notification of changes to a person's residence, employment or education; contact with a specified person; and intended use of specified communications technology, such as the internet. Those conditions have the potential to be extremely onerous,

[67] See especially: *Convention on the Rights of Persons with Disabilities*, [2008] ATS 12. Article 18(1)(d) requires State parties to ensure that persons with disabilities are not deprived, arbitrarily or on the basis of disability, of the right to enter their own country.

[68] See further: Law Council of Australia, *Submission to the PJCIS Review of the ASIO Amendment Bill 2020*, (July 2020), 40-41 at [144]-[147] and recommendation 14.

noting that breach is an offence if the person is reckless in relation to whether their actions contravened a condition.

104. The post-entry conditions imposed on return permits issued under the TEO Act form part of the broad suite of preventive measures which are potentially available in relation to citizens of security concern who are living within the community. As such, it is possible that there could be policy interest in giving consideration to aligning those conditions more closely with the measures in the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2020 (awaiting Royal Assent at the time of writing, having passed both Houses of Parliament on 22 November 2021). The amendments in the latter legislation will expand significantly the range of potential CO conditions, some of which might potentially be sought to be applied to TEO return order conditions. For example, this might include conditions which oblige a person to carry a specified mobile phone at all times, and to answer it or return all calls promptly; to submit to various searches of their premises; and to adhere to various directions as given by specified persons from time-to-time (which are not required to be particularised in the order itself).

105. The Law Council pre-emptively cautions against pursuing such alignment. In addition to the concerns raised by the Law Council about the expanded CO conditions, alignment would not be appropriate because it would overlook significant differences in the issuing thresholds and processes for TEOs (including their *ex parte* nature, and the absence of procedural fairness and review rights in relation to return permits and their conditions).

106. Rather, if there is a legitimate security-based need to impose more stringent controls on the actions and movements of a 'returned' TEO subject in the community, then a separate application should be made to an issuing court for a CO under Division 104 of the Criminal Code. The two powers are legally discrete and should continue to require separate executive action, with respect to the issuance of TEOs, and making applications to court for the issuance of COs.

107. Alignment of TEO return permit conditions (that is, the conditions governing a person's post-entry movements and activities in Australia) with further CO conditions would create a substantial risk that TEOs could become 'back door' COs, without the additional safeguards incorporated in the issuing process for COs. Most importantly, a decision to issue a CO involves the exercise of judicial power, with applications generally conducted on an *inter partes* basis, meaning the respondent would normally have an opportunity to contest the application. Consequently, the respondent to a CO application is invested with legal rights to know the case against them, and to test that case, before a decision is made on the CO application.

Recommendation 13—no alignment with expanded CO and ESO conditions

- **The existing 'post entry' conditions for return permits in subsection 16(10) of the TEO Act should not be aligned with the expanded CO conditions and ESO conditions prescribed in the Counter-Terrorism Legislation Amendment (High Risk Terrorist Offenders) Bill 2021 (awaiting the Royal Assent at the time of writing).**

Legal assistance arrangements for TEO subjects

108. The Committee has noted the ongoing concerns raised by the Law Council about significant inadequacies in legal assistance arrangements for persons who are subject to applications for COs and post-sentence detention orders. The Committee recently recommended that the Government undertake a review of, and report back

to the Committee on, the adequacy of legal assistance funding for these matters.[69] In addition to strongly supporting the timely and participatory conduct of that review, the Law Council suggests that legal assistance in relation to TEOs should also be included in its purview.

109. This reflects that TEOs are similarly restrictive of individual rights, and are extraordinary measures that are not imposed as a criminal punishment following a person's conviction for an offence. The decision-making framework under the TEO Act involves complex judgments on matters of fact and law in this high-risk context. The TEO Act imposes significant criminal sanctions on TEO subjects for contraventions of those orders, and the conditions of return permits. Accordingly, as a matter of practical necessity to avoid arbitrariness and injustice, a person who is subject to a TEO is likely to require legal assistance to make applications for the revocation of a TEO, and for a return permit, and the variation or revocation of specific conditions of a return permit. It is conceivable that legal assistance would be required for more than one of these actions, and potentially all of them, including on multiple occasions when a TEO is in force within its two-year maximum period of effect.

110. As part of the present inquiry, the Committee may wish to seek information from relevant government departments as to whether legal assistance was sought and provided in relation to any of the TEOs issued to date; and if it was granted, the amounts and mechanisms for its delivery. These matters did not appear to be on the public record at the time of writing. More broadly, the Committee may wish to consider making recommendations for the pro-active, ongoing disclosure of information about the allocation and administration of legal assistance funding in the specific context of TEOs, as an aid to transparency in the operation of the TEO regime.

Recommendation 14—legal assistance arrangements for TEO subjects

- **The review of legal assistance arrangements for respondents to applications for control orders or post-sentence orders, as recommended by the Committee, should also consider the adequacy of arrangements for persons subject to TEOs.**
- **This should address matters including access to legal assistance with respect to applications for return permits under the TEO Act; revocation applications for TEOs; and revocation and variation applications for the conditions of return permits.**
- **The Committee may also wish to consider the following matters as part of its present statutory review of the TEO regime:**
  - **seeking information from relevant government departments about the provision or refusal of legal assistance to persons who are subject to the TEOs issued to date; and**
  - **more broadly, making recommendations for the pro-active and ongoing public disclosures of information concerning the allocation and administration of legal assistance funding in the specific context of TEOs, as an aid to transparency in the operation of the TEO regime.**

[69] Parliamentary Joint Committee on Intelligence and Security, *Report on the review of police powers in relation to terrorism: the control order regime, the preventative detention order regime and the continuing detention order regime*, (October 2021), recommendation 13.

Further Parliamentary reviews of the TEO Act

111. Consistent with the extraordinary and intrusive nature of the TEO regime, the Law Council supports the periodic, ongoing Parliamentary review of the regime's operation. The Committee would be well-placed to perform that function, given its ability to take classified evidence, its familiarity with the regime through receiving operational briefings, and its understanding of the broader security environment.

112. The conferral of a further, ongoing statutory periodic review function on the Committee would be consistent with recent recommendations of the Committee, which called for the conferral of statutory functions to conduct discretionary reviews of other extraordinary national security legislation.[70]

Recommendation 15—further periodic Committee reviews of the TEO Act

- **Section 29 of the ISA should be amended to enable the Committee to conduct further own-motion reviews of the operation of the TEO Act, and provide reports to the Parliament.**

[70] See, for example, ibid, recommendations 9, 16 and 17.