



Australian
Human Rights
Commission

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Australian Human Rights Commission

Submission to the Parliamentary Joint
Committee on Intelligence and Security

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) with respect to its inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (the Bill).
2. The Bill would introduce as a stand-alone Act a scheme for the making of 'temporary exclusion orders' and the grant of 'return permits'.
3. The scheme would permit the Minister to make a temporary exclusion order in relation to an Australian citizen who is at least 14 years of age and who is overseas at the time of the making of the order. The order can exclude that person from entering Australia for a period specified by the Minister that does not exceed two years.
4. The scheme would also require the Minister to give a return permit to a person the subject of a temporary exclusion order if they make an application in the prescribed form. In giving a return permit, the Minister can impose conditions on that person's return to Australia. Conditions could include that the person not return to Australia for a prescribed period of up to 12 months, or that the person notify authorities about a wide range of matters such as their use of telephones, their place of residence and employment, and their associations with others.
5. The powers in essence provide for a new form of exile by executive fiat. On the return of an affected person to Australia, the powers allow the Minister to compel the person to assist in the monitoring of their communications and other activities, without providing for the oversight and other checks and balances that typically are conditions of the exercise of such intrusive powers.
6. The powers in the Bill would impinge on a number of human rights protected in the *International Covenant on Civil and Political Rights* (the ICCPR)¹ and the *Convention on the Rights of the Child* (the CRC),² including the right to enter one's own country, the right to privacy, the right to freedom of movement, the right to family life, and the requirement that in all decisions concerning children, the rights of the child must be a primary consideration.

7. The long title of the Bill reveals that its purpose is ‘to protect the community from terrorism by providing for temporary exclusion orders, and for related purposes’.
8. The Commission acknowledges the vital importance of protecting Australia’s national security and the community from terrorism. Enacting measures that achieve these goals can protect human rights, including the right to life,³ and help fulfil Australia’s international law obligations.⁴
9. However, to comply with international human rights law, any limitations on human rights must be reasonable, necessary and proportionate. The Commission considers that the Bill does not satisfy these requirements.
10. Owing to the short time available for submissions to be made to the PJCIS, the Commission focuses on specific aspects of the Bill.
11. For the reasons given below, the Commission recommends that the Bill not be passed. In the event that this recommendation is not accepted, the Commission makes a number of alternative recommendations intended to ameliorate some of the Bill’s most significant limitations on human rights.

2 Recommendations

Recommendation 1

The Commission recommends that the Bill not be passed.

Recommendation 2

In the event that Recommendation 1 is not accepted, the Bill be amended:

- a. so that temporary exclusion orders can only be issued by a court on application by the Minister
- b. so that a temporary exclusion order may only be made where a court is satisfied on the balance of probabilities that the making of the order is necessary and proportionate to achieve the objects of the Bill, in all the circumstances of the particular case
- c. to ensure that a temporary exclusion order may only be issued in relation to a person who has, while abroad, engaged in conduct that would contravene division 119 of the Criminal Code

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- d. to provide that a temporary exclusion order may only be made where the issuing authority is satisfied that the person affected is lawfully entitled to remain in another country for the duration of the order
- e. to afford a person in full the requirements of procedural fairness in relation to any decision made under the Bill
- f. to ensure that the Minister take all reasonably practicable steps to notify the subject of a temporary exclusion order that that order has been made, and that these steps be taken as soon as reasonably practicable after the making of the order
- g. so that in any prosecution for a breach of a temporary exclusion order, the prosecution is required to prove actual knowledge of the existence of the order
- h. to significantly reduce the maximum permissible duration of a temporary exclusion order
- i. to provide that an affected person is entitled to challenge in court the making of a temporary exclusion order on first becoming aware of that order; and that full merits review of the decision to make the order is available
- j. to require that the Minister issue a return permit as soon as reasonably practicable on receipt of an application by an affected person
- k. so that: conditions may only be imposed on a return permit by a court on application by the Minister; no conditions may be imposed unless they are individually and collectively demonstrated to be necessary and proportionate to achieve the objects of the Bill; and the onus to establish these matters rests with the Minister
- l. that no significant further period of exclusion from Australia can be imposed as a condition of a return permit
- m. to provide that a person affected by conditions imposed on a return permit is entitled to contest the imposition of those conditions at a full hearing — either at first instance, or, if the conditions are imposed in absentia, as soon afterwards as reasonably practicable
- n. to make explicit that any conditions imposed on a return permit have no effect until such time as notice of those conditions is served personally on the affected person

- o. to require the Minister to review periodically any temporary exclusion orders and the conditions imposed on any return permits, and to make an application to the issuing court to revoke the order or the conditions unless the Minister is satisfied that the order or the conditions remain necessary and proportionate
- p. to ensure that the scheme is reviewable by the Independent National Security Legislation Monitor on his own motion, as well as on referral by the Prime Minister or the Attorney-General
- q. so that temporary exclusion orders cannot be made with respect to persons under 18 years of age.

Recommendation 3

In the event that Recommendations 1 and 2.q are not accepted, the Bill be amended to ensure that the best interests of any child affected by the provisions of the Bill are at all times a primary consideration, and may not be trumped by any higher order or 'paramount' considerations.

3 Background

3.1 The Bill

12. The Bill would introduce a scheme for 'temporary exclusion orders' and 'return permits'. The Statement of Compatibility with Human Rights prepared in relation to the Bill sets out the reasons for the Bill's introduction:

Since 2014, the number of Australians travelling to join terrorist organisations overseas has increased significantly. This has driven the need to reform Australia's approach to managing individuals who may represent a threat to public safety. The collapse of the Islamic State's territorial control complicates the threat environment as more Australians participating in or supporting the conflict, leave the conflict zone and seek to return home.⁵

It continues:

The purpose of this Bill is to ensure that if these Australians do return, it is with forewarning and carefully managed by authorities.⁶

13. Further, the Minister for Home Affairs stated in his second reading speech:

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The bill will introduce a... scheme to provide greater control over returning Australians of counterterrorism interest, including foreign fighters.

...

Following the collapse of Islamic State's territorial control, more Australians participating in or supporting the conflict are seeking to leave the conflict zone, and return to Australia. The government is determined to deal with these people as far away from our shores as is possible to ensure that if they return it is into the hands of the authorities. This will enable law enforcement and security agencies to reduce the threat returnees pose to Australia.⁷

14. The Bill purports to achieve these aims by introducing a scheme in which Australian citizens can be temporarily excluded from entering Australia for up to two years at a time and conditions imposed on their entry to Australia as well as for a period of up to 12 months following their entry.
 - (a) Temporary exclusion orders
 15. The Bill would empower the Minister to make a temporary exclusion in relation to any Australian citizen who is outside Australia, if the Minister suspects on reasonable grounds that making the order would substantially assist in:
 - a. preventing a terrorist act
 - b. preventing training from being provided to, received from, or participated in, with a listed terrorist organisation
 - c. preventing the provision of support for, or the facilitation of, a terrorist act, or
 - d. preventing the provision of support or resources to an organisation that would help engage in preparing, planning, assisting in or fostering the doing of a terrorist act.⁸
 16. It is not a requirement for the Minister to suspect that the subject of the order has engaged in foreign incursions, taken part in terrorist activities or training, or entered a declared area for the purposes of division 119 of the Criminal Code before making an order.
 17. The Bill also would allow the Minister to make a temporary exclusion order if the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security for reasons related to politically motivated violence.⁹

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18. The order may remain in effect for a period of up to two years during which the person the subject of the order is not permitted to enter Australia.
 19. A person the subject of a temporary exclusion order who enters Australia in violation of the order will be liable to imprisonment for two years.¹⁰ The Bill also introduces an offence of permitting a vessel or aircraft to be used by a person the subject of a temporary exclusion order for the purpose of conveying that person to Australia.¹¹
 20. The Minister would not be required to observe any of the requirements of procedural fairness in deciding to issue an order.
 21. The Minister would be required to take such steps as are, in the Minister's opinion, reasonable and practicable, to bring to the attention of the person the content of the order.¹² It is not a requirement that the notice be received by the subject, or brought to his or her attention, for it to enter into force.
 22. It is similarly not a requirement that, in any prosecution for entering Australia while the subject of an order, the prosecution prove that the notice was served on, or received by, the subject.
 23. The Bill does not prescribe any fault elements for the offence. If a person were prosecuted for violating a temporary exclusion order under the Criminal Code, it appears that the Crown would be required to prove intention with respect to the act of entry into Australia, and at least recklessness with respect to the fact that a temporary exclusion order was in force at the relevant time.¹³
- (b) Return permits
24. The Bill would also introduce a scheme for the Minister to 'give' a return permit to a person the subject of a temporary exclusion order. If a person is given a return permit, the temporary exclusion order is revoked.¹⁴
 25. The Minister *must* give a return permit to a person who has applied to the Minister in the prescribed form and manner or if the person is being deported to Australia.¹⁵ The Minister *may* also give a person the subject of a temporary exclusion order a return permit if he or she considers it appropriate.¹⁶
 26. The Minister may give a return permit that is subject to conditions.

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27. The Bill will allow the Minister to impose conditions on the person's entry to Australia. These conditions can include that the person not enter Australia for a period of up to 12 months¹⁷ or that they enter Australia in a prescribed manner, such as on a particular flight.¹⁸ These are known as 'pre-entry' conditions.¹⁹
28. The Bill also empowers the Minister to impose conditions on a return permit. These can, individually or collectively, impose onerous notification obligations on the subject of the permit for up to 12 months. Examples of permissible conditions include that the person surrender their Australian travel document²⁰ or that the person notify 'a specified person or body' of the use or access of 'specified forms of telecommunication or other technology in Australia'.²¹ These are known as 'post-entry' conditions.²²
29. To demonstrate the potential scope, potentially highly intrusive nature of the conditions the Minister may attach to a return permit, the full list of 'post-entry' conditions that could be attached to a return permit is reproduced here:²³
 - (6) The conditions ... are as follows:
 - (a) that the person notify a specified person or body of the person's principal place of residence in Australia;
 - (b) that the person notify a specified person or body of any change to the person's principal place of residence in Australia within 24 hours of the change occurring;
 - (c) that the person notify a specified person or body of the person's place of employment in Australia;
 - (d) that the person notify a specified person or body of any change to the person's place of employment in Australia within 24 hours of the change occurring;
 - (e) that the person notify a specified person or body of the person's place of education in Australia;
 - (f) that the person notify a specified person or body of any change to the person's place of education in Australia within 24 hours of the change occurring;
 - (g) that the person notify a specified person or body of any contact with specified individuals (whether within or outside Australia) within 24 hours of the contact occurring;
 - (h) that the person notify a specified person or body, within a specified period, if the person intends to enter, or enters, a State or Territory

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that is not the State or Territory in which the person's principal place of residence is located;

- (i) that the person notify a specified person or body, within a specified period, if the person intends to leave, or leaves, Australia;
 - (j) that, if the person accesses or uses, or intends to access or use, specified forms of telecommunication or other technology in Australia, the person do either or both of the following within a specified period of the access or use, or intended access or use, occurring:
 - (i) notify a specified person or body of the use or access, or intended use or access;
 - (ii) provide a specified person or body with sufficient information to enable the specific telecommunications service, account or device to be identified;
 - (k) that the person notify a specified person or body, within a specified period, if the person intends to apply for an Australian travel document;
 - (l) if the person has an Australian travel document—that the person must surrender the document to a specified person or body;
 - (m) that the person is not permitted to apply for an Australian travel document;
 - (n) that the person is not permitted to obtain an Australian travel document.
30. The permit can also specify the manner in which notifications must be made and the documents or information that must be supplied to substantiate any relevant matter.²⁴
31. The Minister cannot impose conditions on a return permit unless satisfied that they are, taken together, reasonably necessary, and reasonably appropriate and adapted, for the purposes of preventing a terrorist act, preventing terrorist training, or preventing terrorism being supported or facilitated.²⁵ The Bill provides no guidance about how the Minister is to go about forming the requisite state of satisfaction, or what factors he or she should consider in doing so. For instance, the Minister is not required to consider whether alternative existing law enforcement or surveillance measures would achieve the desired outcome in a less intrusive way. As discussed below, the Minister is not required to hear submissions from the affected person about any relevant matters.

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32. A person who fails to comply with any of the conditions imposed on a return permit commits an offence, punishable by imprisonment for up to two years.²⁶ The Bill also introduces an offence of permitting a vessel or aircraft to be used by a person subject to a return permit for the purpose of conveying that person to Australia in contravention of the conditions of their return permit.²⁷ There is also a related offence of giving false or misleading information or documents in response to a condition imposed on the return permit given to that person.²⁸
- (c) 'Temporary' exclusion
33. While exclusion orders made under the Bill are described as 'temporary', there is nothing in the Bill that would prevent the Minister from making successive temporary exclusion orders in relation to the same person. In fact, this is contemplated in clause 10(5) of the Bill. In this way, the Bill would enable the Minister to exclude an Australian citizen from entering Australia indefinitely.
34. It is true that a person subject to a temporary exclusion order can apply to the Minister in the prescribed form for a return permit, but until such time, the Minister can impose successive temporary exclusion orders on that person. A person might not request a return permit because they are unaware of the order (because the Minister is not required to ensure the person is actually notified of it). On the other hand, a person may not apply for a permit because they do not wish to be compelled to return to Australia on a specified date, and to be subject to onerous and privacy-intrusive notification conditions. For so long as a temporary exclusion order is in force, a person has no right to enter Australia.
35. Further, even if the person the subject of a temporary exclusion order applies for a return permit in the prescribed form, the return permit for that person could be subject to a condition that prevents their entry to Australia for a further period of up to 12 months.²⁹
36. The Bill expressly excludes the requirements of procedural fairness from the exercise of the Minister's powers in clauses 10, 11, 12 and 13 of the Bill.³⁰ Among other things, that means the Minister:
- does not have to allow a person an opportunity to make representations about any decision, or proposed decision, under these provisions, including about whether any material the Minister relies on is accurate

- does not have to provide an affected person with all relevant information, and
- does not have to act without bias.

4 Key human rights

4.1 The right to enter one's own country

37. Article 12(4) of the ICCPR provides that 'no one shall be arbitrarily deprived of the right to enter his own country'. While clear on its terms, the United Nations Human Rights Committee (UN HR Committee), in its General Comment No 27, has confirmed that this right includes the right to return after having left one's own country.³¹
38. It is clear that any prohibition, irrespective of duration, of an Australian citizen from entering Australia interferes with the right of that person to enter their 'own country'. It follows that the Bill would deprive affected persons of this right for up to two years (in relation to a temporary exclusion order) and up to 12 months (once a return permit has been issued). As noted above, a citizen may be subject to consecutive temporary exclusion orders, thereby extending the period that they are prevented from returning to Australia.
39. The right in article 12(4) is not absolute, but any deprivation of the right must not be arbitrary. In relation to the concept of arbitrariness under article 12(4), the UN HR Committee has stated:

[A]rbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interferences provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.³²
40. To avoid arbitrariness under international human rights law, any limitation on human rights must:
 - a. be lawful, meaning that any limitations on a human right must be provided for by law. The relevant law must be sufficiently specific and detail the precise circumstances in which interferences with rights may be permitted; must be precise and clear enough to allow individuals to

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regulate their conduct; and must provide effective remedies in the case of abuse

- b. be necessary to achieve a legitimate objective, consistent with the provisions and aims of the ICCPR
 - c. be proportionate to achieving the legitimate objective.³³
41. Specifically on the concept of reasonableness in article 12(4), the UN Human Rights Committee has observed:
- [T]he Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.³⁴
42. In arguing that operation of the Bill is not arbitrary, the Statement of Compatibility with Human Rights for the Bill says:
- Importantly, the Minister *must* issue a return permit upon application, which facilitates that Australian's controlled return within 12 months.³⁵ (emphasis in original)
43. And further:
- TEOs will not exclude the subject of a TEO from entering Australia permanently. Rather the scheme is designed to ensure the individual's return to Australia occurs in a planned and controlled manner, enabling effective management of the risks they may pose to the Australian community.³⁶
44. And further again:
- ... any limitation to an individual's right to enter Australia is not arbitrary. The preconditions for issuing a TEO and return permit are provided for by law and is predictable, and is justified by being reasonable, necessary and proportionate.
- ...
- The temporary restriction on an individual's ability to enter Australia is reasonable, as the measures in the Bill are intended to promote national security by managing the return of Australians from conflict zones overseas and may pose a threat to the safety of the Australian community.³⁷
45. It may be accepted that the Bill is directed to a legitimate purpose (of protecting the Australian community), and that it does not allow for permanent exclusion from Australia (though see further below). However,

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the following factors indicate the Bill does not meet the requirements described above of lawfulness, necessity, and proportionality:

- a. the secondary materials contain no persuasive evidence or argument establishing that the provisions are necessary
- b. the explanatory materials state that the purpose of the Bill is to address the threat of people returning to Australia from conflict zones, having joined terrorist organisations while abroad. However, it is not a condition for the issue of a temporary exclusion order that a person has fought in or even travelled to a conflict zone or a declared area; or has joined or associated with a terrorist organisation while abroad. A person could be issued a temporary exclusion order while travelling to any country, such as the United Kingdom or New Zealand, on holiday. The fact that mere travel abroad is enough to enliven special powers that would not otherwise be available is manifestly disproportionate to the Bill's national security aim
- c. a person may be prevented from re-entering Australia for up to two years, or, once they are granted a return permit, for up to a year, even if they have no lawful right to remain elsewhere or enter any other country
- d. even where a permit is issued, the right of a person to return to Australia will be contingent on them complying with whatever curtailments on their liberty are occasioned by the conditions imposed by the Minister. These conditions can involve very significant limitations on a person's human rights, including the right to privacy
- e. decisions to make temporary exclusion orders, and decisions to attach conditions to return permits, are not made by an independent body such as a court or a judicial officer acting *persona designata*. That increases the risk of arbitrary decision-making. The regime established by the Bill may be contrasted in this regard with the control order scheme in division 104 of the Criminal Code, which provides that applications for control orders are made to a court; interim applications may be made *ex parte*; while continuing control orders can only be granted after a full hearing
- f. the claimed justification for a temporary exclusion order need only be established to the reasonable suspicion of the Minister. That is far too low a threshold to enliven such a severe restriction on human rights

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- g. the Minister must be satisfied only to the relatively low standard of reasonable satisfaction of the need for any conditions attached to a return permit (including for any further period of exclusion from Australia)
- h. the Minister would not be obliged to observe any of the requirements of procedural fairness when exercising any of his or her powers under the scheme that would be established by the Bill, including when deciding to issue a temporary exclusion order or to give a return permit. An affected person therefore would have no right to make representations to the Minister about the duration of any exclusion from Australia or about any conditions attaching to their return, or to challenge any materials relied on by the Minister. Even if the Minister made a decision under the scheme that was actually biased, or gave rise to a reasonable apprehension of bias, it would not be unlawful
- i. there is no right to merits review of the Minister's decisions
- j. there is, as drafted, no explicit provision for the regular review of the scheme the Bill would introduce by the INSLM.³⁸ Regular review by the INSLM or a similar independent body would help guard against the regime being continued in circumstances where that was not necessary, and would help identify whether the scheme was being applied in an arbitrary way
- k. finally, the claimed necessity for the Bill must be assessed in light of the many powers already in force which allow security and law enforcement agencies to mitigate risks to the community. These measures include:
 - i. the cancellation of passports of people who travel abroad
 - ii. investigating and prosecuting people suspected of engaging in foreign conflicts or terrorist conduct while abroad under relevant provisions of the Criminal Code (including the foreign incursions and declared areas provisions in division 119)
 - iii. security and law enforcement agencies obtaining warrants to conduct surveillance of persons reasonably suspected of posing a risk to security
 - iv. law enforcement agencies obtaining warrants to investigate people reasonably suspected of engaging criminal conduct

(including the inchoate terrorism related offences in the Criminal Code), and prosecuting those who commit crimes

- v. obtaining a control order under division 104 of the Criminal Code.

None of the above should be taken to suggest that the Commission endorses all of the above provisions. It is simply to observe that, given the many powers already at the disposal of security and law agencies, the new powers in the Bill do not appear to fill a gap in Australia's national security protection. As such, the Commission does not consider these powers to be necessary.

- 46. For the reasons above, the Commission considers that the Bill would interfere with the right to enter one's own country in circumstances where that has not been demonstrated to be necessary to achieve its stated purpose, and in a way that is not proportionate to achieving that purpose.

4.2 Rights of the child

- 47. Children enjoy all rights guaranteed by the ICCPR, as well as particular and special protections under the CRC.³⁹ International human rights law recognises that, in light of their physical and mental immaturity, children have special need of safeguards, care and protection.⁴⁰ In recognition of that fact, Australia ratified the CRC.

- 48. The Bill could affect children in the following ways:

- a. children as young as fourteen years of age who engage in relevant conduct could be the subject of a temporary exclusion order or a return permit in the same way as adults
- b. children whose parents are, or who are themselves, the subject of a temporary exclusion order or a return permit may have the family unit broken up.

- (a) The best interests of the child

- 49. The Bill applies in the same way to children between the ages of 14 and 17 years of age as it does to adults save for a requirement that the Minister, before making a temporary exclusion order or imposing conditions on a return permit in relation to a child, have regard to:

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- a. the protection of the community as the paramount consideration, and
 - b. the best interests of the child as a primary consideration.⁴¹
50. Article 3 of the CRC protects the best interests of the child:
- In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, *the best interests of the child shall be a primary consideration.* (emphasis added)
51. The UN Committee on the Rights of the Child has stated:
- The expression “primary consideration” means that *the child’s best interests may not be considered on the same level as all other considerations.* This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness.
- The best interests of the child* – once assessed and determined – *might conflict with other interests or rights* (e.g. of other children, the public, parents, etc.). ... the right of the child to have his or her best interests taken as a primary consideration means that *the child’s interests have high priority* and not just one of several considerations. Therefore, *a larger weight must be attached to what serves the child best.*⁴²
52. Placing the protection of the community as the paramount consideration is incompatible with recognising the best interests of the child as a primary consideration. As noted by the High Court:
- The concluding words of Art.3.1 ... give[s] those interests *first importance* along with *such other considerations* as may, in the circumstances of a given case, *require equal, but not paramount, weight.*⁴³
53. The Commission understands and accepts that the protection of the community is a relevant consideration. Where a significant risk to the community is demonstrated to exist, this factor may well weigh most tellingly, in comparison with all other relevant considerations. However, Australian law should not require that, in every case, the protection of the community is the paramount consideration. Imagine, for example, that a temporary exclusion order is sought against a 14-year-old child who poses no more than a trivial risk to the community, in circumstances where the order likely will cause significant harm to the child. If the protection of the community is the *paramount* consideration, this order nevertheless might be considered appropriate.
54. The Commission’s primary recommendation is that the Bill not be passed. In the event that recommendation is not accepted, the Bill should be

amended so that the best interests of the child and the protection of the community are both primary considerations in determining whether a temporary exclusion order should be made, or whether conditions should be imposed on a return permit.

(b) Other rights in the CRC

55. The Bill would also impinge on a number of other rights protected in the CRC, for instance:

a. the rights of the child to family relations and family life (protected by articles 8(1), 9(1), 16(1) and 20(1) of the CRC)

b. the rights of the child to be heard in relation to all decisions affecting them in accordance with their developing capacities, for all such decision making processes to be transparent, and for review mechanisms to be available (protected by article 3 of the CRC).⁴⁴

56. Depriving a child of their right to enter Australia is likely to have even more serious consequences than it would an adult, and is more likely to be arbitrary. That is so for a range of reasons, including that a child is less culpable for wrongdoing, is more vulnerable to any adverse consequences, and may suffer the deprivation of their right to enter Australia through no fault of their own, such as where they have been taken to a conflict zone by a parent.

4.3 Other human rights issues

57. A number of other human rights are likely to be engaged by the Bill. Some of these are briefly outlined below.

(a) The right to privacy

58. The imposition of many of the 'post-entry' conditions available under clause 12(6) of the Bill would significantly impinge on the right to privacy of the person affected by them. That is because these conditions could impose intrusive notification requirements about where the person lives and works, who they associate with, and the means they use to communicate with others.

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59. Privacy is a fundamental human right, protected by article 17 of the ICCPR. The United Nations High Commissioner for Human Rights has recently offered the following definition of privacy:

Privacy can be considered as the presumption that individuals should have an area of autonomous development, interaction and liberty, a “private sphere” with or without interaction with others, free from State intervention and from excessive unsolicited intervention by other uninvited individuals.... In the digital environment, informational privacy, covering information that exists or can be derived about a person and her or his life and the decisions based on that information, is of particular importance.⁴⁵

60. Like a number of human rights, the right to privacy may be subject to some permissible limitations, provided that those limits are not arbitrary. In international law, that means, among other things, that any legislation that limits the right to privacy must be necessary and proportionate to achieve a legitimate purpose.⁴⁶
61. The right to privacy has an intrinsic value. However, it is also vital to protect and advance a number of other rights, including the right to freedom of thought protected by article 18 of the ICCPR and the right to freedom of opinion and expression protected by article 19 of that treaty.

(b) The freedom of movement

62. The Bill would interfere with the freedom of movement protected in article 12(1) of the ICCPR. The Minister could impose on a return permit a condition that a person return to Australia on a particular day and in a particular manner. Failure to comply with that condition would be a criminal offence.
63. Further, temporary exclusion orders, or conditions attached to a return permit, may prohibit a person from returning to Australia for a lengthy period. A person may be subject to such a prohibition even if they are not lawfully entitled to enter or remain in any third country. That would have the effect that the person would be prohibited from leaving the country they are in at the time the order is made or the permit given. That too would interfere with the right to freedom of movement.

- (c) The rights to life, liberty, security of person, and not to be subject to torture, or cruel, inhuman or degrading treatment

- 64. A person prevented from returning to Australia from a conflict zone may be forced to remain in a country where they are not entitled to stay, or where they are not safe. They may as a result be subject to detention, mistreatment, or harm resulting from unrest in the country they are in. That could interfere with their rights to life (protected by article 6(1) of the ICCPR), liberty and security of person (article 9(1)), and the right not to be subject to torture or cruel, inhuman or degrading treatment (article 7).

5 The scheme in the *Counter-Terrorism and Security Act 2015 (UK)*

- 65. The Commission's primary recommendation remains that the Bill not be passed. However, the Commission draws attention to the temporary exclusion provisions in force in the United Kingdom. It is not intended to suggest that this scheme does not impermissibly limit human rights. Rather, the discussion is included to show that if our primary recommendation is not accepted, the Bill could be redrafted in way that would impinge on human rights to a significantly lesser extent. This further demonstrates that the Bill as drafted is not necessary or proportionate to achieving its stated aim.

- 66. Chapter 2 of the *Counter-Terrorism and Security Act 2015 (UK)* (the UK Act) introduced a scheme for the temporary exclusion of individuals who have the right of abode in the UK to be excluded from the UK, and a scheme for 'permits to return' and for conditions to be imposed on a person who enters the UK while subject to a temporary exclusion order. The UK Act has the following relevant features:
 - a. except in urgent cases, the UK Secretary of State must apply to a court for permission to impose a temporary exclusion order on a particular person⁴⁷

 - b. before seeking permission, the Secretary of State must:
 - i. reasonably suspect that the individual is, or has been, involved in terrorism-related activity outside the UK

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- ii. 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 temporary exclusion order to be imposed on the individual
 - iii. reasonably consider that the individual is outside the UK
- c. the scheme cannot be applied to a person unless they have the right of abode in the UK
- d. in urgent cases, the Secretary of State may impose a temporary exclusion order without first seeking permission from a court.⁴⁸ However, in those circumstances, the Secretary of State is subsequently required to refer the matter to a court, which may quash the order if it was 'obviously flawed'⁴⁹
- e. the court must grant permission to impose a temporary exclusion order unless the Secretary of State's assessment of any of the preconditions for the imposition of an order is 'obviously flawed'.⁵⁰ In considering the application, the court applies the principles applicable to judicial review.⁵¹ The court can hear the application in the person's absence, and the person does not need to be notified of the application or be given the opportunity to make any representation to the court if aware of the application⁵²
- f. a temporary exclusion order is automatically in force for a period of two years and only ceases if revoked.⁵³ It is an offence to enter the UK while a temporary exclusion order is in force without reasonable excuse⁵⁴
- g. an affected person must be notified of a temporary exclusion order by hand, fax, post, electronically, document exchange, courier or collection.⁵⁵ The order only has effect once notice has been given⁵⁶
- h. if the person's whereabouts are unknown or there is no known address of the person, notice may be deemed to have been given, but the order must be brought to the affected person's attention once their whereabouts is known⁵⁷
- i. while an order is in force, the Secretary of State must keep under review whether it remains necessary to protect the public from a risk of terrorism⁵⁸
- j. an affected person can apply to a court for review of a decision of the Secretary of State to impose a temporary exclusion order or any

conditions on their presence in the UK.⁵⁹ The court can quash the order or any conditions imposed on the person⁶⁰

- k. if an affected person returns to the UK while subject to a temporary exclusion order, conditions can be imposed on that person by the Secretary of State,⁶¹ including that the person affected report to a police station, attend an appointment, and notify the police of their place of residence⁶²
 - l. any condition imposed on the affected person only comes into effect when the person is given notice in the same way notice of a temporary exclusion order is given⁶³
 - m. the Secretary of State must issue a permit to return if a person affected by a temporary exclusion order is deported to the UK⁶⁴ or if they apply for a permit to return,⁶⁵ unless the person fails to attend a required interview with authorities⁶⁶
 - n. a permit to return must allow the person to return to the UK within a reasonable period⁶⁷ though the manner and time of the arrival to the UK can be prescribed by the Secretary of State.⁶⁸
67. This scheme demonstrates that in the UK, it was considered practicable to implement a temporary exclusion order regime which provides for court authorisation and review; requires notification before orders come into effect, and provides that orders are only available with respect to persons reasonably suspected of having been involved in terrorist activities while abroad. That strongly suggests that the omission of these features from the exclusion order regime proposed in the Bill is not necessary or proportionate to achieve the Bill's stated objectives.

6 Conclusion and recommendations

68. For the reasons given above, the Commission considers that the Bill interferes with a number of human rights to a degree that has not been demonstrated to be necessary or proportionate to achieving its stated objectives. The Commission makes the following recommendations:

Recommendation 1

The Commission recommends that the Bill not be passed.

Recommendation 2

In the event that Recommendation 1 is not accepted, the Bill be amended:

- a. so that temporary exclusion orders can only be issued by a court on application by the Minister
- b. so that a temporary exclusion order may only be made where a court is satisfied on the balance of probabilities that the making of the order is necessary and proportionate to achieve the objects of the Bill, in all the circumstances of the particular case
- c. to ensure that a temporary exclusion order may only be issued in relation to a person who has, while abroad, engaged in conduct that would contravene division 119 of the Criminal Code
- d. to provide that a temporary exclusion order may only be made where the issuing authority is satisfied that the person affected is lawfully entitled to remain in another country for the duration of the order
- e. to afford a person in full the requirements of procedural fairness in relation to any decision made under the Bill
- f. to ensure that the Minister take all reasonably practicable steps to notify the subject of a temporary exclusion order that that order has been made, and that these steps be taken as soon as reasonably practicable after the making of the order
- g. so that in any prosecution for a breach of a temporary exclusion order, the prosecution is required to prove actual knowledge of the existence of the order
- h. to significantly reduce the maximum permissible duration of a temporary exclusion order
- i. to provide that an affected person is entitled to challenge in court the making of a temporary exclusion order on first becoming aware of that order; and that full merits review of the decision to make the order is available
- j. to require that the Minister issue a return permit as soon as reasonably practicable on receipt of an application by an affected person
- k. so that: conditions may only be imposed on a return permit by a court on application by the Minister; no conditions may be imposed unless they are individually and collectively demonstrated to be necessary

and proportionate to achieve the objects of the Bill; and the onus to establish these matters rests with the Minister

- l. that no significant further period of exclusion from Australia can be imposed as a condition of a return permit
- m. to provide that a person affected by conditions imposed on a return permit is entitled to contest the imposition of those conditions at a full hearing — either at first instance, or, if the conditions are imposed in absentia, as soon afterwards as reasonably practicable
- n. to make explicit that any conditions imposed on a return permit have no effect until such time as notice of those conditions is served personally on the affected person
- o. to require the Minister to review periodically any temporary exclusion orders and the conditions imposed on any return permits, and to make an application to the issuing court to revoke the order or the conditions unless the Minister is satisfied that the order or the conditions remain necessary and proportionate
- p. to ensure that the scheme is reviewable by the Independent National Security Legislation Monitor on their own motion, as well as on referral by the Prime Minister or the Attorney-General
- q. so that temporary exclusion orders cannot be made with respect to persons under 18 years of age.

Recommendation 3

In the event that Recommendations 1 and 2.q are not accepted, the Bill be amended to ensure that the best interests of any child affected by the provisions of the Bill are at all times a primary consideration, and may not be trumped by any higher order or ‘paramount’ considerations.

¹ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 3 and 8(1).

³ *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) article 6.

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- 4 See, for example, *Threats to international peace and security caused by terrorist acts*, SC Res
1373, UN SCOR, 4385th mtg, UN Doc S/RES/1373 (28 September 2001).
- 5 Statement of Compatibility with Human Rights, Counter-Terrorism (Temporary Exclusion
Orders) Bill 2019 (Cth) 16 [1].
- 6 Statement of Compatibility with Human Rights, Counter-Terrorism (Temporary Exclusion
Orders) Bill 2019 (Cth) 16 [1].
- 7 Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2019, 19
(Peter Dutton, Minister for Home Affairs).
- 8 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 10(2).
- 9 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 10(2)(b).
- 10 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 8.
- 11 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 9(1).
- 12 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 10(6).
- 13 *Criminal Code Act 1995* (Cth) s 5.6. See also s 9.1 – a person would not be liable in the event
they were ignorant or mistaken about the fact a temporary exclusion order was in effect.
- 14 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 11(4).
- 15 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(1).
- 16 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(2).
- 17 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(5)(a).
- 18 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(5)(d).
- 19 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(5).
- 20 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(6)(l).
- 21 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(6)(j).
- 22 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(6).
- 23 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(6).
- 24 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(7).
- 25 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(8).
- 26 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 14.
- 27 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 15.
- 28 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 16.
- 29 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(5)(a).
- 30 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 17.
- 31 'United Nations Human Rights Committee, General Comment No 27: Article 12 (Freedom of
Movement) 67th Sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
- 32 'United Nations Human Rights Committee, General Comment No 27: Article 12 (Freedom of
Movement) 67th Sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 6 [21].
- 33 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and
Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc
E/CN.4/1985/4, Annex (1985) 3 [10].
- 34 'United Nations Human Rights Committee, General Comment No 27: Article 12 (Freedom of
Movement) 67th Sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 6 [21].
- 35 Statement of Compatibility with Human Rights, Counter-Terrorism (Temporary Exclusion
Orders) Bill 2019 (Cth) 20 [29].
- 36 Statement of Compatibility with Human Rights, Counter-Terrorism (Temporary Exclusion
Orders) Bill 2019 (Cth) 20 [27].
- 37 Statement of Compatibility with Human Rights, Counter-Terrorism (Temporary Exclusion
Orders) Bill 2019 (Cth) 20 [29], 21 [32].

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- 38 The functions of the INSLM are contained in the *Independent National Security Legislation Monitor Act 2010* (Cth). The Monitor's functions include inquiry into matters referred to them by the Prime Minister that relate to counter-terrorism or national security: s 7. However, the INSLM's own motion powers are defined by reference to 'Australia's counter-terrorism and national security legislation'. The Bill, if passed, would not fall within the definition of that phrase: and arguably would not 'relate to' the legislation that does fall within that definition: see ss 4 and 6.
- 39 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) articles 3 and 8(1).
- 40 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 25(2).
- 41 Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) cl 12(4).
- 42 United Nations Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (Art 3, Para 1)*, 62nd Sess, UN Doc CRC/C/GC/14 (29 May 2013) [37], [39] (emphasis added).
- 43 *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 183 CLR 273 (7 April 1995) per Mason CJ and Deane J [31] (emphasis added).
- 44 United Nations Committee on the Rights of the Child, *General Comment No 14 (2013) on the Right of the Child to Have His or Her Best Interests Taken as Primary Consideration (Art 3, Para 1)*, 62nd Sess, UN Doc CRC/C/GC/14 (29 May 2013) 18–20 [87], [89]–[91], [98].
- 45 United Nations High Commissioner for Human Rights, *The right to privacy in the digital age* (Advance Edited Version) 3 August 2018, UN Doc A/HRC/39/29, at <http://daccess-ods.un.org/access.nsf/Get?Open&DS=A/HRC/39/29&Lang=E> (viewed 28 February 2019) [5].
- 46 United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* UN Doc E/CN.4/1985/4, Annex (1985).
- 47 *Counter-Terrorism and Security Act 2015* (UK) s 3(1).
- 48 *Counter-Terrorism and Security Act 2015* (UK) s 2(7)(b).
- 49 *Counter-Terrorism and Security Act 2015* (UK) items 3 and 4(1) of schedule 2.
- 50 *Counter-Terrorism and Security Act 2015* (UK) ss 3(6) and (7).
- 51 *Counter-Terrorism and Security Act 2015* (UK) s 3(5).
- 52 *Counter-Terrorism and Security Act 2015* (UK) s 3(3).
- 53 *Counter-Terrorism and Security Act 2015* (UK) s 4(3).
- 54 *Counter-Terrorism and Security Act 2015* (UK) s 10(1).
- 55 *The Temporary Exclusion Orders (Notices) Regulations 2015* (UK) reg 3(1).
- 56 *Counter-Terrorism and Security Act 2015* (UK) s 4(3)(a).
- 57 *The Temporary Exclusion Orders (Notices) Regulations 2015* (UK) reg 3(2).
- 58 *Counter-Terrorism and Security Act 2015* (UK) s 2(8).
- 59 *Counter-Terrorism and Security Act 2015* (UK) ss 11(1) and (2).
- 60 *Counter-Terrorism and Security Act 2015* (UK) ss 11(4) and (6).
- 61 *Counter-Terrorism and Security Act 2015* (UK) s 9(1).
- 62 *Counter-Terrorism and Security Act 2015* (UK) s 9(2).
- 63 *Counter-Terrorism and Security Act 2015* (UK) s 9(3).
- 64 *Counter-Terrorism and Security Act 2015* (UK) s 7(1).
- 65 *Counter-Terrorism and Security Act 2015* (UK) s 6(1).

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⁶⁶ *Counter-Terrorism and Security Act 2015* (UK) s 6(2).

⁶⁷ *Counter-Terrorism and Security Act 2015* (UK) s 6(1).

⁶⁸ *Counter-Terrorism and Security Act 2015* (UK) ss 5(4), (5) and (6).