HOME AFFAIRS PORTFOLIO
DEPARTMENT OF HOME AFFAIRS

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security

17 October 2022

QoN Number: 01

Subject: 10.3 refers to Children between 14-17. Where does the Act talk specifically about Adults?

Asked by: Andrew Wallace

Question:

Mr WALLACE: I'm just wondering if you can help me out. I'm just curious, and perhaps I've missed it, but there are only two references in the act about the paramountcy of the protection of the community, and they're both in relation to the making of an order under 10(3) for children between 14 and 17 and then the same in relation to a return permit. Is there somewhere else in the act that isn't just for children but is actually, perhaps self-evidently, also in relation to orders made against adults?

Mr Kefford: Two observations: one is that it's mentioned in the long title of the act. I'm happy to take on notice if you'd like to go back to the explanatory material at the time, which would set it out further. You're right; the specific references to paramountcy do come into discussions about the making of orders in relation to children between 14 and 17. But if you look at this act in the context of the entire counter-terrorism legislative framework, then the purpose of these arrangements is clear, as are the intersections with the other legislation that the assistant commissioner was just referring to.

Mr WALLACE: So you'll come back to us on that...........

Answer:

The *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (the Act) introduced a temporary exclusion order scheme to delay Australians of counter-terrorism interest from re entering Australia until appropriate protections are in place.

The Act requires that where a person is 14 to 17 years of age, the Minister must, take into account the protection of the community as the paramount consideration and the best interests of the person as a primary consideration before making a Temporary Exclusion Order (TEO) or imposing a condition on a return permit. This is consistent with Division 104 of the Criminal Code, which relates to control orders. As outlined in the explanatory memorandum, this subsection, taken together with subsection 10(4), provides additional safeguards for children recognising their particular vulnerability, consistent with Australia's international obligations.

This subsection is not replicated for adults, as the protection of the community is the overriding objective and implicit in each TEO that the Minister makes. The Explanatory Memorandum notes, "The over-arching objective of the proposed TEO regime is to protect Australians from the threat of terrorism. As individuals seek to return to Australia from conflict zones overseas, it is crucial that law enforcement agencies are able to manage their return and ensure they do not pose a threat to the Australian community". Matters pertaining to the protection of the community, as provided for in section 10(2) of the Act, form the conditions on which the Minister may make a TEO.

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PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security

17 October 2022

QoN Number: 02

Subject: Explanation of why the Minister is the Decision Maker

Asked by: Julian Hill

Question:

Mr HILL: You're aware of the two concerns of the Law Council. They said there's a reasonable or responsible argument that this is an extrajudicial power that breaches the Constitution and similarly with the review powers that they're also judicial powers, and they pointed to section 30 of the act, which appears to acknowledge that there's at least an arguable case.

Mr Webber: The department's position is that the act remains constitutionally safe, as Mr Kefford just outlined. I add only to that what is obvious, which is, because your question arises out of the Alexander case, that's a case about the loss of citizenship, which is a permanent state of affairs, should it happen. Factually this is quite a different circumstance, where we're looking at the suspension of the right to return only until somebody asks for permission to return and then the imposition of conditions on return, which we know from the operation of control order provisions is something that is constitutionally sound.

Mr HILL: Okay, I get the argument. You referred earlier, I think in response to Mr Wallace's questions, to why you may prefer a minister to make this decision as opposed to somebody who may have a constitutional risk, according to the Law Council, whatever form that took, and I think you used the word 'expeditious'. The previous government's response also pointed out that it would be cheaper not to have those pesky lawyers involved. 'Pesky lawyers' were my words, but I think it was a cost issue. Are there any other reasons, apart from speed and the fact it's cheaper, that you can point to as to why a different regime would be problematic?

Mr Webber: It really is about the design of the scheme here as it operates alongside other schemes, mainly the control order scheme and criminal law. We'd only say as a department it's not a simple as expedition, but certainly with the TEO regime we have, which does ultimately result in conditions that are far fewer and less onerous than control order conditions, your first stop where you need to do something in between somebody arriving and the control order is to put in place some kind of management with speed.

Mr HILL: I understand that, and presumably you had somebody listening at home at least to our discussion this morning. It was pretty clearly acknowledged by everyone

in the question and the responses that if the decision-maker were someone other than minister, then the minister would, as happens in the UK, of course require the power to make a quick decision. I don't think anyone would disagree with that. So I suppose I'm just trying to get on the record: are there any other reasons, apart from expeditiousness, the fact that it is cheaper and some sense of alignment with other regimes, which you haven't really explained and I don't understand, why you would have a concern if the decision-maker were someone other than the minister?

Mr Kefford: I would just add to the point Mr Webber was making about the hierarchy. For more significant controls there are more complex processes, if I might describe them that way. What we're suggesting here is that, given the operation of the act as a whole and the fact that even if an exclusion order is made a return permit must be issued, the consequences are not as stringent for the individuals as exist under other parts of the Criminal Code in terms of control orders and so on, that there is a balance to be struck in terms of the level of that decision- making and the overall complexity of the process.

Mr HILL: That's fine. If you have any additional words, the concern for me in exploring this—I haven't formed a view, and the committee hasn't formed a view, I'm sure, because we'll talk about it and reflect on it—is that, given the former government stuffed up the citizenship legislation, that puts even more pressure on this as a regime that needs to be effective and work, and those concerns about the constitutionality that the Law Council outlined do not seem spurious. I admire your confidence, but I'm at least trying to understand what options we may have to reduce the constitutionality risk and shore up the regime on the basis of the assumption that everyone agrees it's sensible to retain. I'm sure there are things we can do to improve it. That's the perspective that I'm coming from.

Mr Kefford: I accept that, and we're not saying that the sort of process that you're describing is not one that's open to ultimately the government and the parliament to institute. But what you've asked us is to explain where we are now, and that's what we've done.

Mr HILL: If you have any extra words to help us flesh out that point you're making about the hierarchy of things, that would be helpful, because I'm new to the committee and I still haven't wrapped my head around all of the detail of those other complementary regimes.

Mr Kefford: We're happy to take that on notice.

Answer:

The Department of Home Affairs considers that the Minister is the most appropriate decision maker for the making of Temporary Exclusion Orders (TEOs) under the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*. Ministerial decision making is considered commensurate with the implications of a decision to make a TEO as it puts conditions on a person’s right to return to manage risks to the Australian community, rather than acting as a prohibition to return. This in in contrast to other frameworks which involve more onerous judicial measures determined by courts.

Critically, Ministerial determination ensures timely consideration of a TEO application, which is necessary given the dynamic operational requirements and time

sensitivity required for the scheme to react effectively, and eliminates resourcing imposts associated with judicial hearings.

The TEO regime provides time for law enforcement and security agencies to assess the level of potential threat an Australian citizen may pose, should they return to Australia. TEOs act effectively as a short-term measure to manage a person's return and to enable appropriate threat mitigation and management measures to be put in place where necessary.

Should other controls or punitive measures be assessed as appropriate to mitigate and manage the threat associated with a person, then it would be appropriate for these measures be determined by a judicial officer. These measures could include Control Orders or prosecution for Criminal Code offences.

The TEO regime does not permanently exclude citizens from returning to Australia, rather the regime seeks to delay a person of counter-terrorism interest from re-entering Australia until appropriate protections and arrangements are in place. A TEO prevents a person from entering Australia for a specified period of up to two years, or until a return permit is issued by the Minister. Alternatively, the person can apply to the Minister for the TEO to be revoked.

Where a Return Permit is issued it may include pre and/or post entry conditions. Pre-entry conditions may require the person enter Australia in a specified manner and time. Post-entry conditions that remain valid for a period of no more than one year after the person enters Australia do not prohibit the person's activities in any way, but may require the person to notify authorities of specified matters.

Return Permit conditions assist law enforcement and security agencies to monitor the whereabouts, activities and associations of an individual. This assists authorities to maintain awareness of any possible increase in risk to the community and enable early intervention. Persons who are subject to a return permit may be subject to additional law enforcement action that may lead to a judicial measure being sought through the court.

The TEO regime is in contrast to a Control Order, where more restrictive conditions are sought through a judicial process in order to manage a higher threat or risk to the community. In particular, a Control Order enables prohibitions and restrictions to be imposed on the person's associations and activities and may require the person to do certain things including wear a tracking device or report to specified persons at specified times and places.

The Commonwealth's High Risk Terrorist Offender (HRTO) regime enables judicial imposition of more severe management measures. For example, an Extended Supervision Order (ESO) or Continuing Detention Order (CDO) may be applied in circumstances where an individual has been convicted of a terrorism offence by an Australian court and is detained in custody for that offence. An ESO can impose any condition (more onerous than available under a Control Order) reasonably necessary and appropriate to manage the unacceptable risk of a convicted terrorist offender committing a serious terrorism offence. A CDO enables continued detention of a convicted terrorist offender posing the highest category of risk to the community. These measures are relevant to Australia-based individuals, convicted by an Australian court of a specified terrorism or foreign incursions offence who are approaching sentence expiration. To impose a CDO or ESO a court must be satisfied of the need for additional measures to manage the risk the individual poses.

Importantly, the HRTO regime applies only to persons who are convicted terrorist offenders in detention in Australia to protect the Australian community. The TEO and Return Permit regime performs a complementary but separate function by managing the return of an individual of counter-terrorism interest to Australia while ensuring appropriate arrangements are in place to protect the Australian community.

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AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security

17 October 2022

QoN Number: 03

Subject: Law Council proposal for an Interim TEO

Asked by: Karen Andrews

Question:

Mrs ANDREWS: I don't believe this particular issue has been raised. It goes to a proposal—I believe it was from the Law Council—that one of the options that should be considered is an interim TEO so that there could be an opportunity for the minister of the day to make an interim order, and then that would be reviewed at another time. The proposal was for that interim order to be valid for a period of 10 to 14 days. I'm interested in comments from all of the agencies and the department represented here today, and their views on that, particularly in light of comments that they have made about the additional time that's required as part of a TEO. Perhaps we can start with Mr Burgess.

Mr Burgess: My initial reaction to that—if I understand what they were saying in terms of an interim temporary exclusion order or a time-limited temporary exclusion order—is that it would be better than nothing. But, if it's two weeks, that may not be enough time. That's my initial reaction to that. I'd have to ponder that. I'm happy to take that question on notice.

Mr McCartney: I think we're going to parrot the director-general of ASIO. I think we'd have similar concerns about the time period, knowing that we're dealing with people overseas and we're dealing with people overseas in countries where access to information, let alone access to evidence, is problematic.

Mrs ANDREWS: And Home Affairs?

Mr Kefford: I'd certainly echo those concerns. The other thing I'd point out is that, as you would be aware, there are processes for requests to change conditions. The act already provides for mechanisms for individuals, once they become aware of the issues, and the restrictions to requesting changes. There's an opportunity for the minister to either vary the conditions or, indeed, revoke the order if the circumstances change. I'm not sure that in this sort of context 14 days would be long enough to do anything meaningful. That would be my initial reaction.

Mrs ANDREWS: If anybody would like to provide further information to us in writing on that point, it would be appreciated.

Mr Kefford: Happy to.

Answer:
Section 10(6)(d) of the Counter-Terrorism (Temporary Exclusion Orders) Act (2019) allows the Minister for Home Affairs to make a Temporary Exclusion Order (TEO) for any period not exceeding two years after the day on which the order is made. Under this provision, a TEO may be made for any period of time required on a case by case basis, including 14 days as noted in the hearing.

The Department understands the Law Council of Australia's proposal to involve an interim TEO that could be made by the Minister and valid for a period until the application for a TEO could be brought before a Court. The Law Council suggested that valid period would be seven to 14 days.

Given the subject of a TEO would be located overseas, potentially in a conflict zone, a period of seven to 14 days would unlikely be enough time for the Department and partner agencies to collect, analyse, and assess relevant information and evidence to inform an application to a Court for a TEO.

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PARLIAMENTARY INQUIRY SPOKEN QUESTION ON NOTICE

Parliamentary Joint Committee on Intelligence and Security

17 October 2022

QoN Number: 04

Subject: Split of TEOs issued - 10.2a and 10.2b

Asked by: Peter Khalil

Question:

CHAIR: Just on that point, I asked earlier how many TEOs had been issued to date. Of those TEOs issued to date, how many have been given under section 10(2)(a) and how many under section 10(2)(b)?

Mr Kefford: We might have to take that detail on notice for the committee.

CHAIR: Thank you. If you could, that would be good...........

Answer:

No Temporary Exclusion Orders (TEO) have been made under section 10(2)(a) of the *Counter-Terrorism (Temporary Exclusion Orders) Act* (2019) (the Act).

Eight TEOs have been made under section 10(2)(b) of the Act.