



Australian Government
Department of Home Affairs



**Department of Home Affairs and Australian Border
Force Submission to the Review of the *Counter-
Terrorism (Temporary Exclusion Orders) Act 2019***

**Parliamentary Joint Committee on Intelligence and
Security**

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1. Introduction

The Department of Home Affairs (the Department) and the Australian Border Force (ABF) welcome the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (PJCIS') review into the operation, effectiveness and implications of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (TEO Act).

The purpose of this submission is to provide the PJCIS with an overview of the operation of the scheme, as well as its effectiveness in enabling the management of the return of Australian citizens of counter-terrorism interest to mitigate the risk to the community.

Australia's terrorism threat level remains at PROBABLE. Credible intelligence indicates that individuals and groups have the capability and intent to conduct terrorism onshore.¹

There are Australians offshore who are of counter-terrorism interest and remain at liberty; there are others whose involvement, or extent of affiliation with terrorist groups or extremist movements, remains unknown; and, there are those who are being detained, investigated or otherwise come to notice for terrorism-related activities across the globe.

Conflict zones and ungoverned spaces, such as in Syria, Afghanistan, Yemen, the Sahel, the Sinai and Somalia, will continue to influence Australia's onshore threat environment and challenge the ability of agencies to maintain coverage of the threat posed by offshore Australians of counter-terrorism interest.

As international borders re-open, Australians of counter-terrorism interest will have increased opportunities to return to Australia. The reopening of international borders may also increase the number of Australians seeking to travel offshore for the purposes of engaging in terrorist activity.

There are a range of measures available to the Australian Government to manage effectively the terrorism threat to the Australian community. The TEO Act is the only legislative scheme that allows for the management of risks relating to the return to Australia of Australians of counter-terrorism interest.

¹ Australian Security Intelligence Organisation Director-General's Annual Threat Assessment, 17 March 2021.

Purpose and overview of the scheme

The TEO Act commenced on 30 July 2019. The legislation was developed in the context of a security environment marked by the collapse of the Islamic State of Iraq and the Levant's (ISIL's) territorial control in Iraq and Syria and the expected challenge of managing the return of foreign fighters to Australia.

The development of the legislation reflected the Government's commitment to keeping Australians safe by giving Australian law enforcement and security agencies the ability to manage the expected return of those individuals in a controlled manner.

The TEO and return permit scheme includes two components: the making of a TEO and the issuance of a return permit.

Making a TEO

Section 10 of the TEO Act provides the grounds by which the responsible Minister (currently the Minister for Home Affairs) may make a TEO in relation to a person. To be eligible the person must be located outside Australia, be an Australian citizen, be at least 14 years of age and not have a return permit in force in relation to them. There are two circumstances in which the Minister may make a TEO:

- where the Minister suspects on reasonable grounds that the order would substantially assist in preventing specified terrorism-related activities; and
- if the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of the *Australian Security Intelligence Organisation Act 1979*) for reasons related to politically motivated violence.²

Once made, a TEO will remain in force either until it expires (which can be up to 2 years after the day on which the order is made), or until it is revoked – whichever occurs first. However, it is open to the Minister to make subsequent TEOs in relation to one individual, so long as the relevant thresholds for making a TEO are met each time.

² *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (TEO Act), ss10(2).

As soon as practicable after a TEO comes into force or is revoked, the Minister must cause steps to be taken that are, in the Minister's opinion, reasonable and practicable, to bring to the attention of the person (or the parent or guardian of the person if they are aged between 14 and 17) the content or revocation of the order.

A TEO may specify that the person to whom it applies must surrender their Australian travel document and may be prevented from holding, applying or obtaining an Australian travel document for the duration of the order.³

It is a criminal offence for a person who is the subject of a TEO to return to Australia, carrying a maximum penalty of two years' imprisonment.⁴ It is also an offence for a person who is the owner, charterer, lessee, operator, agent or master / pilot of a vessel or aircraft to knowingly permit the vessel or aircraft to be used to bring a person who is subject to a TEO to Australia, in breach of a TEO⁵. This offence carries a maximum penalty of two years imprisonment but does not apply if the person who is subject to the TEO is being deported or extradited to Australia.

Issuing a return permit

The second component of the TEO Act is the return permit scheme. A person subject to a TEO, or someone acting on their behalf, can apply for a return permit which the Minister must issue within a reasonable period. The Minister must also issue a return permit if the person is to be, or is being, deported or extradited to Australia.⁶

The Minister also has discretion to issue a return permit if the Minister considers it is appropriate to do so.

If a return permit is issued, the TEO in relation to that person is taken to be immediately revoked.⁷

An Australian citizen who is subject to a TEO will only be able to return to Australia with a return permit issued by the Minister. This measure was intended to ensure that if an Australian of counter-terrorism interest does return to Australia, it is with adequate forewarning and the knowledge of authorities.

³ Ibid, s 10 (6) (e) – (g)

⁴ Ibid, s 8.

⁵ Ibid, s 9.

⁶ Ibid, ss15(3).

⁷ Ibid, ss11(5).

Once issued, a return permit remains in force until the earliest of the following occurs:

- the period for which the return permit is specified to be in force ends (which can be up to 12 months after the person enters Australia);
- if the period is varied, the end of that period as varied;
- the permit is revoked.⁸

If the person remains offshore and an Australian citizen, it is open to the Minister to make another TEO in relation to the person once the return permit expires or is revoked, so long as the relevant thresholds for making a TEO are again met.

Under a return permit, the Minister may impose pre and post-entry conditions to control the manner in which a person may return to Australia and impose notification requirements once they are onshore. Failure to comply with a return permit condition is a criminal offence punishable by up to two years' imprisonment.⁹ Knowingly facilitating the return of a person to Australia in breach of a condition imposed on a return permit is a criminal offence punishable by up to two years' imprisonment. This offence does not apply if the person subject to the return permit is being deported or extradited to Australia.¹⁰

Before imposing any return permit conditions, the Minister must be satisfied that the imposition of the condition or conditions, individually and when taken together, are:

- reasonably necessary, and
- reasonably appropriate and adapted

for the purpose of preventing specified terrorism-related conduct.

Before imposing a pre-entry condition on a return permit that would prevent a person from entering Australia for a period of time, the Minister must consider (to the extent known to the Minister) whether the person has a lawful right to remain, or to enter and remain, in a country other than Australia during that period. If the person has no lawful right to remain, or to enter and remain, in a country other than Australia during that period the Minister must consider – the likelihood of the person being detained, mistreated or harmed if the person cannot enter Australia until the end of that period¹¹ (see s16(8)).

⁸ Ibid, s19(b).

⁹ Ibid, s 20.

¹⁰ Ibid, s 21.

¹¹ Ibid, s 16(8).

Once a return permit is issued and if a return permit is varied, the Minister must cause a copy of the permit as varied to be served personally on the person to whom it relates. Or if it is reasonably practicable to do so, on a parent or guardian of the person to whom the permit relates if the person is between 14 to 17 years of age.

If a return permit or a condition on a return permit is revoked, the Minister must as soon as practicable after the revocation, cause steps to be taken that are, in the opinion of the Minister, reasonable and practicable:

- to bring the revocation of the permit or condition to the person's attention;
- if the person to whom the permit relates is 14 to 17 years of age—to bring the revocation of the permit or condition to the attention of the person's parent or guardian.

Imposing pre-entry conditions

Return permit pre-entry conditions include the ability to prohibit a person from entering Australia for up to 12 months and specifying the manner in which a person is to return to Australia.¹²

The return permit condition permitting exclusion for up to 12 months is intended to provide agencies additional time to:

- obtain and review information in relation to the individual;
- generate a comprehensive threat assessment of the risk posed by the entry of the person to Australia; and
- make appropriate arrangements for that entry.

Depending on the assessed risk posed by the person subject to the return permit, there are significant operational resources involved in imposing and managing the pre-entry conditions and the person's return travel to Australia.

¹² Ibid, ss16(9).

Imposing post-entry conditions

The return permit may also provide specific conditions with which the person must comply for a period of up to 12 months after their return to Australia. The majority of post-entry conditions are notification only and do not restrict or prohibit the subject from undertaking lawful activities. The only two exceptions are the conditions requiring a person to:

- surrender their Australian travel document, and
- prohibit the person applying for or obtaining an Australian travel document for the onshore duration of the permit.

The nature of post-entry conditions reflects that the person continues to be subject to further monitoring and assessment by law enforcement and security agencies. The Minister may vary a return permit and impose or remove conditions as appropriate and may do so on his or her own initiative; or on application by, or on behalf of, the person to whom the return permit relates.¹³

The purpose of these conditions is twofold. First, it enables agencies to continue to assess the threat once the person is onshore and vary conditions as required. For example, engagement in certain occupations or fields of study may represent a risk.

Second, the notification conditions enable law enforcement and security agencies to maintain awareness and visibility of the whereabouts, activities and associations of a person subject to a return permit. For example, if a person is subject to a return permit condition that stipulates they must notify a specified body when they intend to enter a State or Territory other than that in which their residence is located, this information can be shared with relevant jurisdictions to enable local measures to be implemented to ensure officer and community safety.

Before imposing any return permit conditions, the Minister must be satisfied that the imposition of the condition or conditions, individually and when taken together, are:

- reasonably necessary, and
- reasonably appropriate and adapted

for the purpose of preventing specified terrorism-related conduct

¹³ Ibid, s18.

The assessment ensures that the conditions imposed are proportionate in addressing the risks posed by the person. Unlike a control order, the person will not be restricted or prohibited from undertaking certain activities (except traveling overseas). This appropriately reflects the fact that the person continues to be the subject of further monitoring and assessment as to their risk.

Safeguards and oversight

The TEO and return permit scheme is designed to protect Australian communities from terrorism. The TEO Act includes a range of safeguards similar to other counter-terrorism legislation, and includes protection for minors, independent review and Parliamentary oversight.

Children

A TEO cannot be made against a person younger than 14 years of age.¹⁴ Before making a TEO, or before conditions are imposed under a return permit, in relation to a person who is 14 to 17 years of age, the Minister must have regard to the protection of the community as the paramount consideration and the best interests of the person as a primary consideration,¹⁵ taking into account the person's personal circumstances and their best interests as a child.¹⁶ The Minister must also provide copies of documents that are required to be provided to a person aged 14 to 17 to a parent or guardian personally when it concerns return permit conditions, and where reasonably practicable for a TEO.

Before the Minister imposes any return permit conditions on a return permit, the Minister must consider the impact of imposing the condition, or conditions taken together, on the person's personal circumstances, particularly the impact on any dependants of the person who are aged under 18 years.

¹⁴ Ibid, s 10 (1) (c).

¹⁵ Ibid, s10(3) and 16(5).

¹⁶ Ibid, s 10(4) and 16(6).

Review of decisions

An independent reviewing authority must review the Minister's decision to make a TEO. A TEO does not come into force until the authority reviews the TEO under section 14 and decides that none of subparagraphs 14(4)(b)(i) to (iii) apply to the decision to make the TEO. This ensures that the TEO is not made with an improper exercise of the power to make the decision, induced or affected by fraud, or made in the absence of appropriate material to make the decision.¹⁷

In urgent circumstances the Minister may make a TEO that comes into force immediately. Urgent circumstances may include, for example, where the person's return is imminent and the Minister becomes aware of that fact. However if the reviewing authority determines that one or more of subparagraphs 14(4)(b)(i) to (iii) apply to the TEO decision (regarding improper exercise of power, fraud or the absence of appropriate material), the TEO is taken to have never been made.¹⁸

Under the Act, the Attorney-General may appoint any of the following as a reviewing authority:

- a former Justice of the High Court; or
- a former judge or justice of a court created by the Parliament; or
- a former judge of the Supreme Court of a State or Territory; or
- a current Deputy President or Senior Member of the Administrative Appeals Tribunal (who has been enrolled for at least 5 years as a legal practitioner of a federal court or of the Supreme Court of a State or a Territory).¹⁹

A person can also seek review of the TEO decision in the High Court of Australia, under section 75(v) of the Constitution, or in the Federal Court of Australia, under section 39B of the *Judiciary Act 1903*.

¹⁷ Ibid, s 14 (4) (b) (i) – (iii).

¹⁸ Ibid, s 14 (7) (a).

¹⁹ Ibid, s 23 (1)

Applications to the Minister

A person who is subject to a TEO, or their representative, may apply to the Minister to have the TEO revoked. Similarly, a person who is subject to a return permit, or their representative, may apply to the Minister to have the return permit varied or revoked.²⁰

Oversight

The Minister must provide an annual report to the Parliament on the exercise of power under the TEO and return permit scheme.²¹ In addition to the requirement for the PJCIS to review the TEO and return permit scheme within three years, the Independent National Security Legislation Monitor also has a statutory function to review the operation, effectiveness and implications of the scheme.

²⁰ Ibid, s 11 (2) (b); Ibid s. 18 (2) (b).

²¹ Ibid, s 31

2. Operation of the TEO and return permit scheme

Eight TEOs have been made and five return permits have been issued since the TEO Act commenced on 30 July 2019. Each of the eight TEOs provided agencies with sufficient time to develop a contemporary threat picture, and identify and apply the most appropriate risk mitigation measure. It is worth noting that COVID-19 related international travel restrictions have been in place for much of the period the scheme has been in force, which may have limited or prevented the attempted departure or return to Australia of persons of counter-terrorism interest.

The majority of the cohort that has been subject to the TEO and return permit scheme, and the anticipated future cohort, share certain characteristics:

- extended periods of time located offshore;
- time spent located in conflict zones or ungoverned spaces; and
- information gaps on the extent of their involvement in terrorist activities or the threat they may pose.

Members of this cohort include individuals who have been detained or investigated for terrorism offences in foreign countries, where there is limited information available to Australian agencies regarding the specifics of the alleged offences.

The operational experience of the Department and the ABF in implementing the TEO and return permit scheme demonstrates that it is a valuable scheme to manage the return of a broad range of individuals of counter-terrorism interest.

The TEO and return permit scheme has so far facilitated a number of intended operational effects:

- keeping individuals offshore while agencies determine the risk they pose;
- allowing agencies to manage and prepare for the return of individuals; and
- a notification mechanism to maintain awareness of individuals once onshore.

The scheme has kept individuals of counter-terrorism interest offshore while agencies determine the risk they pose to the community

By delaying the return of Australians of counter-terrorism interest, the TEO and return permit scheme has provided security and law enforcement agencies with additional time to investigate and develop a contemporary threat picture in relation to that individual. This additional time has been particularly crucial in the case of individuals who have spent extended periods of time offshore in ungoverned spaces or been arrested for terrorism offences in foreign countries. In these cases, available information may be incomplete or fragmentary and agencies may require further information from foreign governments to complete assessments of the threat posed by the individual.

Australian agencies often receive limited notice of a person's intent to return, and a possible attempt at travel. The TEO and return permit scheme provides a valuable interim measure while agencies consider the availability of other longer-term treatment options. Such treatment options (e.g. criminal prosecution) often take significant time to be developed and applied. This is illustrated by the case study below (Individual A).

The scheme allows agencies to manage and prepare for the return of individuals of counter-terrorism interest

The TEO and return permit scheme provides agencies with the ability to manage and prepare for the return travel of an individual of counter-terrorism interest, which is critical to mitigating risk.

In many instances the country in which a person subject to a TEO or return permit is located will not have direct flights to Australia, thereby requiring the person to transit or travel through a third country in order to return to Australia. In these circumstances agencies proactively engage with foreign government officials and airline representatives in order to enable the secure return of these individuals to Australia.

The ability to dictate a return path and timeframe for return enables onshore agencies to prepare for a person's return. This may include:

- establishing a notification regime to ensure compliance with return permit conditions;
- preparing a reception plan for the person's return and associated intelligence or evidence collection opportunities; and

- engaging with relevant State and Territory authorities in relation to the person's return.

The operational benefits of this are illustrated in the case studies below (Individuals A and B).

The scheme provides a mechanism to manage risk posed by persons of counter-terrorism interest once onshore

The TEO scheme provides agencies with time to assess the threat associated with an Australian of counter-terrorism interest who is located offshore. However, given the potential period of time spent offshore and the person's location, agencies may still only be able to develop a comprehensive threat assessment upon the person's return to Australia.

The ability to impose post-entry conditions facilitates ongoing agency engagement with that person. If conditions are complied with, agencies have greater visibility of the person's activities, including their possible re-integration back into the Australian community. If, there is insufficient information available to impose return permit conditions at the time of an individual's return, the return permit can subsequently be varied or revoked if additional relevant information becomes available. As such, should a person of counter-terrorism interest return to Australia on a return permit without conditions, and agencies subsequently become aware of additional adverse information in relation to that person, return permit conditions can be subsequently imposed while the degree of threat posed by the person is assessed and/or longer-term treatment options are developed.

Return permit conditions are critical for maintaining community safety and risk mitigation activities in relation to returned persons of counter-terrorism interest. These may include:

- conditions to provide State policing partners with visibility over the person's previous activities and current location, ensuring officer and community safety in the event they respond to an incident in relation to the person or the location in which they are residing, working at, travelling or studying.
- a condition whereby the person must notify within a specified period of the access or use, or intended use, of specified forms of telecommunication or other technology in Australia. This condition greatly assists agencies in identifying specific communications services, accounts or devices being used by the person and an awareness of communications that the person may have with other persons of counter-terrorism interest in Australia and overseas.

- post-entry conditions that include notification of an intention to travel to another domestic jurisdiction. This notification enables relevant law enforcement agencies to be aware that a person of CT interest is travelling to their jurisdiction so that appropriate community safety mitigation and intelligence collection can occur.
- given the possible risk posed by this cohort, employment in some vocations or fields of study may be of security concern and ensuring that relevant agencies maintain visibility over these activities is imperative to ensuring community safety.

The benefit of such conditions is illustrated in the case study below (Individual B).

Illustrative case studies

Case study: Individual A

An Australian citizen, Individual A, departed Australia and was subsequently the subject of a TEO. The TEO prohibited Individual A from being able to hold, apply or obtain an Australian travel document. Separately, Individual A was subsequently detained by a foreign government and placed in immigration detention pending deportation.

A return permit was issued in relation to Individual A. Individual A was deported from the foreign country to a third country. Individual A's subsequent return to Australia was managed in close consultation with the airline industry and relevant international partners to mitigate risk or disruption associated with the travel.

During the period Individual A was offshore and subject to the TEO and return permit, Australian Government agencies were able to obtain sufficient evidence to support a domestic prosecution. Individual A was arrested upon arrival into Australia and remains in custody.

Case study: Individual B

An Australian citizen, Individual B, departed Australia in June 2015 to travel to Syria. Subsequently, Individual B was convicted in a foreign court of being a member of a terrorist organisation. Some years later, Individual B was released from prison subject to judicial controls, including a condition that prevented them from departing the country for a specified period. Individual B was subsequently subject to a TEO and return permit with post-entry conditions.

Individual B's return travel to Australia was managed to mitigate risk. By the time Individual B returned to Australia, they had spent almost six years offshore. The post-entry conditions in their return permit facilitated continued awareness of Individual B by security and law enforcement agencies to determine the ongoing risk they posed and to implement measures to safeguard the community.

3. Effectiveness of the TEO and return permit scheme

While the implementation of the TEO Act has been demonstrably effective, practical challenges in obtaining information have impeded the scheme's successful operation.

By design, the scheme is focused on offshore Australians of counter-terrorism interest. Many have spent substantial periods of time offshore. They may have been located for considerable periods in conflict zones or ungoverned spaces, or spent time in other areas outside the legitimate control of any government.

The complexities of gathering reliable evidence and intelligence in these regions are evident. They include the absence of established processes and procedures to obtain evidence and intelligence, practical difficulties in bilateral information exchanges, and lengthy delays in receiving relevant information. The cumulative effect of these challenges presents significant obstacles for agencies to develop an understanding of the contemporary threat a person may pose and implement associated risk mitigation measures, against the thresholds and within the timeframes currently provided for under the scheme.

Conflict zones and ungoverned spaces will continue to challenge agencies' abilities to generate a comprehensive understanding of the threat posed by offshore Australians of counter-terrorism interest, implement required mitigation measures and effectively manage their return.

4. Conclusion

While Australia's counter-terrorism legislative framework is mature and robust, it continues to be important to ensure that agencies have the means to tackle the enduring terrorist threat. This includes ensuring that counter-terrorism legislative schemes are flexible and adaptive to respond to a complex and constantly evolving threat environment. The TEO Act forms an important element of Australia's robust and wide-ranging counter-terrorism legislative framework, provides forewarning of those of counter-terrorism interest returning to Australia and allowing appropriate risk assessment and mitigation measures to be implemented.

As international borders re-open, Australians of counter-terrorism interest will have increased opportunities to return to Australia. The reopening of international borders may also increase the number of Australians seeking to travel offshore for the purposes of engaging in terrorist activity. Around 65 Australian (and former Australian) men and women are currently in Syria/Iraq and have fought with, or were otherwise associated with religiously motivated violent extremist groups which remain in the region.

The TEO Act plays a specific role in managing Australian citizens of counter-terrorism interest by providing a mechanism to delay a person's return to Australia and allow agencies critical time to generate a contemporary threat assessment of the risk posed by the entry of the person to Australia, which may inform the development and implementation of appropriate risk mitigation strategies, including return permit conditions to assist agencies in onshore monitoring.

The TEO Act is a valuable tool in contributing to the safety of the community.