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Review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*

**Submission to the
Parliamentary Joint Committee on Intelligence and Security**

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TABLE OF CONTENTS

1. Introduction	3
2. Brief overview of the regime	3
3. Observations	4
Threshold for the making of a TEO under paragraph 10(2)(b)	4
Comparison to other regimes	4
Information provided to the Minister	5
Procedural fairness	6

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1. INTRODUCTION

1. The Inspector-General of Intelligence and Security (IGIS) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security's review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (the TEO Act).
2. IGIS jurisdiction in relation to the TEO Act is relatively limited, being confined to the activities of ASIO in connection with the regime. However, to assist the Committee in its review, IGIS offers the below observations informed by its inspections of ASIO's activities to date. Specifically, we note for the Committee areas where the operation of the TEO Act differs from other comparable regimes.
3. IGIS would be happy to discuss the submission further at a public or classified hearing, should the Committee require.

2. BRIEF OVERVIEW OF THE REGIME

4. The TEO Act enables the Minister for Home Affairs to issue a temporary exclusion order (TEO) in relation to an Australian citizen who is at least 14 years of age and located outside Australia. Subsection 10(2) of the Act provides that the Minister must not make a TEO in relation to a person unless either:
 - (a) *The Minister suspects on reasonable grounds that making the order would substantially assist in one or more of the following:*
 - (i) *preventing a terrorist act;*
 - (ii) *preventing training from being provided to, received from or participated in with a listed terrorist organisation;*
 - (iii) *preventing the provision of support for, or the facilitation of, a terrorist act;*
 - (iv) *preventing the provision of support or resources to an organisation that would help the organisation engage in an activity described in paragraph (a) of the definition of terrorist organisation in subsection 102.1(1) of the Criminal Code; or*
 - (b) *the person has been assessed by the Australian Security Intelligence Organisation 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 (within the meaning of that Act).*
5. The effect of a TEO is to prohibit the Australian citizen from entering Australia. A TEO may be in force for up to two years, and entering Australia while a TEO is in force is a criminal offence.¹ A TEO may also require the Australian citizen to surrender their Australian travel document, or be prevented from applying for or obtaining a new Australian travel document.²
6. A TEO is automatically revoked if the Minister issues a return permit.³ The Minister must issue a return permit within a reasonable period if he or she receives an application from a person for whom a TEO is in force; or if the person is to be, or is being, deported or extradited to Australia.⁴
7. Subject to additional thresholds being met, the Minister may impose one or more pre-entry and post-entry conditions on a return permit. Pre-entry conditions are directed at controlling the timing and method of a person's return to Australia, whereas post-entry conditions are directed at monitoring a person's activities and movements, and/or preventing international travel, for up to 12 months after their return to Australia. Post-entry conditions may also require a person to surrender their Australian travel document, or be prevented from applying for or obtaining a new Australian travel document.⁵

¹ *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, section 8.

² *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, paragraphs 10(6)(e)-(g).

³ *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, subsection 11(5).

⁴ *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, section 15.

⁵ *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, section 16.

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3. OBSERVATIONS

8. IGIS has conducted periodic inspections of ASIO's activities in relation to the TEO regime as part of its inspection program. These inspections have primarily focused on assessments produced by ASIO for the purpose of paragraph 10(2)(b) of the TEO Act.
9. To assist the Committee with its review, IGIS offers the following observations informed by its inspections to date.

THRESHOLD FOR THE MAKING OF A TEO UNDER PARAGRAPH 10(2)(B)

10. Although not unique to the TEO Act,⁶ the threshold for ASIO to make an assessment under paragraph 10(2)(b)—that the person is 'directly or indirectly a risk to security ... for reasons of politically motivated violence'—can be interpreted quite broadly. It is a lower threshold than the alternative threshold in paragraph 10(2)(a), as it does not require the person to pose a specific *threat*. The subject of the assessment is only required to be a *risk* to security—and that risk may be either direct or indirect.
11. In the absence of any statutory requirements setting out the matters that an assessment must, and must not, take into account (as noted below), the TEO Act provides little guidance as to the level of risk that must exist before the threshold can be said to have been met. This presents complexities from an oversight perspective as it is difficult to assess objectively whether ASIO has provided sufficient detail to satisfy this threshold.
12. Noting that (as discussed below) an assessment for the purposes of paragraph 10(2)(b) of the TEO Act does not have the same legislative safeguards and review mechanisms as ASIO security assessments produced for the purpose of other regimes, the Committee may wish to consider whether the current threshold is appropriate.

COMPARISON TO OTHER REGIMES

13. The threshold in paragraph 10(2)(b) uses substantially similar language to other provisions in the *Migration Act 1958* and the *Migration Regulations 1994*.⁷ However, unlike those provisions, section 28 of the TEO Act makes clear that neither a TEO nor a return permit constitute 'prescribed administrative action' for the purposes of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).⁸ As a result, a formal ASIO 'security assessment' under Part IV of the ASIO Act is not required in order to meet the threshold under paragraph 10(2)(b) of the TEO Act.⁹
14. The safeguards and review mechanisms that apply in relation to Part IV security assessments include:
 - a requirement for ASIO to comply with binding determinations that prescribe matters that are to be taken into account, the manner in which those matters are to be taken into account, and matters that are not to be taken into account, in the making of assessments;¹⁰

⁶ As discussed below, substantially similar language appears in the *Migration Act 1958* and the *Migration Regulations 1994*.

⁷ See *Migration Act 1958*, paragraphs 5C(1)(g), subsection 36(1B), sections 134B-134C and paragraph 501(6)(g); and *Migration Regulations 1994*, regulation 2.43(1)(b) and Schedule 1, public interest criterion 4002.

⁸ In contrast, the definition of 'prescribed administrative action' in section 35 of the ASIO Act specifically includes 'the exercise of any power, or the performance of any function, in relation to a person under the *Migration Act 1958* of the regulations under that Act'.

⁹ Section 35 of the ASIO Act defines 'security assessment' or 'assessment' to mean a statement in writing expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for *prescribed administrative action* to be taken in response of a person or the question whether the requirements of security make it necessary or desirable for *prescribed administrative action* to be taken in respect of a person.

¹⁰ ASIO Act, subsections 37(3)-(4).

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- a requirement for an adverse or qualified security assessment to be accompanied by a statement of the grounds for the assessment;¹¹
 - a requirement for the subject of an adverse or qualified security assessment to be notified within 14 days of the assessment being furnished, unless the Minister certifies that he or she is satisfied that withholding of notice is ‘essential to the security of the nation’;¹²
 - a requirement for the subject of an adverse or qualified security assessment to be given a copy of the statement of grounds, unless the Minister has certified that he or she is satisfied that disclosure of the statement of grounds, or a particular part of the statement of grounds, would be ‘prejudicial to the interests of security’;¹³ and
 - an ability for the subject of an adverse or qualified security assessment to seek merits review of ASIO’s assessment by the Security Division of the Administrative Appeals Tribunal.¹⁴
15. These safeguards and review mechanisms do not apply to assessments made by ASIO for the purpose of the TEO Act. This contrasts with other frameworks in which restrictions may be placed on an Australian citizen’s freedom of movement on the basis of ASIO advice, such as the refusal, suspension or cancellation of a passport under the *Australian Passports Act 2005*.¹⁵
16. The limited avenues for either administrative or judicial review of TEO assessments arguably places more importance on IGIS review of those assessments.¹⁶ However, noting the low threshold in paragraph 10(2)(b) (discussed above), the lack of clarity on whether ASIO owes procedural fairness obligations under the framework (discussed below), and the absence of other clear statutory requirements, IGIS’s ability to provide assurance as to the legality and propriety of ASIO’s assessments is limited. The Committee may therefore wish to consider whether the current safeguards and review mechanisms applying to ASIO’s assessments under the TEO Act are sufficient.

INFORMATION PROVIDED TO THE MINISTER

17. Paragraph 10(2)(b) does not require a copy of ASIO’s assessment to be provided to the Minister. Rather, it only requires that the Minister is satisfied that an assessment has taken place. This means the Minister is not required to be given any contextual information concerning ASIO’s assessment, including the degree of risk or the strength of the evidence that ASIO has relied upon. As a matter of propriety, such contextual information would more fully inform the Minister’s decision on whether or not to make a TEO.
18. Again, this differs from the information provided to the Minister for Part IV security assessments. With some exceptions,¹⁷ ASIO must provide a statement of the grounds for a security assessment to the relevant agency, and must also provide that statement of grounds to the subject. The Minister may direct that the statement of grounds be redacted or withheld, or that the subject not be notified of

¹¹ ASIO Act, subsection 37(2).

¹² ASIO Act, subsections 38(1), (2). The Minister must consider revoking such a certificate at least every 12 months.

¹³ ASIO Act, subsection 38(1), (2).

¹⁴ ASIO Act, sections 54 and 61.

¹⁵ See *Australian Passports Act 2005*, sections 14, 22, 22A. The exercise of powers and functions under the *Australian Passports Act 2005* is prescribed administrative action under section 35 of the ASIO Act. As noted above, an Australian citizen’s passport may similarly be required to be surrendered or refused when a TEO is issued – see *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, paragraphs 10(6)(e)-(g).

¹⁶ The *Administrative Decisions (Judicial Review) Act 1977* does not apply to decisions made under the TEO Act (see section 27 of the TEO Act).

¹⁷ Part IV, other than subsections 37(1), (3) and (4) of the ASIO Act, does not apply in relation to certain types of security assessments outlined in section 36, including security assessments in respect of persons who are not Australian citizens, permanent residents, or holders of a special purpose or special category visa; and security assessments that are requests for the suspension of a person’s travel documents for 14 days under section 22A of the *Australian Passports Act 2005*.

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the assessment, on the basis of security.¹⁸ This necessitates the statement of grounds being provided to the Minister to inform these decisions.

19. As the independent reviewing authority may only review information that was in front of the Minister at the time of a TEO decision,¹⁹ the meaningfulness of that independent review will likely be reduced if the Minister is not provided with a copy of ASIO's assessment or relevant contextual information. However, in any event, the reviewing authority is not empowered to review the basis of ASIO's assessment.²⁰
20. The Committee may wish to consider whether it is appropriate that there is no requirement for an assessment made by ASIO under paragraph 10(2)(b) of the TEO Act, or the grounds upon which such an assessment was made, to be provided to the Minister.

PROCEDURAL FAIRNESS

21. Procedural fairness traditionally consists of two requirements:
- the fair hearing rule – which requires a person to be afforded an opportunity to be heard before a decision is made that may affect their interests. Depending on the circumstances, this could include a requirement to be given information about the critical issues to be addressed and a reasonable opportunity to present a case;²¹ and
 - the bias rule – which requires decision-makers to be objectively considered to be impartial and not to have pre-judged decisions. This is determined by reference to the standards of the hypothetical observer who is fair minded and informed of the circumstances.²²
22. The TEO Act makes clear that the Minister is not required to comply with the requirements of procedural fairness in exercising a power or performing a function under the TEO Act (section 26). However, it does not state that ASIO is also excused from the requirements of procedural fairness in a decision to make an assessment under paragraph 10(2)(b). It is a well-established common law principle that the abrogation of procedural fairness can only be accomplished by express words or necessary implication, neither of which are arguably present in the existing framework.²³
23. ASIO is required to apply procedural fairness in relation to security assessments under Part IV of the ASIO Act (although, in practice, the content of those obligations may be limited depending on the particular circumstances in which an assessment is made).²⁴ The same obligations do not apply in other contexts where ASIO may provide advice, such as when communicating intelligence under paragraph 17(1)(b) of the ASIO Act. Such advice does not involve an administrative decision by ASIO.
24. An assessment by ASIO for the purpose of the TEO Act differs from the communication of intelligence or other advice under paragraph 17(1)(b) of the ASIO Act that falls short of a security assessment. An assessment under paragraph 10(2)(b) of the TEO Act is not merely advisory, but rather is a condition precedent to the issue of a TEO and *in lieu* of the Minister being required to make a decision as to whether the threshold at paragraph 10(2)(a) has been met. In this sense, the decision by ASIO to make an assessment under the TEO Act may be more similar to a decision to furnish a security assessment, and could be interpreted as requiring procedural fairness to be applied.

¹⁸ ASIO Act, subsections 37(2) and section 38.

¹⁹ *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, paragraph 14(2)(b).

²⁰ The reviewing authority is empowered to review the Minister's decision to make a TEO. See *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*, section 14.

²¹ *Kioa v West* (1985) 195 CLR 550.

²² Australian Law Reform Commission, *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, paragraphs 14.20 to 14.21.

²³ *Annetts v McCann* (1990) 170 CLR 596.

²⁴ See, for example, *Leghaei v Director General of Security* [2005] FCA 1576 at 83 and 88.

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25. Noting this potential ambiguity, the Committee may wish to consider clarifying whether the requirements of procedural fairness are intended to apply to ASIO's assessments under paragraph 10(2)(b) of the TEO Act, and if so, the content of those requirements. The current lack of clarity means that IGIS is not well placed to provide assurance that ASIO is fulfilling its common law obligations in relation to procedural fairness.