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AUSTRALIAN FEDERAL POLICE



Parliamentary Joint Committee on Intelligence and Security

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

6 December 2021

Submission by the
Australian Federal Police

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Introduction

1. The Australian Federal Police (AFP) welcomes the opportunity to make a submission to the Parliamentary Joint Committee on Intelligence and Security's (the Committee) Review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (TEO Act).
2. Australia has strong counter-terrorism laws aimed at deterring and preventing Australians from fighting in overseas conflicts, endangering the lives of others and providing support to terrorist entities. The TEO Act addressed a gap by enabling authorities to plan for and manage the return of Australians of counter-terrorism interest and mitigate risks to the community posed by these individuals.
3. Temporarily excluding an individual from entering Australia allows law enforcement and intelligence agencies to (a) complete a fulsome assessment of the individual's activities whilst offshore to inform domestic threat and (b) put a plan in place to address the threat that individual may pose to Australians and Australia upon their return, including reporting obligations for up to 12 months when thresholds can be met.
4. This scheme provides a legislative framework to manage the return to Australia of Australian citizens who present a risk of politically motivated violence who are either entitled to return to Australia, or being involuntarily deported back to Australia. It also provides a streamlined mechanism to impose limited conditions to facilitate the monitoring of an individual once they have returned to Australia.
5. This submission focuses on the AFP's operational experience with the TEO scheme. We recommend it be read alongside the submissions from the Department of Home Affairs and the Australian Security Intelligence Organisation (ASIO) to provide the full context of the consideration and use of TEOs to date.

Threat Environment

Terrorism

6. Within Australia, the terrorism threat level remains PROBABLE. Credible intelligence indicates that individuals or groups have the intent and capability to conduct terrorist attacks within Australia. The security environment in Australia continues to be complex, challenging and ever changing.
7. The threat posed by the return to Australia of foreign terrorist fighters (FTFs) endures, and the impacts of the recent resurgence of the Taliban in Afghanistan will continue to be assessed. The AFP remains concerned that individuals who have travelled to a conflict zone and engaged in terrorist activity and/or supported extremist groups, may present a level of threat to Australia, should they return.
8. FTFs are deemed to be those who have travelled to foreign conflict zones to engage in terrorist activities such as receiving training from extremist groups, building personal capabilities to undertake violence, seeking opportunities to participate in armed conflict, terrorist acts and foreign incursion through, supporting the cause of an extremist group and engaging with other high-risk individuals. During this time, law enforcement and security agencies may lack visibility of the actions of these FTFs.

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9. The AFP expects the movement of FTFs, including into South East Asia (SEA), will be an ongoing challenge for law enforcement and partners as the Islamic State and Al Qaeda remain networked into and continue to influence extremist groups in SEA.
10. The management of Australians who have travelled offshore to fight with or support extremist groups is an ongoing priority, and the AFP plays a key role in the whole of government response (both within the commonwealth, and with states and territories) to this multifaceted issue.
11. Since 2012, approximately **230** Australians (or former Australians) have travelled to Syria or Iraq to fight with or support violent extremist groups. Of that cohort, approximately **120** Australians (or former Australians) that travelled to Syria or Iraq are believed to be deceased, and around **50** people have returned to Australia.
12. 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. Not all of these individuals are still active – a number are in Internally Displaced Person (IDP) camps or otherwise detained.
13. It continues to be an operational concern to the AFP that FTFs may seek to return to Australia with enhanced skills and motivation, which could be used to conduct, facilitate or support a terrorist act in Australia.

The Scheme

14. The Counter-Terrorism Coordination Centre (CTCC) within the Department of Home Affairs is the lead agency in relation to the TEO scheme.
15. To date, the AFP is aware **eight** (8) TEOs and **five** (5) return permits have been issued by the Minister for Home Affairs.
16. Individuals of counter-terrorism interest who seek to return to Australia are considered by law enforcement and security agencies on a case-by-case basis.
17. A TEO can be made if the Minister for Home Affairs (the Minister) suspects on reasonable grounds that the TEO would substantially assist in preventing a terrorist act, preventing the provision of support for a terrorist act, preventing training from being provided to, received from or participated in with a listed terrorist organisation or preventing the provision of support or resources to a terrorist organisation; or the person has been assessed by ASIO to be a risk to security for reasons related to politically motivated violence.
18. A TEO prohibits an Australian who meets either of these thresholds from returning to Australia for a specified time of **up to two years** (unless a return permit is issued). The Minister must issue a return permit if an individual applies for one, or is subject to deportation proceedings.
19. A return permit must be issued within a reasonable period. If a return permit is issued within the period of a TEO being in force, then the TEO is immediately revoked.

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20. The Minister can impose pre and/or post entry conditions as part of the return permit if he or she is satisfied that the imposition of conditions on an individual are reasonably necessary, appropriate and adapted for the purpose of: preventing a terrorist act; support for a terrorist act; training with a terrorist organisation; or support for a terrorist organisation.
21. Pre-entry conditions may include restricting the individual from entering Australia for up to one year or specifications on the manner in which the individual is to return to Australia. The scheme of pre-entry conditions under the return permit provides valuable time for authorities to undertake evidence collection and put in place strategies to mitigate the threat an individual may pose upon their return to Australia.
22. Post-entry conditions may compel an individual to notify a specified person or body of any changes to their personal arrangements including their place of residence, employment or education, intended (interstate or international) travel movements or intentions to apply for travel documents or use of a telecommunication device.
23. Returnees who remain of significant security concern may be subject to a suite of treatments depending on evidence and information available to justify those measures. Dual nationals who act inconsistently with their allegiance to Australia by choosing to fight with terrorist organisations offshore may be eligible for citizenship cessation, loss or revocation under the *Australian Citizenship Act 2007* (Cth).
24. Those who are, or have been, in areas of conflict or of counter-terrorism interest, may be investigated for a range of terrorism-related offences including:
 - membership of a terrorist organisation;
 - providing support to a terrorist organisation;
 - foreign incursions, including entering or remaining in a declared area, and
 - collecting or making funds available to facilitate or engage in terrorist acts.
25. The fact an individual may be under investigation for a criminal offence does not impact on the availability or application of a TEO or a return permit.

The role of the AFP

26. The AFP and domestic partner agencies are responsible for ensuring that conditions of a TEO or return permit are met, to mitigate the threat these individuals may pose to Australia and Australians. The return of FTFs poses unique challenges, as an individual may have been offshore for extended periods in locations where law enforcement may have a limited ability to collect admissible evidence regarding their conduct during that time.
27. Where sufficient admissible evidence has been obtained, the priority for law enforcement is to prosecute individuals for any terrorism related conduct they may have engaged in offshore. Offshore investigations present a number of challenges and in some instances prosecution has not commenced until after the person of interest

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has returned and spent some time in the community due to the length of time required to gather admissible evidence of the offshore offending.

28. Since the introduction of the TEO scheme, **three** (3) individuals subject to this scheme have returned to Australia. This has allowed for the individuals to return to Australia after an assessment has been conducted of their activities whilst offshore. Of those **three** (3), **two** (2) of those individuals have had post entry conditions placed upon them with **one** (1) currently before the courts for terrorism related offences and **one** (1) in the community with post entry return permit conditions in force. The third subject of a return permit did not have any conditions imposed and the return permit has subsequently expired.
29. The AFP understands no individual has sought judicial review of a TEO or return permit to date.
30. The AFP is aware that the following return permit conditions having been imposed, requiring individuals to report: primary place of residence, employment and education, intent to leave the State or Territory in which they reside, intent to leave Australia, intent to apply for an Australian travel document and the use of certain telecommunication devices.
31. To date, there have been no prosecutions for failing to comply with TEO or return permit.

Cooperation with domestic and international partners

32. The AFP remains committed to a regional and international approach to meet the shared challenge of terrorism and our common goal to disrupt, prosecute and manage FTFs both domestically and internationally.
33. The AFP's International Command, has officers who work collaboratively with law enforcement partners to manage the risks of domestic threats and FTFs. The AFP continues to work closely with our international partners to address and monitor evolving terrorist threats.
34. The majority of priority FTF investigations are undertaken by Joint Counter Terrorism Teams (JCTTs) which are based in every capital city across Australia they are comprised of State and Territory Police, the AFP and ASIO. These teams ensure that when an individual of counter-terrorism interest may return to their respective jurisdiction, that the JCTT arrangements apply to manage the return of the individual onshore.
35. Inter-agency collaboration occurs through the Joint Operations Group and Senior Oversight Group. The CTCC within Home Affairs coordinates and prioritises information from government agencies for consideration of the Minister. The AFP currently has three members seconded to the CTCC to enhance collaboration between the two agencies.

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How TEOs interact with other terrorism powers and offences within the Criminal Code

36. TEOs and return permits are one of a number of potential treatment options including control orders and criminal prosecutions, which may be employed in respect of certain individuals, such as FTFs who seek to return to Australia. Depending on the particular circumstances of the matter, more than one of these options may be available in respect of an individual.
37. Conditions attached to a return permit for an individual who has been served a TEO may include: specified periods and means of when and how a person may re-enter Australia (could be excluded for up to 12 months – pre entry conditions), the individual must notify a specified person or body of their principle place of residence in Australia, their place of employment or education and the individual must notify if they intend to leave Australia (post entry conditions).
38. The Minister must be satisfied the conditions are reasonably necessary, appropriate and adapted for the purpose of: preventing a terrorist act, preventing the provision of support for or the facilitation of a terrorist act, preventing training from being provided to or received from a listed terrorist organisation and preventing the provision of support or resources to a terrorist organisation.
39. In the instance where an individual who has been issued with a return permit, is charged with federal criminal offences, the Commonwealth Director of Public Prosecutions (CDPP) will have carriage of any related bail hearings, noting bail may only be granted for terrorism offences in exceptional circumstances. In these situations the AFP would likely seek for the Minister to consider varying or revoking the return permit, and rely on any related bail conditions.
40. An Interim Control Order (ICO) may be sought to complement or replace a TEO and return permit where the relevant thresholds are met. An ICO can be made ex parte and may impose obligations, prohibitions and restrictions on an individual for the purpose of protecting the Australian public from a terrorist act. The obligations, prohibitions and restrictions in an ICO may include: a requirement to remain at a specified premises between specified times, a requirement to wear a tracking device, or a prohibition on communicating with specified individuals. Confirmation proceedings for a control order are not held ex parte.
41. The controls available under an ICO are more intrusive than the notification conditions of a return permit. An ICO may also include monitoring powers under the *Telecommunications (Interception and Access) Act 1979* (Cth) and the *Surveillance Devices Act 2004* (Cth). In the event of a conflict between the conditions of a return permit and the controls of an ICO, the Minister may revoke or vary the return permit.
42. Depending on the circumstances, there may be limited treatment options available for an Australian of counter-terrorism interest who is returning home. For example, agencies may not have enough evidence of the person's offshore activities for a criminal prosecution. Or the person may already have been prosecuted in a foreign country (raising double jeopardy considerations). In addition, there may not be sufficient information in admissible form about the person's risk to public safety to

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satisfy the court that an ICO should be confirmed. Therefore in some circumstances a TEO and return permit may be the only way to actively manage the person's return to Australia and monitor certain, limited activities once they arrive.

Operational issues identified with the scheme

43. For notification requirements to be imposed under a return permit the Minister must consider if the condition/s are reasonably necessary, appropriate and adapted for the purpose of preventing a terrorist act; preventing training or support for a terrorist act; or preventing support to a listed terrorist organisation or organisation involved, directly or indirectly, engaged in preparing, planning, assisting or fostering the doing of a terrorist act.
44. Given the potential difficulties faced in obtaining evidence relating to an individual's activities overseas, the high threshold for imposing conditions as part of a return permit may mean that return conditions are unable to be justified and therefore the individual may return to Australia without any conditions being imposed upon them. The potential risk these individuals may pose to the community has the ability to go unchecked if sufficient evidence is not able to be obtained to meet the threshold for a return permit or an ICO.
45. Furthermore, under section 10(8) of the TEO Act, the Minister must take reasonable steps to bring the TEO to the attention of the person to whom it applies. Whilst under section 15(5) of the Act, the Minister when serving a return permit, must serve this in person.
46. The AFP notes that it is not secure or practical, and in some situations it may be difficult or dangerous, to serve a return permit in person where the individual is located off-shore. To enhance the operational effectiveness of the legislation, the AFP suggests return permits could be served via alternative means (including text message or email). An additional provision could also be sought allowing service of a return permit on the individual in person, upon their arrival into Australia where all other means (including email and text) have been exhausted.

Conclusion

47. The AFP considers the TEO scheme facilitates more effective management of the return to Australia of persons of interest in relation to counter terrorism matters than was available before the TEO Act commenced. It allows relevant agencies to control their return in a way that mitigates *some* risks these individuals may pose to the Australian community.
48. The AFP recognises the utility of the TEO scheme, specifically regarding the offshore conditions it imposes upon an individual. The AFP welcomes the review by this committee to ensure the scheme most effectively allows agencies to prevent harm to the Australian community.
49. The AFP would be pleased to expand on these issues at a public hearing.