



Australian  
Human Rights  
Commission

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

Submission to the Parliamentary Joint Committee on Intelligence  
and Security

3 December 2021

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## 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in relation to its statutory review of the operation, effectiveness and implications of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) (TEO Act), as required by s 29(1)(cc) of the *Intelligence Services Act 2001* (Cth).
2. In 2019, the Commission made a submission to the PJCIS in relation to its inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth).<sup>1</sup>

## 2 Summary

3. There is a significant disjuncture between the language used to justify the introduction of the TEO Act, and its practical operation. Instead of applying to people reasonably suspected of being involved in terrorism-related conduct, the practical operation of the TEO Act is focused on relatives or associates of Australian foreign fighters, who may not have engaged in any criminal conduct at all.
4. When legislation of this nature was first proposed in Australia, the stated purpose was to 'enable authorities to delay, and then monitor and control, the return and re-entry to our community of Australian foreign fighters'.<sup>2</sup> The phrase 'Australian foreign fighter' referred to Australian citizens who had travelled to conflict zones in Syria and Iraq to fight with or provide support to extremist groups.
5. Since 2012, at least 230 Australians have travelled to the conflict zone. As at October 2020, around 120 had been killed as a result of their involvement in the conflict and approximately 45 had returned to Australia, leaving only around 65 still in the conflict zone.<sup>3</sup>
6. Some Australians with dual nationality have had their Australian citizenship revoked. The TEO Act does not apply to former Australian citizens.
7. The Australian Federal Police (AFP) have issued at least 40 arrest warrants in relation to alleged Australian foreign fighters who are outside Australia.<sup>4</sup> Significantly, the AFP have confirmed that the temporary exclusion order (TEO) regime will *not* be used in relation to people in respect of whom an arrest warrant has been issued.<sup>5</sup> Those

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people will either be extradited to Australia, or arrested on arrival when they seek to return home voluntarily.

8. Instead, the practical focus of the TEO regime is on ‘associates and facilitators and relatives that haven’t been doing active fighting in that conflict zone’ and in respect of whom there is not sufficient evidence available to justify issuing an arrest warrant.<sup>6</sup>
9. The first point to make about this group is that, based on the numbers set out above, it appears to be a very small cohort. This view is supported by the fact that as at 30 June 2021 only eight TEOs had been issued and it appears between two and four people had returned to Australia pursuant to a return permit.
10. The second point to make is that the significant human rights impact involved in the TEO scheme – preventing Australians from entering their own country for lengthy periods – is far harder to justify in relation to people who are associates or relatives of Australian foreign fighters, but who may not have engaged in any criminal conduct themselves.
11. The third point to make is that, if the AFP have at least a ‘reasonable suspicion’ that a person may have committed a terrorism-related offence, the person could be immediately arrested when they return to Australia without the requirement for a warrant.<sup>7</sup> If there is not even a reasonable suspicion of such conduct, there seems to be little justification for preventing them from returning.
12. The primary position of the Commission is that the TEO Act should be repealed because it is not necessary and, to the extent it applies to people not suspected of involvement in terrorism-related activity themselves, it is a disproportionate infringement of their right to enter their own country recognised by article 12(4) of the *International Covenant on Civil and Political Rights* (ICCPR).
13. If the Commission’s primary position is not accepted, the Commission makes a number of recommendations to amend the TEO Act to strengthen its safeguards and accountability measures. Many of these recommendations are the same as those previously made by the PJCIS but not adopted by the Australian Government.
14. In particular, the Commission recommends that the threshold for making a TEO be raised, so that it only applies to people actually suspected of being involved in terrorism-related activity.
15. The process for making a TEO should be amended to provide additional oversight. The Commission’s preferred position is that the

Minister should have to apply to a court in order for a TEO to be issued. In the alternative, the Commission says that the Minister should have to apply to an issuing authority, being a judge, a retired judge or senior member of the Administrative Appeals Tribunal (AAT).

16. Any TEO issued should include the grounds on which it was made, and identify the review rights available to the person to whom it is addressed.
17. The Commission continues to be of the view that the TEO Act does not comply with the requirements of the *Convention on the Rights of the Child* (CRC). The Commission's preferred position is that the TEO Act not apply to children at all. If the TEO Act is to have a continued operation in relation to children, the decision-making frameworks for making a TEO and imposing conditions on a return permit should be amended to ensure that no consideration is treated as inherently more significant than the rights of the child to whom the TEO or return permit applies.
18. Finally, there should be a change to the elements of the offence provisions to ensure that a person cannot be convicted of failing to comply with a TEO, or the conditions on a return permit, unless they knew of the prohibitions or conditions that applied to them.

### 3 Recommendations

19. The Commission makes the following primary recommendation.

#### **Recommendation 1**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed.

20. If Recommendation 1 is not accepted, the Commission makes the following recommendations for amendment of the TEO Act.

#### **Recommendation 2**

The Commission recommends that:

- section 10(2)(a) the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that the Minister must not make a temporary exclusion order in respect of a person unless the Minister reasonably suspects that:
  - the person is, or has been, involved in terrorism-related activities outside Australia, and

- making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act.
- section 10(2)(b) of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed.

### **Recommendation 3**

The Commission recommends that the provision for review of a temporary exclusion order decision by a 'reviewing authority' in s 14 of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed and replaced with a requirement that the Minister seek an order from a Court for the making of a temporary exclusion order based on the model in the *Counter-Terrorism and Security Act 2015* (UK).

### **Recommendation 4**

If Recommendation 3 is not accepted, the Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that:

- subject to the third dot point below, a temporary exclusion order may only be issued by an 'issuing authority' (being a judge, a retired judge or a senior member of the Administrative Appeals Tribunal) on application by the Minister,
- the issuing authority must approve any condition set out in a return permit, and
- in respect of urgent situations, the Minister may issue a temporary exclusion order, or impose a condition in a return permit, without the approval of an issuing authority, provided that:
  - the Minister obtain the approval of an issuing authority for the temporary exclusion order as soon as reasonably practicable, and
  - if the issuing authority does not approve of the temporary exclusion order, the Minister must immediately revoke the order.

### **Recommendation 5**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that a temporary exclusion order is required to set out:

- a summary of the grounds on which the order is made, excluding information that is likely to prejudice national security, and

- the person's rights of review in relation to the order and any return permit made.

### **Recommendation 6**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended to exclude its application to children.

### **Recommendation 7**

In the alternative to recommendation 6, the Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that the assessment of:

- whether to make a temporary exclusion order, and
- what conditions should be included on a return permit

does not treat any factor as inherently more significant than the rights of the child to whom the temporary exclusion order or return permit applies.

### **Recommendation 8**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that, in any prosecution for a breach of an offence provision, the prosecution must prove that the defendant had knowledge of the existence of the temporary exclusion order or of the relevant return permit condition (as applicable).

## **4 The TEO Act**

21. The Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) was first introduced in February 2019. It was the subject of inquiry by the PJCIS which reported in April 2019. The Bill lapsed with the dissolution of the 45<sup>th</sup> Parliament.
22. Following the 2019 federal election, the Bill was reintroduced with amendments to reflect the Australian Government's response to the recommendations of the PJCIS.
23. In its current form, the TEO Act allows the responsible Minister to make a TEO that prevents an Australian citizen over the age of 14 years old who is outside Australia from re-entering Australia for a period of up to 2 years.<sup>8</sup> It is an offence punishable by up to 2 years imprisonment for a person to enter Australia if a TEO is in force in relation to them.<sup>9</sup>

24. If a TEO is made, the Minister must refer the decision to make the TEO to a 'reviewing authority' for review. The reviewing authority is a former judge or senior member of the AAT. If the reviewing authority is of the opinion that the decision involved a specified error of law, the decision is taken never to have been made.<sup>10</sup>
25. The Minister must issue a return permit to a person who is subject to a TEO if the person applies for one (or if the person is being deported or extradited to Australia). The Minister also has a discretion to issue a return permit.<sup>11</sup> If a return permit is issued, then the TEO is revoked.<sup>12</sup> Subject to any conditions imposed by the return permit, the person would then be able to return to Australia.
26. The return permit may contain conditions including what are described as 'pre-entry conditions' that control when a person may return to Australia. A pre-entry condition may be one of the following:
  - The person must not enter Australia during a specified period. This period can be up to 12 months, but must not be longer than the period 'reasonably necessary to assess the risk posed by the entry of the person to Australia and to make appropriate arrangements for that entry'.
  - The person must enter Australia within a specified period or on a specified date. If a condition of this nature is imposed, the period or date must be within 3 months of when the permit was issued.
  - The person enter Australia in a specified manner. For example, in combination with one of the above conditions as to timing, a return permit could require a person to return to Australia on a particular flight on a particular date.<sup>13</sup>
27. The return permit may also contain 'post-entry conditions'. These may include notification requirements in relation to the person's place of residence, place of employment, place of education, contact with specified individuals, travel intentions and use of telecommunications services. They may also include conditions requiring the surrender of a passport or prohibiting the application for a passport.<sup>14</sup>
28. Failure to comply with either a pre-entry condition or a post-entry condition is an offence punishable by up to two years imprisonment.<sup>15</sup>

## **5 Use of temporary exclusion orders**

29. There is little public information about the use that has been made of temporary exclusion orders.

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30. The Minister must publish an annual report including certain kinds of information.<sup>16</sup> Similar reporting requirements exist in relation to other extraordinary counter-terrorism powers and the practice of the Australian Government has been to combine those reports into a single document. Only one annual report has been published (for the 2019-20 year) since the TEO Act came into force on 30 July 2019.<sup>17</sup>
31. Separately, the standard annual reports of the Department of Home Affairs contain some less extensive information on the use of TEOs.
32. Based on that information, it appears that as at 30 June 2021 a total of eight TEOs had been made and between two and four people had returned to Australia pursuant to a return permit.
33. Five TEOs were made in 2019-20, all in relation to people aged 18 years and older. During that year, one return permit was issued (without any pre- or post-entry conditions), the TEO in relation to that person was revoked, and the person subject to the return permit entered Australia. No-one was charged with an offence under the TEO Act.
34. In 2020-21, it appears that three TEOs were made.<sup>18</sup> Three return permits were issued. The language of the Department's annual report is not entirely clear, but it appears that two of these permits may have been issued in relation to TEOs made in 2019-20 and one permit issued in relation to a TEO made in 2020-21. In relation to the most recent return permit, the Department said:

An Australian citizen, who had previously been convicted of terrorism offences offshore, expressed an intention to return to Australia. The Minister for Home Affairs made a TEO and then subsequently issued a Return Permit in relation to the person. The person's eventual return to Australia was controlled under the MACTI framework [Management of Australians of Counter Terrorism Interest Offshore]. The Return Permit imposed conditions upon the person once they returned to Australia, such as notifying the Department of intended address and place of work. These conditions assist law enforcement and intelligence agency to monitor the risk posed by the person. Should the person fail to comply with Return Permit conditions, they face a maximum penalty of two years imprisonment.<sup>19</sup>
35. The Commission has not identified any legal cases that have considered the TEO Act.

## 6 Primary position: repeal

36. The primary position of the Commission is that the TEO Act should be repealed because it is not necessary.
37. The TEO Act was introduced in response to a group of people described as 'Australian foreign fighters': Australians who travelled to conflict zones in Syria and Iraq to fight for or otherwise support extremist groups, and who may later seek to return to Australia.
38. At the time that the first Bill was being considered by the PJCIS in March 2019, there were approximately 90 Australians still in the conflict zone.<sup>20</sup> By the time the amended Bill was introduced, this number was down to 80.<sup>21</sup> It seems that the number may now be as low as 65.<sup>22</sup> The AFP confirmed during the PJCIS hearing that there were arrest warrants in place for 28 of those people, described as 'active fighters', but that the TEO regime was not necessary in relation to those people because, once they arrived in Australia (whether by extradition or otherwise), they could immediately be arrested pursuant to the terms of those warrants.<sup>23</sup> By December 2019, the number of active arrest warrants had increased to 40.<sup>24</sup> Those charged with criminal offences could be remanded in custody (likely, given the presumption against bail for terrorism related offences)<sup>25</sup> or released subject to bail conditions.
39. Instead, it was suggested that the TEO regime was necessary in relation to 'associates and facilitators and relatives that haven't been doing active fighting in that conflict zone' and in respect of whom there may be challenges in obtaining sufficient evidence of criminal conduct.<sup>26</sup>
40. This argument is unconvincing given:
  - (a) the broad offences that attach to mere presence in the conflict zone in Syria and Iraq
  - (b) the reduced threshold for the arrest of a person for such an offence
  - (c) the ability of police to hold people for questioning before charging them with such an offence
  - (d) the other measures in place to impose limits on the conduct of people in Australia, including control orders.
41. In relation to (a), it is an offence against s 119.2 of the *Criminal Code* for an Australian citizen to enter or remain in an area of a foreign country which is the subject of a declaration made by the Minister for Foreign Affairs. Two areas have been declared:

- al-Raqqa Province in Syria (from 4 December 2014 to 27 November 2017)
  - Mosul district, Ninewa Province in Iraq (from 2 March 2015 to 19 December 2019).<sup>27</sup>
42. Significantly, mere presence in the area (unless one of the exceptions in ss 119.2(3)–(5) applies) is sufficient to have committed the offence. There is no requirement, for example, to be an ‘active fighter’.
43. In relation to (b), since 2014 police have had the ability to arrest a person without a warrant in relation to a terrorism offence (including an offence against s 119.2 of the *Criminal Code*) if they ‘suspect on reasonable grounds’ that the person has committed an offence.<sup>28</sup> This is a lower threshold than ‘belief on reasonable grounds’ which applies to all other Commonwealth offences.<sup>29</sup>
44. In relation to (c), if a person has been arrested in relation to a Commonwealth offence, the police have the ability to question the person under the pre-charge detention regime in Part IC of the Crimes Act for the purpose of investigating whether they committed the offence. In the case of a person arrested in relation to a terrorism offence, they may be held for the purpose of investigation (including questioning) for up to 24 hours after arrest (with the approval of a Magistrate).<sup>30</sup> However, this investigation period may be paused for a variety of reasons. The total period that a person may be held, including any pauses in the investigation, is eight days (again, with the approval of a Magistrate).<sup>31</sup>
45. In relation to (d), there is an existing ability to seek a control order in relation to a person, with a similar threshold to that in s 10(2)(a) of the TEO Act.<sup>32</sup> An interim control order can be obtained on an urgent *ex parte* basis by telephone, fax, email or other electronic means.<sup>33</sup> In November 2019 (after the TEO Act was already in force), a control order was granted in relation to a young woman who intended to travel to the conflict zone for the purpose of either providing medical assistance to fighters and others or to marry an Islamic State fighter, but who was prevented from doing so before she got on a plane from Adelaide.<sup>34</sup> There is no reason to think that a control order would not be available in relation to a person who had successfully travelled to the conflict zone for such a purpose.
46. In combination, these provisions indicate that if there is a reasonable suspicion that a person was unlawfully present in a conflict zone in Syria or Iraq, they could be arrested immediately on arrival in Australia

and, if necessary, held for a limited time for questioning to determine whether further evidence could be obtained to support a charge. Alternatively, police could apply for a control order. If there is no reasonable suspicion that a person has been unlawfully present in the conflict zone or has engaged in terrorism-related activity, there is rightly no power to arrest the person. Nor should there be a mechanism, such as the TEO Act, to prevent them from re-entering Australia.

47. Some of these mechanisms for dealing with people who were present in Syria and Iraq raise other human rights concerns. The 'declared areas' offences and the control order regime have both been subject to criticism by the Commission in previous submissions to this Committee.<sup>35</sup> However, the continued existence of these provisions demonstrates that the TEO Act is not necessary.

#### **Recommendation 1**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed.

## **7 Alternative position: proposed amendments**

48. If the PJCIS does not accept the Commission's primary recommendation, the Commission makes the following recommendations for amendment of the TEO Act to strengthen its safeguards and accountability measures. Many of these recommendations are the same as those previously made by the PJCIS.

### **7.1 Threshold for issuing a temporary exclusion order**

49. When the Prime Minister first announced the proposed TEO scheme, he said that it would apply to 'Australians involved in terrorism overseas'.<sup>36</sup> This cohort was also described as 'Australian foreign fighters', 'Australians who had travelled to the conflict zone in Iraq and Syria' and 'those who seek to do us harm'.
50. However, the Act as passed is not limited to Australians involved in terrorism. It does not require those who are refused entry to Australia to have travelled to conflict zones in Iraq or Syria, or to 'declared areas' contrary to the requirements of s 119.2 of the *Criminal Code*. In fact, it does not even require them to have engaged in any alleged criminal conduct or any conduct adverse to Australia's interests at all.

51. This is contrary to a key recommendation of the unanimous PJCIS report in 2019. The PJCIS recommended that the Bill be amended so that the Minister must not make a TEO in respect of a person unless the Minister reasonably suspects that:
- the person is, or has been, involved in terrorism-related activities outside Australia, and
  - making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act.<sup>37</sup>
52. The Commission agrees with this recommendation.
53. If this change were made to the TEO Act, it would bring the Act into line with the UK legislation on which it is based. Section 2(3) of the *Counter-Terrorism and Security Act 2015* (UK) requires that before a TEO is issued in relation to an individual, the Secretary of State must reasonably suspect that the individual is, or has been, involved in terrorism-related activity outside the United Kingdom.
54. The Australian Government argued that if such an amendment were made, the scheme would apply to fewer people thus 'undermining its utility':
- Implementing the recommendation [of the PJCIS] to require the Minister to suspect the person is or has been involved in terrorism-related activities outside Australia would restrict the operation of the scheme to high risk individuals only. Proposed section 10(2) would set out a two-part test which will be significantly harder to make out, thus reducing the number of individuals eligible for a TEO and undermining the utility of the scheme.<sup>38</sup>
55. This criticism misses the point. The utility of a TEO scheme should not be judged on *how many* people it applies to, but on whether the range of people it applies to is appropriate. In assessing whether the scope is appropriate, regard should be had to both the stated objectives of the scheme and to Australia's human rights obligations.
56. The starting point for analysis is that the regime under the TEO Act applies only to Australian citizens. The Australian citizens must be over the age of 14 years old and be located outside Australia.<sup>39</sup> Article 12(4) of the ICCPR provides that 'no one shall be arbitrarily deprived of the right to enter his own country'. Self-evidently, this right includes the right to return after having left one's own country.<sup>40</sup>
57. The TEO Act interferes with this right. First, the making of a TEO has the effect of depriving an Australian citizen of their right to enter Australia for a period of up to 2 years at a time. While a temporary

entry permit must be granted on application, any such permit may be made subject to conditions that deprive the Australian citizen of the right to enter Australia for up to 12 months.

58. The human right under article 12(4) of the ICCPR may be subject to limitations, but only if those limitations are in accordance with the provisions of the ICCPR. In particular, Australia must demonstrate the necessity of the limitation and it may only take measures that are reasonable and proportionate in carrying out legitimate aims.<sup>41</sup>
59. There is no objects clause in the TEO Act, but the purpose of the legislation was made clear in the second reading speech for the amended Bill. The Minister for Home Affairs said that the purpose of the scheme was to 'delay Australians of counterterrorism interest from re-entering Australia, until appropriate protections are in place'.<sup>42</sup>
60. The Commission accepts that this may be a legitimate objective that justifies an interference with the right under article 12(4) of the ICCPR. However, when assessing whether the law is reasonable and whether any restrictions on the right are proportionate, it is necessary to examine whether the law is appropriately targeted to achieving its objective and whether alternatives are available that would achieve the purpose in a way that is less restrictive of the human right in question. The United Nations Human Rights Committee has emphasised that the assessment of reasonableness is a stringent one due to the nature of the right engaged:
- [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.<sup>43</sup>
61. Other than the factual prerequisites for the issue of a TEO discussed above, there are a number of prerequisites that depend either on a 'suspicion' held by the Minister or on advice provided by the Australian Security Intelligence Organisation (ASIO) that the person is a risk to security for reasons related to politically motivated violence.
62. As to the views of the Minister, a TEO may be granted if the Minister 'suspects on reasonable grounds' that making the TEO would 'substantially assist' in:
- preventing a terrorist act
  - preventing training being provided to, received from or participated in with a listed terrorist organisation
  - preventing the provision of support for, or the facilitation of, a terrorist act

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- preventing the provision of support or resources to an organisation that would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act.<sup>44</sup>
63. Significantly, it is *not* necessary that the person the subject of the TEO be suspected of engaging in any of this conduct themselves. The four factors in s 10(2)(a)(i)–(iv) of the TEO Act are drafted entirely in the passive tense.
64. The threshold for making a TEO under this limb is very low. As is clear from case law in relation to control orders, where similar language is used, the phrase ‘substantially assist’ does not require the assistance provided to be large.<sup>45</sup> Rather, something will ‘substantially assist’ if the assistance provided is ‘non-trivial’.<sup>46</sup> In combination then, the Minister must have no more than a suspicion that making the order would have a non-trivial impact on preventing an outcome that the subject of the TEO need not themselves be involved in. If the Minister had a suspicion of this nature, it would be enough to prevent an Australian citizen over the age of 14 years old from re-entering their own country.
65. The position is different in relation to the assessment by ASIO. The person must have been assessed as being directly or indirectly a risk to security for reasons related to politically motivated violence.<sup>47</sup> However, the Commission agrees with the view formed by the PJCIS in the last inquiry, that it should not be enough for the relevant decision maker to have received advice from ASIO to this effect. Rather, the relevant decision maker should themselves form a view about the risk posed by the potential subject of the TEO. Advice from ASIO could legitimately be referred to for the purposes of forming this opinion.
66. The Commission considers that the ability to make a TEO in relation to a person who is not suspected of being involved in any terrorism-related activity themselves does not bear a tight enough correlation with the stated purpose of the TEO scheme, and does not fall within the narrow category of cases that justify preventing Australian citizens from returning to their own country.
67. Clearly a less restrictive alternative to s 10(2)(a) of the TEO Act is available that would achieve the policy objective of delaying Australians of counter-terrorism interest from re-entering Australia, until appropriate protections are in place. That alternative is limiting the scheme to people reasonably suspected of being involved in terrorism-related activities outside Australia.

## Recommendation 2

The Commission recommends that:

- section 10(2)(a) the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that the Minister must not make a temporary exclusion order in respect of a person unless the Minister reasonably suspects that:
  - the person is, or has been, involved in terrorism-related activities outside Australia, and
  - making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act.
- section 10(2)(b) of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed.

## 7.2 Fair, independent decision making

68. As noted above, the TEO Act is based on a similar scheme that exists in the United Kingdom under the *Counter-Terrorism and Security Act 2015* (UK).
69. However, the TEO Act differs from the UK legislation in a key respect. In the UK, the Secretary of State must apply to a court for permission to impose a TEO on a particular person.<sup>48</sup> The court will review each of the elements of the decision of the Secretary of State to determine whether the decision was 'obviously flawed'.<sup>49</sup> This includes a review of whether there was a reasonable basis for the Secretary of State to suspect that the individual was involved in terrorism-related activity outside of the UK.
70. In Australia, the Minister may make a TEO without any involvement of a court. The TEO is then subject to a limited form of review by a former judge or former senior AAT member for certain kinds of legal error (but not to assess whether or not it was appropriate to make the TEO).<sup>50</sup>
71. In the UK, in urgent cases, the Secretary of State may impose a TEO without first seeking the permission of a court. However, in those circumstances, the Secretary of State must then immediately refer the matter to a court, which will determine whether the decision was obviously flawed.<sup>51</sup>
72. In the previous PJCIS review, concerns were expressed about the degree of power that the proposed Australian regime would vest in the Executive. The PJCIS heard evidence from a number of parties that if a

TEO regime were introduced, decisions should be made by a court or another independent decision maker.<sup>52</sup>

73. The Department of Home Affairs submitted that a requirement for judicial authorisation had been rejected on the basis that, without it, the regime would be quicker and cheaper to administer:
- The bill has been drafted with a ministerial discretion rather than a judicial discretion so that it sets itself apart from the processes that we have got, for example, under the control order regime, which is a time-consuming and resource-intensive process. This is intended to cover the period when people are in another jurisdiction for a shorter period after their arrival into Australia. The necessity to have judicial decision-making processes involved in that wasn't seen as necessary.<sup>53</sup>
74. The PJCIS was not persuaded that a regime based on ministerial discretion was appropriate and recommended that the Bill be amended so that a TEO may only be issued by an 'issuing authority' (being a judge, a retired judge or a senior member of the AAT) on application by the Minister.<sup>54</sup> The PJCIS noted that such a regime would be consistent with the regime that applies in relation to preventative detention orders.<sup>55</sup>
75. On the basis of the evidence presented to it, the PJCIS was of the view that a requirement that a decision be made by an issuing authority, rather than the Minister, would enhance the protection of individual rights without compromising the operational effectiveness of the scheme.<sup>56</sup>
76. The Australian Government did not accept the recommendation of the PJCIS. Instead, it adopted a hybrid model pursuant to which the decision-making power is still vested in the Minister, but a 'reviewing authority' is then charged with conducting a review in relation to a limited range of legal grounds. The justification given by the Australian Government for taking this course was that:
- [T]his approach appropriately balances independent oversight of the scheme with operational requirements in an international and dynamic threat environment.
- The new provisions will provide that the Minister can make a TEO which comes into effect immediately and without a reviewing authority's permission if the Minister reasonably considers it necessary due to the urgency of the matter, provided that:
- the reviewing authority reviews the TEO as soon as reasonably practicable, and

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- if the reviewing authority decides the decision is flawed, the TEO will not be valid.

The reviewing authority will not review the conditions set out in a return permit.

77. The essence of the rationale by the Australian Government is that the approach it has adopted would allow the Minister to act immediately in urgent circumstances. However, this ignores the balance of the recommendation made by the PJCIS which was in the following form:

The Committee recommends that the Bill be amended so that: ...

- in respect of urgent situations, the Minister may issue a temporary exclusion order, or impose a condition in a return permit, without the approval of an issuing authority, provided that:
  - the Minister obtain the approval of an issuing authority for the temporary exclusion order as soon as reasonably practicable; and
  - if the issuing authority does not approve of the temporary exclusion order, the Minister must immediately revoke the order.<sup>57</sup>

78. The Commission submits that there are at least two ways that the scheme could be amended in order to facilitate immediate steps being taken while still ensuring that the substantive decision is taken by an independent decision maker rather than the Executive.

79. First, the model used in the UK could be adopted. This would involve an application being made by the Minister to a court for permission to issue a TEO. In urgent cases, the Minister could issue a TEO without the need to go to court. In those circumstances, the Minister would need to immediately refer the matter to court for an urgent determination. This is the Commission's preferred option because of the increased safeguards involved in judicial proceedings.

80. Alternatively, the regime recommended by the PJCIS in its previous report could be adopted.

81. The regime that has been adopted in the TEO Act not only provides fewer safeguards, it is also constitutionally suspect. The kind of review that s 14 of the TEO Act envisages will be done by a reviewing authority has the hallmarks of an exercise of judicial power. If, in the opinion of the reviewing authority, a TEO decision was affected by one of a number of specified legal errors (which have been drafted using the language of jurisdictional error), the consequence is that the TEO decision is taken never to have been made.<sup>58</sup> In effect, the reviewing authority is deciding whether the TEO decision was void *ab initio*.

Significantly, this means that the reviewing authority has the power to make a binding and authoritative decision in relation to a controversy about legal rights.<sup>59</sup> The opinion formed by the reviewing authority under s 14 is a decision settling for the future a question about the validity of a TEO decision (which, in turn, impacts on a person's right to re-enter Australia).<sup>60</sup> However, the reviewing authority is not a court and is not vested with judicial power. This raises the real prospect that the review provision is invalid.

82. The TEO Act itself recognises that the review provision may well be constitutionally invalid by building in a default position if this turns out to be the case. Section 30 of the TEO Act provides that if s 14 is invalid, then the rest of the Act continues to operate *without* provision for review by a reviewing authority.<sup>61</sup>
83. The Commission submits that the rights of review of Australian citizens under the TEO Act should not be made dependent on a scheme of dubious constitutional validity.
84. The Commission notes that the Government accepted recommendation 18 of the PJCIS report that it obtain legal advice from the Solicitor General on the constitutional validity of the final form of the Bill.<sup>62</sup> The Commission suggests that the PJCIS ask for a copy of this advice.

### **Recommendation 3**

The Commission recommends that the provision for review of a temporary exclusion order decision by a 'reviewing authority' in s 14 of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be repealed and replaced with a requirement that the Minister seek an order from a Court for the making of a temporary exclusion order based on the model in the *Counter-Terrorism and Security Act 2015* (UK).

### **Recommendation 4**

If Recommendation 3 is not accepted, the Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that:

- subject to the third dot point below, a temporary exclusion order may only be issued by an 'issuing authority' (being a judge, a retired judge or a senior member of the Administrative Appeals Tribunal) on application by the Minister,
- the issuing authority must approve any condition set out in a return permit, and

- in respect of urgent situations, the Minister may issue a temporary exclusion order, or impose a condition in a return permit, without the approval of an issuing authority, provided that:
  - the Minister obtain the approval of an issuing authority for the temporary exclusion order as soon as reasonably practicable, and
  - if the issuing authority does not approve of the temporary exclusion order, the Minister must immediately revoke the order.

### **7.3 Information about grounds and review rights**

85. Regardless of the identity of the person or body given the power to make a TEO, the order should include a summary of the grounds on which it was made, excluding any information that is likely to prejudice national security. It should also include details of the person's rights of review in relation to the order. Both of these things were recommended by the PJGIS in its previous review.<sup>63</sup>
86. Providing a statement of the grounds for the exercise of extraordinary powers such as these would fulfil an important public function of identifying the claimed basis for the TEO, so that it could be properly examined for the purpose of assessing whether it was lawfully made. That is, the statement would assist in any application for judicial review. There do not appear to be any compelling policy reasons why a statement of grounds, excluding national security information, should not be included in a TEO. As the PJGIS noted at the time, it would make the TEO regime consistent with the current regimes for control orders<sup>64</sup> and preventative detention orders.<sup>65</sup>
87. While a TEO must 'state that the person may have review rights in relation to the decision to make the order',<sup>66</sup> it would be preferable for the TEO to specify what those review rights are.

#### **Recommendation 5**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that a temporary exclusion order is required to set out:

- a summary of the grounds on which the order is made, excluding information that is likely to prejudice national security, and
- the person's rights of review in relation to the order and any return permit made.

## 7.4 Rights of children

88. The Commission reiterates the submissions it previously made in relation to the rights of children.<sup>67</sup> First, it submits that the TEO regime should not apply to Australian children with the result that they are prevented from re-entering Australia.
89. At the last PJCIS hearing, the Department of Home Affairs suggested that because the UK regime did not include a criterion in relation to age, it applied to people of any age, including children. It was suggested that the TEO Act, in providing a minimum age of 14 years was therefore more protective of children's rights.<sup>68</sup> This is not the view of Mr Jonathan Hall QC, the Independent Reviewer of Terrorism Legislation in the UK, who said in his most recent report:
- In principle, TPIMs [Terrorism Prevention and Investigation Measures] and TEOs could be imposed on children, although the lack of attention to the needs of children suggests that Parliament never contemplated that they would be. In each case the requirement for "involvement in terrorism-related activity" suggests, even if not strictly required under the terms of the legislation, a degree of moral culpability that does not sit well with the position of children who have only become involved because of parental influence or pressure.<sup>69</sup>
90. If Commission's primary position is not accepted, it submits that the TEO scheme should be amended so that the rights of children are taken into account in a way that is consistent with Australia's international obligations.
91. Currently, if the Minister proposes to make a TEO in relation to a child aged between 14 and 17 years old, or to impose conditions on a return permit in relation to such as child, the Minister must have regard to the best interests of the child. While the legislation suggests that the child's best interests are 'a primary' consideration, it is clear from the context of the Act that this language is misleading. That is because the Act provides that 'the paramount' consideration is the protection of the Australian community.<sup>70</sup> The starting point, therefore, is that the protection of the community is assessed as inherently more significant than the best interests of the child. At the highest, the best interests of the child can be no more than a *secondary* consideration, even if the potential impact on a child is grave and any potential benefit to the community as a whole is slight.
92. It is clear that this is contrary to the requirements of article 3 of the CRC, pursuant to which Australia has committed that 'in all actions

concerning children ... the best interests of the child shall be a primary consideration'. As the High Court has noted:

The concluding words of Art 3.1 ... give those interests *first importance* along with such other considerations as may, in the circumstances of a given case, *require equal, but not paramount, weight*.<sup>71</sup>

93. A requirement to treat the best interests of the child as a primary consideration does not inexorably lead to a requirement to act in conformity with those interests. Under article 3 of the CRC, it is open to a decision maker to depart from the best interests of a child. However, to do so consistently with Australia's international law obligations, there are two requirements:
- the decision maker must not treat any other factor as inherently more significant than the best interests of the child
  - the strength of other relevant considerations must outweigh the consideration of the best interests of the child, understood as a primary consideration.<sup>72</sup>
94. A similar structure, also contrary to the requirements of article 3 of the CRC, is contained in the law relating to control orders.<sup>73</sup>

### **Recommendation 6**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended to exclude its application to children.

### **Recommendation 7**

In the alternative to recommendation 6, the Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that the assessment of:

- whether to make a temporary exclusion order, and
- what conditions should be included on a return permit

does not treat any factor as inherently more significant than the rights of the child to whom the temporary exclusion order or return permit applies.

## **7.5 Mental element for offences: actual knowledge**

95. The final issue raised by the Commission relates to the fault element for the offences of entering Australia contrary to the requirements of a TEO (s 8) or contrary to a pre-entry condition imposed on a return

permit (s 20). In either case, no fault element is specified in the offence. The result is that the default fault element of 'recklessness' applies to:

- the circumstance that a TEO is in force in relation to the person (in relation to an offence against s 8); or
- the circumstances that a return permit is in force in relation to the person and that it contains a condition that the person must not enter Australia during a specified period (in relation to an offence against s 20).<sup>74</sup>

96. A TEO comes into force as soon as the review by the reviewing authority is concluded (or, in urgent cases, as soon as the TEO is made by the Minister).<sup>75</sup> As soon as practicable after the TEO comes into force, the Minister must take steps that the Minister considers 'reasonable and practicable' to bring the TEO to the attention of the person to whom it relates.<sup>76</sup> However, there is no obligation to serve a copy of the TEO on the person if the Minister does not consider it reasonable and practicable to do so. It is therefore entirely possible that TEO will be in force in relation to a person without them knowing that this is the case.
97. While the Minister must issue a return permit to a person on application, the Minister also has a general discretion to issue a return permit to a person if the Minister considers that it is appropriate to do so.<sup>77</sup> A return permit comes into force on the day specified in the permit.<sup>78</sup> The Minister must cause a copy of the return permit to be served personally on the person to whom it relates.<sup>79</sup> However, service is not a prerequisite for the permit coming into force. Again, it is possible for a return permit to be in force in relation to a person without their knowledge.
98. A person is reckless with respect to a circumstance (eg the fact a TEO has been issued in relation to them) if the person is aware of a substantial risk that the circumstance exists or will exist and, having regard to known circumstances, it is unjustifiable to take the risk.<sup>80</sup> It seems possible that a prosecutor may argue that any Australian who has been in the conflict zone in Syria or Iraq should be aware of a substantial risk that a TEO has been made in relation to them because this is the general purpose of the legislative regime.<sup>81</sup> If this is the case, the practical effect of the offence provision is to prevent *any* Australian in that position returning to Australia, regardless of whether or not a TEO has in fact been made in relation to them. Such an offence provision is too broad.

99. This issue does not arise in relation to the UK legislation because, there, a TEO only comes into force when notice of it is given to the person affected.<sup>82</sup>
100. In the Commission's view, it would be more appropriate for these offences only to apply if the person subject to the TEO or return permit has actual knowledge that they are not permitted to return to Australia. This was also the view taken by the PJCIS in its recommendations to the Australian Government.<sup>83</sup>
101. While the Government did not initially accept this recommendation, it noted that the further review of the TEO Act by the PJCIS would be an opportunity to consider this recommendation further.<sup>84</sup>

### **Recommendation 8**

The Commission recommends that the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) be amended so that, in any prosecution for a breach of an offence provision, the prosecution must prove that the defendant had knowledge of the existence of the temporary exclusion order or of the relevant return permit condition (as applicable).

## Endnotes

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- <sup>1</sup> Australian Human Rights Commission, *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth)*, submission to the Parliamentary Joint Committee on Intelligence and Security, 8 March 2019, <https://www.aph.gov.au/DocumentStore.ashx?id=372fe9e7-3d94-4ba4-9bad-eff0c1084111&subId=667095>.
- <sup>2</sup> The Hon Scott Morrison MP, Prime Minister and the Hon Peter Dutton MP, Minister for Home Affairs, 'Combatting Australian terrorists', *Media release*, 22 November 2018, <https://www.pm.gov.au/media/combating-australian-terrorists>.
- <sup>3</sup> Independent National Security Legislation Monitor, *Annual Report 2019–20*, at [27], <https://www.inslm.gov.au/sites/default/files/2021-02/inslm-annual-report-2019-2020.pdf>.
- <sup>4</sup> Independent National Security Legislation Monitor, *Annual Report 2018–19*, at [2.13], <https://www.inslm.gov.au/sites/default/files/2020-02/INSLM%20Annual%20Report%20-%202018-2019.pdf>.
- <sup>5</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, Canberra, 15 March 2019, p 17 (Mr Ian McCartney, Acting Deputy Commissioner, National Security, Australian Federal Police), [https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/24ee7702-d065-4b84-9de9-ff9ab32ba199/toc\\_pdf/Parliamentary%20Joint%20Committee%20on%20Intelligence%20and%20Security\\_2019\\_03\\_15\\_7008\\_Official.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/commjnt/24ee7702-d065-4b84-9de9-ff9ab32ba199/toc_pdf/Parliamentary%20Joint%20Committee%20on%20Intelligence%20and%20Security_2019_03_15_7008_Official.pdf;fileType=application%2Fpdf).
- <sup>6</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, Canberra, 15 March 2019, p 17 (Mr Ian McCartney, Acting Deputy Commissioner, National Security, Australian Federal Police).
- <sup>7</sup> *Crimes Act 1914* (Cth), s 3WA.
- <sup>8</sup> TEO Act, s 10.
- <sup>9</sup> TEO Act, s 8.
- <sup>10</sup> TEO Act, ss 14 and 23.
- <sup>11</sup> TEO Act, s 15.
- <sup>12</sup> TEO Act, s 12(5).
- <sup>13</sup> TEO Act, s 16(9).
- <sup>14</sup> TEO Act, s 16(10).
- <sup>15</sup> TEO Act, s 20.
- <sup>16</sup> TEO Act, s 31.
- <sup>17</sup> Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences, Annual Report 2019-2020*, pp 7–8, [https://web.archive.org/awa/20211005043413mp\\_/https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Documents/annual-report-2019-20.pdf](https://web.archive.org/awa/20211005043413mp_/https://www.nationalsecurity.gov.au/Media-and-publications/Annual-Reports/Documents/annual-report-2019-20.pdf).
- <sup>18</sup> Department of Home Affairs, *2020-21 Annual Report*, p 67, <https://www.homeaffairs.gov.au/reports-and-pubs/Annualreports/home-affairs-annual-report-2020-21.pdf>.
- <sup>19</sup> Department of Home Affairs, *2020-21 Annual Report*, p 67.
- <sup>20</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion*

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- Orders) Bill 2019*, Canberra, 15 March 2019, p 11 (Ms Linda Geddes, Deputy Secretary Commonwealth Counter-Terrorism Coordinator, Department of Home Affairs).
- <sup>21</sup> Australia, *Parliamentary Debates*, House of Representatives, 4 July 2019 (the Hon Peter Dutton MP, Minister for Home Affairs, second reading speech for the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019), p 297.
- <sup>22</sup> Independent National Security Legislation Monitor, *Annual Report 2019–20*, at [27], <https://www.inslm.gov.au/sites/default/files/2021-02/inslm-annual-report-2019-2020.pdf>.
- <sup>23</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, Canberra, 15 March 2019, p 17 (Mr Ian McCartney, Acting Deputy Commissioner, National Security, Australian Federal Police).
- <sup>24</sup> Independent National Security Legislation Monitor, *Annual Report 2018–19*, at [2.13], <https://www.inslm.gov.au/sites/default/files/2020-02/INSLM%20Annual%20Report%20-%202018-2019.pdf>.
- <sup>25</sup> *Crimes Act 1914* (Cth), ss 15AA.
- <sup>26</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, Canberra, 15 March 2019, p 17 (Mr Ian McCartney, Acting Deputy Commissioner, National Security, Australian Federal Police).
- <sup>27</sup> Parliamentary Joint Committee on Intelligence and Security, *Review of 'Declared Areas' Provisions: Sections 119.2 and 119.3 of the Criminal Code*, Report, at [1.3], [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024574/toc\\_pdf/ReviewofDeclaredAreasProvisions.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024574/toc_pdf/ReviewofDeclaredAreasProvisions.pdf;fileType=application%2Fpdf).
- <sup>28</sup> *Crimes Act 1914* (Cth), s 3WA.
- <sup>29</sup> *Crimes Act 1914* (Cth), s 3W.
- <sup>30</sup> *Crimes Act 1914* (Cth), s 23DF.
- <sup>31</sup> *Crimes Act 1914* (Cth), s 23DB(11).
- <sup>32</sup> *Criminal Code*, s 104.2(2), see in particular (a) and (c).
- <sup>33</sup> *Criminal Code*, s 104.6.
- <sup>34</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218; *McCartney v Abdirahman-Khalif (No 2)* [2020] FCA 1002 (Charlesworth J). For a discussion of this case, see Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the Parliamentary Joint Committee on Intelligence and Security, 10 September 2020, at [170] (Case study 5) <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- <sup>35</sup> Australian Human Rights Commission, *Review of the 'declared areas' provisions*, submission to the Parliamentary Joint Committee on Intelligence and Security, 28 August 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=17e06008-e0f9-491e-98f0-1913b835392a&subId=691220>; Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the Parliamentary Joint Committee on Intelligence and Security, 10 September 2020, <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- <sup>36</sup> The Hon Scott Morrison MP, Prime Minister and the Hon Peter Dutton MP, Minister for Home Affairs, 'Combatting Australian terrorists', *Media release*, 22 November 2018, <https://www.pm.gov.au/media/combating-australian-terrorists>.
- <sup>37</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, recommendation 12, [https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024276/toc\\_pdf/AdvisoryreportontheCounter-Terrorism\(TemporaryExclusionOrders\)Bill2019.pdf;fileType=application%2Fpdf](https://parlinfo.aph.gov.au/parlInfo/download/committees/reportjnt/024276/toc_pdf/AdvisoryreportontheCounter-Terrorism(TemporaryExclusionOrders)Bill2019.pdf;fileType=application%2Fpdf).

- <sup>38</sup> Australian Government, *Response to the Parliamentary Joint Committee on Intelligence and Security report: Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, p 7, <https://www.aph.gov.au/DocumentStore.ashx?id=fd5e63bb-acc4-48d8-a5c9-28e16e310515>.
- <sup>39</sup> TEO Act, s 10(1).
- <sup>40</sup> United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
- <sup>41</sup> United Nations Human Rights Committee, *General Comment 31, The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc CCPR/C/21/Rev.1/Add. 1326 (2004) at [6]; 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).
- <sup>42</sup> Australia, *Parliamentary Debates*, House of Representatives, 4 July 2019 (the Hon Peter Dutton MP, Minister for Home Affairs, second reading speech for the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019), p 297.
- <sup>43</sup> United Nations Human Rights Committee, *General Comment No 27: Article 12 (Freedom of Movement)*, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 6 [21].
- <sup>44</sup> TEO Act, s 10(2).
- <sup>45</sup> *McCartney v Abdirahman-Khalif* [2019] FCA 2218 at [9(37)] and [18] (Charlesworth J).
- <sup>46</sup> Australian Human Rights Commission, *Review of Australian Federal Police Powers*, submission to the Parliamentary Joint Committee on Intelligence and Security, 10 September 2020, at [131]–[134], <https://www.aph.gov.au/DocumentStore.ashx?id=b2a784cc-435f-4cbd-b5c7-6831eeb05e81&subId=691580>.
- <sup>47</sup> TEO Act, s 10(2)(b).
- <sup>48</sup> *Counter-Terrorism and Security Act 2015* (UK), ss 2(7) and 3.
- <sup>49</sup> *Counter-Terrorism and Security Act 2015* (UK), s 3(2).
- <sup>50</sup> TEO Act, s 14.
- <sup>51</sup> *Counter-Terrorism and Security Act 2015* (UK), s 2(7)(b) and Schedule 2.
- <sup>52</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, at [2.20].
- <sup>53</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, at [2.21].
- <sup>54</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, recommendation 7 at [2.120].
- <sup>55</sup> *Criminal Code*, s 105.12.
- <sup>56</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, at [2.112].
- <sup>57</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, recommendation 7 at [2.120].
- <sup>58</sup> TEO Act, s 14(7)(a).
- <sup>59</sup> *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 267–268 (Deane, Dawson, Gaudron and McHugh JJ).
- <sup>60</sup> *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374 (Kitto J).
- <sup>61</sup> TEO Act, s 30.
- <sup>62</sup> Australian Government, *Response to the Parliamentary Joint Committee on Intelligence and Security report: Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, p 9.
- <sup>63</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, recommendation 5 at [2.118].
- <sup>64</sup> *Criminal Code*, ss 104.5(1)(h) and (2A).
- <sup>65</sup> *Criminal Code*, ss 105.8(6)(e) and (6A), 105.12(6)(d) and (6A).

- <sup>66</sup> TEO Act, s 10(6)(i).
- <sup>67</sup> Australian Human Rights Commission, *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth)*, submission to the Parliamentary Joint Committee on Intelligence and Security, 8 March 2019, at [47]–[56].
- <sup>68</sup> Parliamentary Joint Committee on Intelligence and Security, *Official Committee Hansard, Counter-Terrorism Legislation Amendment Bill 2019, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, Canberra, 15 March 2019, p 21 (Mr Michael Redina, Deputy Counter-Terrorism Coordinator, Department of Home Affairs).
- <sup>69</sup> Jonathan Hall QC, Independent Reviewer of Terrorism Legislation, *The Terrorism Acts in 2019, Report of the Independent Reviewer of Terrorism Legislation on the Operation of the Terrorism Acts 2000 and 2006*, at [8.89].
- <sup>70</sup> TEO Act, s 10(3).
- <sup>71</sup> *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273 at 289 (Mason CJ and Deane J), emphasis added.
- <sup>72</sup> *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133 at [32] (Branson, North and Stone JJ).
- <sup>73</sup> *Criminal Code*, ss 104.4(2) and 104.24(2).
- <sup>74</sup> *Criminal Code*, s 5.6(2).
- <sup>75</sup> TEO Act, s 13.
- <sup>76</sup> TEO Act, s 10(8).
- <sup>77</sup> TEO Act, ss 15(1)–(2).
- <sup>78</sup> TEO Act, s 19(a).
- <sup>79</sup> TEO Act, s 15(5).
- <sup>80</sup> *Criminal Code*, s 5.4(1).
- <sup>81</sup> This may be subject to any defence available under s 9.1 of the *Criminal Code* that the defendant was mistaken about, or ignorant of, relevant facts that were sufficient to negate the fault element.
- <sup>82</sup> *Counter-Terrorism and Security Act 2015* (UK), s 4(3)(a).
- <sup>83</sup> Parliamentary Joint Committee on Intelligence and Security, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, April 2019, recommendation 11 at [2.124].
- <sup>84</sup> Australian Government, *Response to the Parliamentary Joint Committee on Intelligence and Security report: Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, p 6.