

8 March 2019

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary

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

Thank you for the opportunity to make a submission to this inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019. We make this submission in our personal capacity, and are solely responsible for the views and content contained herein.

Please note that in the short time available to us, namely, two weeks from introduction of the Bill until the close of submissions, we have not been able to exhaustively review the proposed amendments and their implications.

Part A of this submission sets out the reasons why we oppose the introduction of a TEOs scheme (pages 3 to 6).

However, if the Committee determines that the introduction of TEOs is necessary and proportionate to respond to the threat of terrorism, Part B outlines our concerns regarding the specific provisions of this regime (pages 7 to 15).

If you have questions about this submission, please do not hesitate to contact Dr Nicola McGarrity [REDACTED]

Yours sincerely,

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Part A

The Bill proposes to introduce a new counter-terrorism scheme to address the threat posed by foreign fighters. The Second Reading Speech explains:

Even after the defeat of Islamic State on the battlefield, the issue of foreign terrorist fighters will continue to be a challenge for our national security agencies and international partners for years to come. ... Following the collapse of Islamic State's territorial control, more Australians participating in or supporting the conflict are seeking to leave the conflict zone, and return to Australia. The government is determined to deal with these people as far away from our shores as is possible to ensure that if they return it is into the hands of authorities.¹

In summary, the scheme enables the Minister for Home Affairs ('Minister') to issue a Temporary Exclusion Order ('TEO') preventing an Australian citizen who is currently overseas from re-entering the country. A TEO may be in effect for up to two years. However, as multiple (even rolling) TEOs may be issued in relation to the same person, this does not operate as a meaningful time limit. The effect of a TEO is to make it a criminal offence, subject to a maximum penalty of two years imprisonment, to enter Australia whilst the order is in force.

A TEO ceases at the expiry of the specified period, upon revocation by the Minister or where a Return Permit is issued. The ability to apply for a Permit indicates that the scheme is as much about managed return as it is about exclusion. The Minister *must* issue a Permit if the person is being deported to Australia or if they make an application in the prescribed form. There is also a catch-all provision that the Minister *may* issue a Permit if they consider it appropriate to do so. In keeping with the goal of managed return, re-entry into Australia may be either unconditional or involve the imposition of (potentially quite intrusive) conditions, including the exclusion of the person from Australia for up to one year. It is a criminal offence, subject to a maximum penalty of two years imprisonment, to breach the conditions of a Return Permit.

The enactment of the Bill would have a significant impact upon the fundamental human rights of Australian citizens recognised by international law. These include the right of abode, the right to family, the right to liberty and security of the person, the right to a fair trial, the

¹ House of Representatives, Parliament of Australia, *Parliamentary Debates*, 21 February 2019, 19.

freedoms of association and movement, and the rights of children under the Convention on the Rights of the Child ('CROC'). We appreciate that these rights are not absolute and may be subject to incursions in order to protect national security. However, such incursions should only be permitted where it is demonstrated that they are necessary and proportionate to respond to the threat of terrorism.

Prior to the emergence of the foreign terrorist fighters phenomenon, Australia already had an extensive body of anti-terrorism legislation in place. This included a wide-range of criminal offences, such as doing an act in preparation for terrorism and associating with a member of a terrorist organisation. It also included expanded police and intelligence powers, and civil alternatives to criminal prosecution. Many of these provisions are applicable to the challenge posed by returning foreign terrorist fighters. For example, upon the return of a person to Australia, a criminal charges could be laid in relation to their membership of a terrorist organisation. If the criminal standard of beyond reasonable doubt is too difficult to establish by admissible evidence, an application might be made for a control order requiring them to report to the authorities, observe a curfew and prohibiting contact with specified people.

In addition to this earlier legislation, recent years have seen the enactment of numerous tranches of anti-terrorism legislation specifically in response to the challenge posed by foreign fighters. To facilitate prosecutions of people for activities engaged in overseas, offences of advocating terrorism and travelling to a declared area were introduced. Border controls, including those relating to the suspension or cancellation of Australian travel documents, were strengthened. Finally, and most controversially, it became possible to revoke the citizenship of an Australian citizen who also possesses citizenship of another country. In short, Australia is well-protected by its counter-terrorism framework and, whilst it may be necessary in the future to enact additional legislation, caution should be exercised before going down this path. Otherwise, there is a considerable risk that ever greater intrusions will be made into civil liberties for diminishing returns in respect of national security. We submit that no evidence has been presented to demonstrate that the anti-terrorism legislation which Australia has enacted to date is inadequate and, furthermore, that the proposed TEOs scheme fills an identified gap. We are concerned that the TEOs scheme would be relied upon to circumvent the safeguards of the criminal justice system, which should be given primacy, and even the limited safeguards of the control orders regime.

In addition to the impact of TEOs upon fundamental human rights, we also draw the Committee's attention to another relevant aspect of international law. Countries are not only responsible for protecting the security of their territory and population, but they also have a key role to play in ensuring global security. Insofar as the threat of terrorism is concerned, they are required to exercise criminal jurisdiction over people suspected of engaging in terrorism. This includes taking measures to ensure the presence of the person for the purpose of prosecution or extradition to another country for prosecution. International law also emphasises the need for States to implement rehabilitation and reintegration strategies to address the threat of terrorism. We submit that these rules are violated by the TEOs regime. Whilst we appreciate the difficulties involved in prosecuting a person who has engaged in terrorism-related activities overseas, this is not a justification for Australia to ignore its obligation to hold that person responsible (whether through civil, criminal or other mechanisms). Furthermore, by preventing a citizen from returning to their home country, Australia is making this person some other country's problem to deal with. It is extremely unlikely that any other country would accept a person who has been refused entry by their country of citizenship. This is demonstrated by the case of Shamima Begum, who was refused entry into Bangladesh after the United Kingdom attempted to revoke her citizenship on security grounds. There is, therefore, a strong possibility that a person subject to a TEO would be rendered, effectively if not technically, stateless. Not only is this denial of the rights entailed by citizenship, but it may also be counter-productive in the sense of heightening the risk to national security. Refusal of entry into Australia on relatively flimsy grounds could further a person's sense of injustice and heighten the risk of them, or those close to them, committing terrorist acts overseas or upon their return to Australia at some point in the future.

Finally, we note the potential for constitutional challenge to the Bill. Whilst the likelihood is that the High Court would find it to be supported by a head of power in the Commonwealth Constitution, the failure of the Bill or Explanatory Memorandum to specify any particular head of power upon which it relies leaves it susceptible to challenge. Furthermore, some scholars assert that Australian citizens have a constitutionally protected right of abode in Australia.² The question of whether it is legally permissible for the Commonwealth to prevent an Australian citizen from entering Australia has not yet been tested before the courts. However, the right to

² Helen Irving 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30 Sydney Law Review 133.

abode must be regarded as one of the core attributes of citizenship (either as a constitutional or international law principle). In the event of a challenge to the Bill on this novel ground, it is difficult to predict what conclusion the High Court would reach.

For the above reasons, we **recommend** that the Bill should not be enacted.

Part B

The decision-maker

We are continuing to see a trend towards the expansion of executive power in the national security space. In keeping with this, the person responsible for issuing a TEO is the Minister. It is our **recommendation** that it would be more appropriate for the Minister to apply to a retired judge for a TEO. A model of how this might operate can be found in Australia's existing preventative detention order and Australian Security Intelligence Organisation ('ASIO') questioning and detention warrant provisions. Such an approach is consistent with the severity of the consequences which flow from a TEO, including exclusion from their country of citizenship for up to two years (or one year where a Return Permit has been issued). Whilst forced to remain overseas, there is a real risk of the person being imprisoned in another country that may have less concern for human rights than Australia. Furthermore, even after a Return Permit is issued, intrusive pre- and post-entry conditions may be imposed. The experience of the judiciary in making independent and impartial decisions in the sensitive national security space would assist in ensuring the necessity and proportionality of TEOs and Return Permits, as well as the legitimacy of the TEOs scheme in the eyes of the public.

In the alternative, and as discussed in the final section of this submission, we **recommend** that a retired judge should be required to confirm the decision of the Minister, applying the principles applicable on an application for judicial review.

The criteria for issuing a TEO

Section 10 of the Bill sets out two bases on which a TEO may be issued. We submit that these bases are insufficiently tailored to responding to the threat of terrorism in that they may capture people who have engaged in innocuous activities.

The first is that the Minister 'suspects on reasonable grounds' that issuing a TEO would substantially assist in the prevention of:

- a. a terrorist act;
- b. training related to a terrorist organisation;
- c. the provision of support for, or the facilitation of, a terrorist act; or

- d. the provision of support or resources to help an organisation engage in ‘preparing, planning, assisting in or fostering, or engaging in a terrorist act.

The first basis resembles the grounds on which a control order may be issued by a federal court.³ However, unlike the control order provisions, none of these grounds require a suspicion of wrongdoing on the part of the individual. The United Kingdom TEOs scheme established by the *Counter-Terrorism and Security Act 2015* (UK) similarly requires some evidence of wrongdoing (albeit to a relatively low standard of proof). Not only must a connection between the issuing of a TEO and the protection of the public in the United Kingdom be demonstrated, but the decision-maker must also have a reasonable suspicion that the person is, or has been, involved in terrorism-related activity outside that country.⁴ We **recommend** that a similar requirement, with a definition of ‘terrorism-related activity’, should be incorporated into the Bill.

The second basis on which a TEO may be issued is when the person has been assessed by ASIO to ‘be directly or indirectly a risk to security ... for reasons related to political violence’. This basis echoes the character test in the *Migration Act 1958* (Cth).⁵ Where a person has been assessed by ASIO ‘to be directly or indirectly a risk to security’, they may be denied a visa or have their visa cancelled. The distinction here is that the character test applies only to non-citizens. The Bill proposes to extend this test to citizens, with the result that they may be excluded from Australia on the basis of an assessment made by an intelligence agency. In making this test, ASIO is not required to be satisfied to a particular standard of proof or to take into account only information that would satisfy traditional evidentiary rules. There is also no requirement for ASIO to disclose either the information upon which it bases its decision or the reasons for that decision to the affected person. Indeed, it would be practically difficult for it to do so where that person is overseas at the relevant time. These procedural issues are problematic in their own right (regardless of whether they are applied to non-citizens or citizens). However, the extension of this test beyond non-citizens ignores the particular legal

³ *Criminal Code Act 1995* (Cth) s 104.4(1)(c).

⁴ *Counter-Terrorism and Security Act 2015* (UK) s 2(3).

⁵ See, for example, *Migration Act 1958* (Cth) s 5C(1)(g).

position of citizens, in terms of their rights and the reciprocal responsibilities of the State. We **recommend** that the TEOs scheme be limited to the first basis.

Additional criteria for minors

The Bill applies to children aged 14 to 17 years. Section 10(3) of the Bill requires the Minister to exercise their powers giving ‘paramount consideration’ to the protection of the community and also to take into account the best interests of the child ‘as a primary consideration’. A similar hierarchy of considerations applies to the imposition of a condition as part of a Return Permit under s 12(2). These provisions echo the principle in Article 3 of the CROC that in all matters concerning children, the best interests of the child shall be a primary consideration.⁶

However, we submit that it is misleading to describe the best interests of the child a ‘primary’ consideration when it is secondary to considerations of community protection. We **recommend** that it would be more appropriate to place these two considerations on an equal footing, making each of them primary considerations in the making of a TEO and the imposition of conditions as part of a Return Permit. This approach would reflect the special status of children under Australian and international law and the particularly vulnerable place of children, particularly if separated from family and lacking social and cultural ties.

Travel documents

The purpose of the Bill is to temporarily prevent an Australian citizen from entering Australia and to control their re-entry. As part of this, s 11(4)(d) provides that a person subject to a TEO may be required to surrender their Australian travel document, and subsequently prohibited from applying for or obtaining such a document. The consequence is that, unless the person is a citizen of another country and has a travel document issued by that country, they will be unable to travel internationally. If a person is unable to re-enter Australia and is prohibited from travelling internationally, they are effectively trapped where they are for up to two years under a TEO and, even where a Return Permit is issued, for up to 12 months.

Australia has a duty of care towards its citizens, even in the situation where they are implicated in terrorism-related activities. With that in mind, it is concerning that an inability to travel

⁶ Convention on the Rights of the Child, art 3.

internationally may result in people being stranded in dangerous conflict zones for a considerable period. Not only does this violate the State's duty to protect the life and security of its citizens, but it may also have the counter-productive effect of leaving those people susceptible to radicalisation. These concerns are exacerbated in relation to children, who may be prevented from travelling internationally to reunite with family and are in a particularly vulnerable position.

The Bill is undoubtedly an improvement upon the United Kingdom TEOs scheme under which it automatically follows from the issuing of a TEO that a person's passport is cancelled and they are unable to obtain another.⁷ However, it is problematic that the Bill does not specify any criteria for the Minister to use in determining whether to impose these requirements. In particular, we **recommend** that the Minister be required to take into account the fundamental human rights of the subject of the TEO and any dependents before cancelling their Australian travel documents and restricting their ability to obtain another.

Ongoing Ministerial review

The United Kingdom TEO scheme provides that during the period that a TEO is in force, the Secretary of State 'must keep under review' whether that order continues to be necessary to protect members of the public from the risk of terrorism.⁸ This provision provides an important safeguard in ensuring the TEO remains necessary and appropriate in changing circumstances. We **recommend** that a similar provision should be included in the Bill.

Issuing a Return Permit

Under s 12 of the Bill, the Minister *may* issue a Permit if they consider it appropriate to do so. In addition, the Minister *must* issue a Return Permit if the person is being deported to Australia or if they make an application in the form and manner prescribed in the Rules. These are made by the Minister under s 19. It is pleasing that the Bill recognises Australia's legal responsibility to admit its citizens on deportation. Whilst the mandatory requirement to issue a Return Permit wherever an application is made by the subject of a TEO may appear anomalous, this is nevertheless in keeping with the goal of managed return. The Second Reading Speech states

⁷ *Counter-Terrorism and Security Act 2015* (UK) s 4(9)-(10).

⁸ *Ibid* s 2(8).

that '[t]he bill does not permit the permanent exclusion of any person who holds Australian citizenship'.⁹ Instead, it is intended 'to provide *greater control* over returning Australians of counter-terrorism interest, including foreign fighters' (emphasis added).¹⁰ A Return Permit 'will enhance agencies' ability to monitor the movements and activities of such people once they do return, to mitigate any risks they pose to fellow Australians and Australia's interests'.¹¹

If the necessity and proportionality of the TEOs scheme is accepted, the criteria for issuing a Return Permit are relatively unproblematic. The one exception is the absence of any mention of the time-frame within which a Return Permit must be issued. Under the United Kingdom TEOs scheme, the decision-maker must issue a Return Permit within a reasonable time after the application is made.¹² We **recommend** that an equivalent provision be included in the Bill. In a situation where a person faces deportation to Australia, and may be detained in a foreign country pending this taking place, we **recommend** the inclusion of a requirement for the Return Permit to be issued as soon as practicable.

What is more problematic are the conditions which may be imposed as part of a Return Permit. Under s 12(8), the Minister may impose one or more conditions if satisfied that, taken together, they are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing any of the activities specified in the first basis for issuing a TEO.

The Bill sets out an exhaustive list of pre- and post-entry conditions which may be imposed as part of a Return Permit. Possible pre-entry conditions include being required to enter the country within a specified period, on a specific date or in a specified manner. Most problematically, a person who is granted a Return Permit may nevertheless be excluded from the country for up to 12 months. This potentially lengthy period of exclusion is justified in the Second Reading Speech as being necessary to 'enable authorities to assess the threat posed by the person and make appropriate arrangements for their return'.¹³ The Bill is preferable to the

⁹ House of Representatives, Parliament of Australia, *Parliamentary Debates*, 21 February 2019, 20.

¹⁰ *Ibid* 19.

¹¹ *Ibid* 20.

¹² *Counter-Terrorism and Security Act 2015* (UK) s 6(1).

¹³ House of Representatives, Parliament of Australia, *Parliamentary Debates*, 21 February 2019, 20.

United Kingdom TEOs scheme in that the latter does not specify an ultimate time limit on the period of time that a person may be excluded from the country. It merely states that the ‘relevant return time must fall within *a reasonable period* after the application is made’ (emphasis added).¹⁴ We **recommend** the adoption of a combination of the Australian and United Kingdom approaches, that is, to include both an ultimate time limit and a requirement that the return time be as soon as practicable. This would best protect the right of the person subject to a TEO to return to their home country.

There are also a range of post-entry conditions which may be imposed on the Permit. These include mandatory reporting regarding the person’s place of residence, place of employment, communications with specific people and use of telecommunications devices, as well as restrictions on the use of travel documents. In contrast to the equivalent scheme in the United Kingdom, the Bill does not make any attempt to actively assist in the reintegration of returnees to Australia. In the United Kingdom, for example, conditions may be imposed that a person must attend appointments with a specified person or category of persons.¹⁵ Usefully, this might include a religious or other counsellor conducting a de-radicalisation program. We **recommend** that the conditions which may be imposed be expanded to include attendance at appointments.

Oversight and accountability

TEOs and Return Permits carry serious consequences and will have a severe impact on individuals and families. We are therefore concerned that neither TEOs nor Return Permits are subject to independent oversight or basic accountability measures to ensure the Minister’s powers are exercised properly.

We **recommend**, in the first place, that the definition of ‘counter-terrorism and national security legislation’ in s 4 of the *Independent National Security Monitor Act 2010* (Cth) should be amended so as to ensure that the Monitor has the ability to review the TEOs scheme.

¹⁴ *Counter-Terrorism and Security Act 2015* (UK) s 6(3).

¹⁵ *Ibid* s 9(2)(a)(ii).

More substantively, the usual requirement for the Minister to afford procedural fairness when making a determination that affects rights is removed by s 17 of the Bill. The Minister is therefore only required to take such steps as are explicitly set out in the Bill.

As soon as practicable after a TEO is made, s 10(6) of the Bill requires the Minister to cause reasonable and practicable steps to be taken to bring to the attention of the person the content of the order. This includes a statement of the effect of ss 8 (offence to re-enter Australia whilst a TEO is in force), 11 (revoking a TEO) and 12 (issuing of return permits). However, there is no requirement to inform the person of the grounds on which the order was issued, or the evidence which was relied upon by the Minister and/or ASIO. The lack of such information renders these orders extremely difficult to challenge in practice. Under s 13(10), the Minister must cause a copy of the Return Permit to be served personally on the person to whom it relates. Unlike the provisions which apply to TEOs, there is no time-frame within which this must be done. The Permit must include a statement of the effect of ss 13 (varying and revoking a Permit), 14 (offence for failing to comply with conditions) and 16 (offences for providing false information or documents). As with TEOs, there is no requirement to inform the person of the reasons why particular conditions were included.

We are also concerned that whilst a person subject to a TEO or Return Permit may apply to the Minister for its revocation under ss 11 and 13 respectively, the Bill sets out no procedure for the making and consideration of such an application. The power to determine this process rests entirely with the Minister. Accordingly, the Minister:

- a. determines whether to issue a TEO on extremely broad legislative criteria;
- b. makes rules prescribing relevant matters under s 19;
- c. determines the process for applying for a revocation of a TEO and revocation and/or modification of a Return Permit; and,
- d. considers and determines any such application in the absence of any legislative criteria.

As noted above, all of this occurs the absence of the usual common law requirements of procedural fairness. This concentration of power in a situation that potentially has serious implications for the rights and liberties of Australian citizens runs counter to the most basic attributes of the Australian justice system, including fair process, the rule of law, responsible government, legality, and accountability.

The Commonwealth Constitution mandates that the decisions made by Ministers (amongst others) are subject to an entrenched minimum standard judicial review on the basis of ‘jurisdictional error’.¹⁶ Whilst this theoretically presents an alternative to an application for revocation, in practice, any person subject to a TEO or Return Permit will face considerable practical hurdles. These include the breadth of the criteria upon which the Minister’s decision is made, the need to establish grounds of review despite having limited or no information as to the reasons for the decision, and procedural fairness being excluded as a potential ground of review.

It is notable that the United Kingdom TEOs scheme offers considerably greater safeguards. Under that scheme, the Secretary of State must apply to a court for permission to impose a TEO on an individual. The court then employs principles of judicial review to determine whether the relevant decisions of the Secretary of State ‘are obviously flawed’.¹⁷ The United Kingdom TEOs scheme also makes allowance for urgent situations, in which the matter will be referred to the court for judicial review after the TEO has been issued.¹⁸ Whilst this scheme operates in a distinct constitutional and legislative environment, it nevertheless demonstrates that TEOs can function in an operationally effective manner at the same time as incorporating effective mechanisms for independent oversight of the Minister’s powers.

As discussed earlier in this submission, our primary **recommendation** is that the decision to issue a TEO should be made by a retired judge. In the alternative, we **recommend** that the Bill be amended to provide for independent judicial oversight of the Minister’s decision. The strict separation of powers under the Commonwealth Constitution is likely to prohibit a federal court from issuing a TEO in the absence of a full hearing,¹⁹ which is not a practicable option in the

¹⁶ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531.

¹⁷ *Counter-Terrorism and Security Act 2015* (UK) s 3.

¹⁸ *Ibid* s 2(7)(b) and Sched 2.

¹⁹ There would be no dispute or federal ‘matter’ to determine, and so this would not qualify as judicial power capable of being vested in a federal court. This is in contrast to the issuing of interim control orders by federal courts in *ex parte* proceedings, as interim control orders are merely a precursory step towards a full confirmation hearing at which both sides may present evidence and argument to the court before a confirmed control order is issued.

circumstances. Instead, a confirmation system analogous to that under the United Kingdom TEOs scheme should apply.

In addition, we **recommend** that the Bill be amended to require that the person be informed not only of the content of a TEO, but also of their rights of review, including the process and requirements involved, and the grounds of the order – to the extent permitted by national security. Finally, to ensure the legitimacy of the decision-making process, we **recommend** that detailed procedures in relation to the issuing of TEOs, revocation of TEOs, issuing of Return Permits, and revocation and modification of TEOs be developed and included in the legislation.