



Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

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

The Hon Margaret Stone
Inspector-General of Intelligence and Security

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Brief summary

The Temporary Exclusion Orders Bill (the Bill) proposes to enact a new Act to establish a scheme of 'exclusion orders' to temporarily prevent Australian citizens who are overseas and are of counter-terrorism interest from re-entering Australia. Non-compliance with an exclusion order is an offence, punishable by a maximum penalty of two years' imprisonment (and there are ancillary offences for people who knowingly transport exclusion order subjects into Australia).

A temporary exclusion order (a TEO) is issued by the Minister (Home Affairs). The Minister may only do so if one of two alternative grounds are satisfied: s 10(2):

- (1) **Prevention**—the Minister is satisfied on reasonable grounds that making the order would substantially assist in preventing a terrorist act, preventing training with a listed terrorist organisation, preventing the provision of support or facilitation of a terrorist act, or preventing the provision of support to a terrorist organisation: s 10(2)(a).
- (2) **ASIO assessment**—the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be directly or indirectly a risk to security (within the meaning of the ASIO Act) specifically and only for reasons relating to politically motivated violence (within the meaning of the ASIO Act): s 10(2)(b).

Orders have a maximum duration of two years and must be made in writing. The Minister must take reasonable steps to give a copy to the person: ss 10(4)-(6). There is no limit on the number of temporary exclusion orders that may be made in relation to a person: s 11(5).

The subject of an order must be aged at least 14 years: s 10(1). Additional issuing criteria apply to persons aged between 14 and 17 years, under which the Minister is required to take into account the best interests of the child: s 10(3).

There are statutory grounds for discretionary revocation by the Minister, but there is no duty to revoke if the Minister ceases to be satisfied that the issuing criteria exist (s 11). Notwithstanding that a TEO has not been revoked, a separate provision requires the Minister to give a 'return permit' on the application of the person (s 12(1)). If a return permit is issued to a person, a TEO is taken to be revoked but this does not prevent the making of another TEO in relation to the same person (s 11(4) - (5)). Return permits can impose conditions on the person's re-entry to Australia (for example, notification of places of residence, employment and education) and impose requirements to surrender travel documents: s 12(6).

The Bill will commence the day after Assent.

Observations

In the context of the oversight role of the Inspector-General of Intelligence and Security (IGIS), we note that there are some aspects of the Bill which would benefit from greater clarity, and which the Committee may wish to examine further. These relate primarily to the furnishing of advice by ASIO to the Minister for the purposes of the possible imposition of a TEO.

As an observation, we note that proposed paragraph 10(2)(b) encompasses a wider range of activities than the terrorism activities set out in proposed paragraph 10(2)(a). Proposed paragraph 10(2)(b) does not appear to require the furnishing of a security assessment as a condition precedent

to the exercise of the power to impose a TEO. Although neither the Bill nor the Explanatory Memorandum directly addresses this, we understand that it is the policy intention that any advice provided by ASIO for these purposes would not be required to be in the form of a security assessment, in accordance with Part IV of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). We further understand the policy underpinning the Bill to be that the imposition of a TEO would not be a 'prescribed administrative action' as defined in section 35 of the ASIO Act. For the avoidance of ambiguity, the Committee may wish to consider whether the Bill should be amended to make this policy intention clear.

If this is the case, it would mean that the advice provided by ASIO to the Minister would not be subject to review by the Administrative Appeals Tribunal (as it would be if it were provided in the form of a security assessment). We note that this could create a disparity in the way that advice by ASIO is provided in relation to Australian citizens in other contexts, such as that under the *Australian Passports Act 2005*. The Committee may wish to examine this aspect further.

More generally, we note that it is not clear on the face of the Bill whether ASIO could have a further role in relation to the scheme beyond making assessments that are used under proposed paragraph 10(2)(b), for example, in volunteering advice to the Minister.

In respect of the role of this Office should this Bill be passed, it is anticipated that the oversight of ASIO would focus on the analytic integrity of advice given under proposed subsection 10(2). Oversight of the Minister's decision is, of course, not within the jurisdiction of this office.

Attachment A

Role of the Inspector-General of Intelligence and Security

The Inspector-General is an independent statutory officer who reviews the activities of the following agencies:

- Australian Security Intelligence Organisation (ASIO);
- Australian Secret Intelligence Service (ASIS);
- Australian Signals Directorate (ASD);
- Australian Geospatial-Intelligence Organisation (AGO);
- Defence Intelligence Organisation (DIO); and
- Office of National Intelligence (ONI) formerly the Office of National Assessments (ONA).

The Office of the IGIS is part of the Attorney-General's portfolio, and was previously located in the Prime Minister's portfolio from its commencement on 1 February 1987 until 10 May 2018. The IGIS is not subject to direction from any Minister on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986 (IGIS Act)* should be carried out.

The *IGIS Act* provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion, at the request of a Minister, or in response to complaints. The overarching purpose of the IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the Office are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. IGIS staff have access to all documents of the intelligence agencies, and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries, the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a complaint or systemic matter within an agency. The Inspector-General also receives and investigates complaints and public interest disclosures about the intelligence agencies. These come from members of the public and from current and former agency staff.

In response to the recommendations of the *2017 Independent Intelligence Review*, the Government announced that, subject to the introduction and passage of legislation, the jurisdiction of the IGIS will be extended to include the intelligence functions of the Department of Home Affairs, Australian Federal Police, Australian Criminal Intelligence Commission and Australian Transaction Reports and Analysis Centre. Resources for the IGIS are being increased to allow the office to sustain a full time equivalent staff of 55 (by 2019-20) and to allow the agency to move to new premises (in 2019).