



Faculty of Law

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security

6 March 2018

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Dear Chair,

The *Counter-Terrorism (Temporary Exclusion Orders) Bill* (‘the Bill’) will empower the Minister to make a ‘temporary exclusion order’ (‘TEO’) preventing a person from entering Australia for up to two years. Under section 10(1)(b) of the Bill, the person must be an Australian citizen.

The Bill, I submit, is unconstitutional.

Other concerns regarding the Bill’s compatibility with human rights and denial of procedural fairness arise, and may be raised in other submissions. I focus here on the constitutional questions.

The citizen’s right of abode is a constitutional right

The Bill will deprive Australian citizens of their constitutional right of abode. The High Court of Australia has confirmed on a number of occasions that Australian citizens have the right of abode in Australia and, with this, the right to enter Australia.



In *Air Caledonie International v Commonwealth* (1988) (concerning an administrative fee for immigration ‘services’ found to be invalid) the unanimous High Court stated:

[T]he right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or ‘clearance’ from the Executive.

The Court reiterated that ‘a citizen ha[s], under the law, the right to re-enter the country, without need of any Executive fiat or "clearance", for so long as he retain[s] his citizenship.’

That the citizen’s right of abode is protected by international law has also been recognised by the High Court in its constitutional jurisprudence. In *Re Canavan* (2017) (concerning the constitutional eligibility of dual citizens to serve in Parliament), the Court considered, among other matters, whether Senator Nick Xenophon held British citizenship. In concluding that he did not, the unanimous Court noted that Xenophon did not have the right of abode in Britain. It stated that ‘the right of abode is one of the main characteristics of a national under international law’ and that the right of abode ‘includes the right to enter and to reside in the country of nationality.’

Notwithstanding that the Bill gives a citizen who is subject to a TEO the right to apply for and be granted a return permit, the Bill will make the citizen’s return to Australia dependent upon a ‘clearance’ from the Minister: the return permit may contain conditions, including on the date on which the person may return, and the person to whom it applies may be prevented from returning for up to twelve months from the issue of the permit.



The fact that the exclusion is temporary does not qualify the character of the Bill as a law that would prevent a citizen from exercising his or her right of abode.

The citizen's right to enter and reside in Australia, I submit, is also inherent in the constitutional head of power that permits the Parliament to make laws with respect to citizenship. In making such laws, the Parliament relies upon the 'aliens power' (section 51(xix) of the Constitution) in the absence of a head of power specifically on the subject of citizenship. There must be a constitutional connection between Commonwealth laws governing Australian citizenship and the aliens power. Reliance on the aliens power requires the Parliament to make this connection by distinguishing citizens from aliens. The relevant distinction is the right of Australian citizens to live in Australia and therefore to enter Australia – a right that is denied to non-citizens.

For a law to be a valid law with respect to citizenship, it cannot deny Australian citizens the right of abode in Australia or impose conditions on their right to enter Australia.

For more on this point, see Helen Irving, 'Still Call Australia Home: The Constitution and the Citizen's Right of Abode' (2008) 30(1) *Sydney Law Review* 133.

The Bill breaches the separation of powers

The Bill will make it an offence for a person to enter Australia without a permit if that person is the subject of a TEO. Nothing in the Bill suggests that the making of a TEO requires a prior judicial determination of guilt or even an application before a court or judicial officer. In making it an offence to enter Australia, the Bill will punish a person for what is, effectively, a pre-determination of guilt by the Executive, signified by a



penalty (the imposition of the TEO), the breach of which is the only relevant demonstration of unlawful conduct.

To give an analogy, it is the equivalent of making it an offence for a person to enter their own home if that person is subject to an order prohibiting them from entering their home, absent any legal finding of grounds upon which the prohibition itself was based. It amounts, effectively, to an Executive exercise of judicial power. The fact that the Minister's order may rely on a prior security assessment by ASIO of the person to whom the order relates – an administrative, not a judicial assessment – does not alter the Bill's character as a law that breaches the constitutional separation of powers.

It is to be noted that section 104.1 of the Commonwealth Criminal Code makes provision for control orders allowing 'obligations, prohibitions and restrictions to be imposed on a person' for, among other reasons, the purpose of 'protecting the public from a terrorist act.' In contrast to a TEO or the post-entry conditions attached to a return permit following a TEO, control orders are made by a court, on application by the executive. The court, applying the rules of evidence, must be satisfied that there are reasonable grounds for making an order and that the order is necessary and appropriate to serve the purpose. Judicial oversight, in other words, is inherent to the control order scheme. The High Court, in *Thomas v Mowbray* (2007), found the scheme to be constitutionally valid, including in its conformity to the separation of powers.

Given the availability of control orders, it is unclear why the Bill is thought necessary, beyond the purpose of keeping individual citizens from returning to Australia, a purpose that is in breach of their constitutional rights.

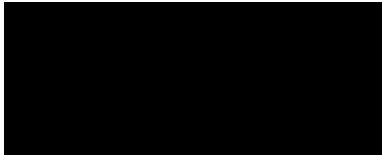
None of this is to suggest that Australian citizens who commit terrorist acts or threaten Australia's security should be treated leniently. However,



Australia should be vigilant not to undermine the constitutional limitations that protect its citizens from the overreach of official power, and that help maintain our democratic freedoms. The Bill threatens these protections.

For the above reasons, I submit that the Bill should not be passed.

Yours sincerely,



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