Australian Government
Department of Home Affairs

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Submission to the review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Parliamentary Joint Committee on Intelligence and Security

Department of Home Affairs

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Introduction

The Department of Home Affairs (Home Affairs) welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security (PJCIS) review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (the Bill). This submission sets out the policy justification for a new temporary exclusion order (TEO) scheme, and outlines the intended operation of the scheme. Home Affairs consulted with the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP), and the Australian Border Force (ABF) on this submission.

Policy intention and rationale

The Bill seeks to establish a TEO scheme to provide law enforcement and security agencies with greater control and certainty in managing Australians of counter-terrorism interest returning to Australia, including foreign fighters.

The evolving security environment highlights the need to constantly review, and amend as necessary, our suite of counter-terrorism measures, to ensure they remain responsive. As the Islamic State of Iraq and the Levant's (ISIL) territorial control collapses, more Australians participating in or supporting the conflict are seeking to leave the conflict zone, and some could attempt to return to Australia. Even after the defeat of ISIL 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.

Australia's previous experiences with Australians returning from conflict zones demonstrates the threat they can pose. Of the 30 Australians who fought or trained with extremist groups in conflict zones between 1990 and 2010, including Pakistan and Afghanistan, 25 returned; of those, eight were convicted of terrorism-related offences on the Australian mainland. The number of Australians involved in the Syria and Iraq conflicts is significantly higher than in previous foreign conflicts. Since 2012, around 230 Australians have travelled to Syria or Iraq to fight with or support groups involved in the conflict. Around 100 are still active in the conflict zone, having fought for or otherwise supported extremist groups.

The Government is continuing to reform and modernise counter-terrorism laws in response to the evolving threat environment. Managing the movement of those engaged in terrorist conduct is a key part of Australia's response to terrorism. The Government is determined to deal with those who support terrorist organisations overseas as far away from Australian shores as is possible. In those instances where an Australian citizen of counter-terrorism interest is to return to Australia, agencies must be able to manage this process with certainty and control.

The TEO scheme proposed in this Bill will provide a single, explicit source of legislative power for the Government to control the return of an Australian citizen of counter-terrorism interest to Australia. A legislated delay in travel will allow Australian agencies more time to determine any threat to public safety and coordinate security arrangements for travel. It will also reduce the possibility of a person altering travel plans or arriving with limited notice by criminalising non-compliance with the Minister's order.

A flowchart outlining the TEO scheme's intended operation is at Appendix A.

Summary of powers

Imposing a temporary exclusion order

The making of a TEO will prevent an Australian citizen overseas from returning to Australia without forewarning. A person subject to a TEO is prohibited from entering Australia for up to two years. Subsection 10(5) makes it clear that the Minister may make more than one TEO against the person if a person does not return to Australia before the first TEO expires.

There are two circumstances under subsection 10(1) under which the Minister may make the TEO. First, the threshold in paragraph 10(2)(a) means that a TEO can be made by the Minister to assist in preventing terrorism-related acts from occurring. Second, the Minister may make a TEO where the person has been assessed by the Australian Security Intelligence Organisation (ASIO) to be a direct or indirect risk to security for reasons related to politically motivated violence.[1] This assessment by ASIO will not constitute a security assessment under Part IV of the *Australian Security Intelligence Organisation Act 1979*, as the making of a TEO is not prescribed administrative action.[2]

Contacting a person in relation to whom a TEO is made may be difficult, for example if that person is in a conflict zone. Subsection 10(6) provides that the Minister must cause such steps to be taken as are reasonable and practicable to bring to the attention of the person the content of the order.

Giving a return permit

The policy intent of this Bill is to ensure that if an Australian of counter-terrorism interest does return to Australia, it is into the waiting hands of authorities. There is no intention to permanently exclude an Australian citizen from entering Australia. The Minister *must* issue a return permit to a person who is subject to a TEO if the person applies (subsection 12(1)(a)) or if the person is being deported to Australia (subsection 12(1)(b)). The Minister also has broad discretion to issue a return permit under subsection 12(2). There could be circumstances outside the scope of subsection 12(1). For example, a person who is in a conflict zone may be unable to apply for a return permit due to limited or regulated access to means of communication.

Subsection 11(4) of the Bill provides that the giving of a return permit automatically revokes a TEO in relation to the person. The permit expires if a person who obtains a return permit does not proceed with returning to Australia in accordance with the permit. The Minister may make another TEO in relation to the person (subject to subsection 10(2) of the Bill).

Imposing conditions in a return permit

The threat posed by Australians leaving a conflict zone will vary on a case-by-case basis. The purpose of section 12 of the Bill is to allow conditions to be set for a person's return to Australia that are appropriate for their circumstances, including their potential risk.

The test for imposing conditions is clearly established in subsection 12(8). The test requires the Minister to make a holistic assessment that conditions imposed are reasonably necessary, and reasonably appropriate and adapted, for the purpose of preventing terrorism-related acts from occurring. For example, a range of notification requirements taken together may be effective in preventing support for terrorism, whereas one requirement by itself may not be very effective. However, a range of notification requirements may also be burdensome for the person to comply with. The holistic assessment ensures that the conditions imposed are proportionate in addressing the risks posed by the person.

[1] This provision is modelled on section 501 of the *Migration Act 1958* (Migration Act). Section 501 provides that the Minister may cancel or refuse to grant a visa to a person if the person does not satisfy the Minister that the person passes the character test. Section 501(6)(g) of the Migration Act provides that a person does not pass the character test if the person has been assessed by ASIO to be directly or indirectly a risk to security.
[2] As defined in section 35(1) of the ASIO Act.

Pre-entry conditions

Subsection 12(5) provides pre-entry conditions which the Minister may impose. Subsections 12(5)(a)-(c) relate to when the person may return and account for difference circumstances.

- Under subsection 12(5)(a), a return permit could provide that the person must not enter Australia during a specified period, which must not end more than 12 months after the permit is given to the person. The intent of this condition is to account for challenges associated with obtaining information and managing risks in relation to individuals in conflict zones. For example, significant consideration could be required to determine how to manage a person's threat to community safety.
- Under subsection 12(5)(b), a return permit could provide that the person must enter Australia within a specified period, which must not end more than 3 months after the permit is given to the person. This could be used when agencies are prepared for a person's return, but there is uncertainty regarding when the person could reach an international airport.
- Under subsection 12(5)(c), a return permit could specify a particular date that the person must enter Australia, which must not be later than 3 months after the permit is given to the person. This could be used when agencies are prepared for the person's return, and there is certainty regarding the person's ability to return.

Subsection 12(5)(d) allows the Minister to specify the manner in which the person may enter Australia. This could include a specific port of entry, airline, or flight number. In practice, this condition would often be imposed together with a condition in subsections 12(5)(a)-(c).

Post-entry conditions

Imposing limited conditions on a person as part of a return permit will reduce threats to community safety by allowing law enforcement and security agencies to more easily monitor their activities in Australia. These conditions take effect immediately on a person's return to Australia. Importantly, the post-entry conditions are less restrictive than those available in orders made by an Australian court, such as in the control order regime in Division 2014 of the *Criminal Code*. The less restrictive nature appropriately reflects the fact that the person continues to be the subject of further investigation and assessment.

Subsection 12(6) provides for a number of post-entry conditions which the Minister can impose in a return permit.

There could be occasions where a person in relation to whom a TEO is made is also the subject to an arrest warrant. Currently, there are 27 arrest warrants for persons offshore. In this instance, the Minister may consider that no post-entry conditions are required due to the person being immediately arrested on arrival. An application being made for a control order may also result in no post-entry conditions being imposed.

Summary of offences

Offences for the relevant person

The Bill provides a strong deterrent to a person breaching a TEO or the conditions in a return permit. Each offence for the relevant person incurs a penalty of imprisonment for 2 years. This penalty is proportionate to the seriousness of the offence. For comparison, the penalty for breaching a control order condition is 5 years.

- Section 8 provides that entering Australia while a TEO is in force is an offence.
- Section 14 provides that the relevant person commits an offence if the person fails to comply with a condition in a return permit.
- Section 16 further provides an offence for knowingly providing false information or documents in response to a condition in the return permit to notify. There is an existing offence for providing false

information under Division 137 of the Criminal Code. However, the penalty for this offence is imprisonment for 12 months. Providing false information is as serious an offence as not providing the required information at all. Section 16 of the Bill provides a penalty equal to that if the person breached a condition in the return permit.

Permitting the use of a vessel or aircraft by person in contravention of a TEO or return permit

The integrity of the TEO scheme rests in part on the compliance of those transport owners or operators that would convey such persons to Australia (for example, airlines). Section 9 and 15 of the Bill create offences for an owner or operator of a vessel or aircraft who *knowingly* permits the vessel or aircraft to be used to bring a person to Australia in breach of a TEO, or in a way that contravenes a return permit.

A person or entity cannot commit an offence against these provisions if they *unknowingly* convey a person to Australia in breach of a TEO or return permit. Nor would they commit an offence if they acted contrary to the TEO or permit by mistake. The provision might apply, for example, where a person is knowingly conveyed to Australia without regard for the conditions specified in a return permit, such as return date. This action undermines the ability of Australian authorities to receive relevant persons at the border in a manner that is controlled, predictable, coordinated and well-managed. This provision would also apply to those with criminal intent, such as people smuggling operators.

Subsections 9(2) and 15(2) of the Bill provide that the offence provisions will not apply if the person subject to a TEO or return permit is being deported or extradited to Australia.

There are established mechanisms for the Australian Government to advise owners or operators of vessels or aircrafts not to convey an individual to Australia. With a high threshold of *knowledge* for these offences, the burden will be on Australian agencies to use these mechanisms to notify an owner or operator of an active TEO or the pre-entry conditions in a return permit.

The criminal offences in sections 9 and 15 of the Bill appropriately reflect the threat posed by Australians of counter-terrorism interest. There are existing offences for conveying a person who does not have a right of entry to Australia. Further information regarding current penalties for conveying a person without a right of entry to Australia is at Appendix B.

Implications for international relationships

Terrorism is a global challenge, and our relationships with international partners are critical to ensuring Australians remain safe from the threat of terrorism in a complex and evolving threat environment. Building on longstanding relationships, the Government will continue to work closely with international partners to manage and control the return of individuals subject to a TEO or return permit and minimise the risk to public safety.

The TEO scheme does not prevent foreign governments from deporting individuals subject to a TEO. Rather it aims to ensure that Australian security and law enforcement agencies are ready for the person's return and are able to put in place security arrangements. This will necessarily require negotiation with the relevant country to determine appropriate pre-entry conditions to be stipulated under a return permit. If a person is deported contrary to conditions in their TEO or return permit, the offences in sections 9 and 15 of the Bill for owners or operators of a vessel or aircraft who permit the person to travel will not apply.

The TEO scheme is intended to operate alongside existing extradition processes. It is aimed at ensuring the controlled return to Australia of individuals who represent a security threat, but whose extradition cannot be sought or secured. Should a person be extradited to Australia, they will be dealt with by law enforcement authorities in accordance with usual extradition processes. As with deportation, if the person is returned to Australia in breach of their TEO or return permit, the owner or operator of a vessel or aircraft carrying the person will not be criminally liable.

Safeguards and accountability

Protections for minors

The TEO scheme in the Bill applies to person aged 14 and above as minors continue to be prosecuted for terrorism offences. This aspect of the evolving threat environment has already been recognised and responded to in other counter-terrorism schemes. For example, changes to the control order scheme in 2016 lowered the minimum age for a control order to be sought from 16 to 14 years. Similarly, subsection 10(1) of the Bill provides that a TEO may only be made against a person who is 14 years or older.

Safeguards in the Bill for persons aged between 14 and 17 appropriately balance the need for community safety and the best interests of persons under the age of 18. The Bill reflect safeguards for minors found in the control order scheme. Subsections 10(3) and 12(4) provide that when making a TEO or issuing a return permit in relation to a person who is aged between 14 years and 17 years old, the Minister must have regard to:

- the protection of the community as the paramount consideration; and
- the best interests of the person as a primary consideration.

Variation and revocation of TEOs and return permits

The circumstances of an Australian citizen of counter-terrorism interest could change rapidly and significantly, particularly when that person is offshore. It is appropriate that the Minister be empowered to vary or revoke orders made. The person can also apply to the Minister to vary or revoke orders.

- Section 11 of the Bill provides that the Minister may revoke a TEO made in relation to a person. Revocation can be done either on the Minister's own initiative or on application by the person to whom the order relates.
- Section 13 provides that the Minister may revoke or vary the conditions in a return permit. The Minister's discretion is purposefully broad. This action can be taken on the Minister's own initiative, or on application by the person.

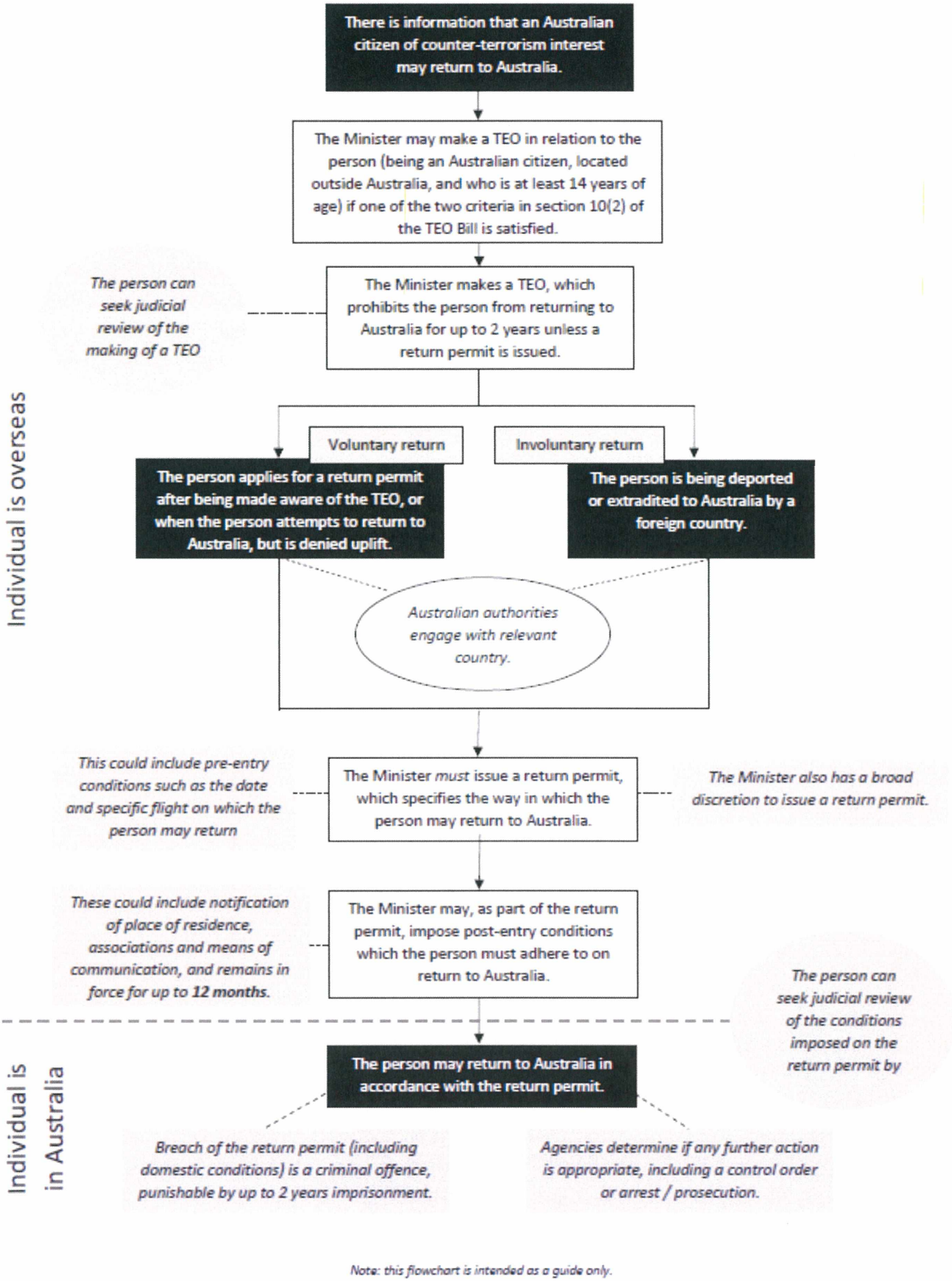
Conclusion

As the threat from terrorism continues to evolve, a single, explicit source of legislative power to exercise greater control over Australians of counter-terrorism interest returning to Australia will further protect the Australian community. Australians overseas participating in or supporting the conflict who seek to leave the conflict zone and return home present a real risk to Australian communities. The influence of ISIL is likely to last beyond its territorial defeat. It is essential that Australian authorities have the ability to comprehensively plan for and manage the arrival of people returning from the conflict zone.

The TEO scheme in this Bill will give authorities another important tool to manage the risks posed by returning Australians of counter-terrorism interest to Australia and Australian interests. This Bill enables authorities to manage the return of Australians of counter-terrorism interest in cooperation with international partners. It will also enhance agencies' ability to monitor the movements and activities of such people once they do return, to mitigate any risks they pose to the Australian community.

Appendices

Appendix A: TEO scheme flowchart



Note: this flowchart is intended as a guide only.

Appendix B: Examples of offences for carriers in the Migration Act[3]

PROVISION	ELEMENTS	DEFENCE	LIABILITY	PROOF	PENALTY PROVISION
Section 229 – Carriage of non-citizens to Australia without documentation	The master, owner, agent, charterer and operator of a vessel on which a non-citizen is brought into Australia each commit an offence against this section if the non-citizen: - is not in possession of evidence of a visa in effect; and - does not hold a special purpose visa (SPV); and - is not eligible for a special category visa (SCV); and - does not hold an enforcement visa; and - is a person to whom s 42(1) of the Act applies. A person commits as offence as a mater, owner, agent, charterer or operator of an aircraft if they bring a non-citizen who is the holder of a maritime crew visa into Australia by air.	Non-citizen was in possession of an evidence of a visa in effect that permitted them to travel to and enter Australia when they boarded or last boarded the vessel. Master of the vessel had reasonable grounds for believing that, when the non-citizen boarded or last boarded the vessel, the non-citizen was eligible for a SCV, holder of a SPV (or would be when entering Australia), holder of an enforcement visa (or would be the holder of an enforcement visa when entering Australia). The vessel only entered Australia because of the illness of a person on board, weather stress or other circumstances beyond the control of the master.	Absolute	Legal burden - Defence bears legal burden in relation to defence. Prosecution bears legal burden in relation to elements of offence. Evidential burden - Defence bears evidential burden that s 42(1) of the Act does not apply because of ss 42(2) or (2A) of the Act or a regulation made under s 42(3) of the Act.	Maximum penalty: Fine not exceeding 100 penalty units i.e. $21,000. Prescribed penalty: Natural person - $3000. Body corporate - $5000.
Section 230 – Carriage of concealed persons to Australia	The master, owner, agent, charterer and operator of a vessel each commit an offence against this section if an unlawful non-citizen is concealed on the vessel when it arrives in the migration zone. The master, owner, agent, charterer and operator of a vessel each commit an	Master of the vessel given notice to an officer that the non-citizen is on board as soon as the vessel arrives in the migration zone and prevents the non-citizen from landing before an officer has the opportunity to question the non-citizen.	Strict	Legal burden – Defence bears legal burden in relation to defence. Defence bears evidential burden that s 42(1) of the Act	Maximum penalty: 100 penalty units i.e. $21,000. Prescribed penalty:

[3] The table in this appendix is a summary only. The provisions can be perused in their entirety in the Act or the Regulations.

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offence against this section if a person who be an unlawful non-citizen if in the migration zone is concealed on the vessel when it arrives in Australia.		does not apply because of ss 42(2) or (2A) or a regulation made under s 42(3).	Natural person - $3000. Body corporate - $5000.

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