THE UNIVERSITY OF MELBOURNE

Peter McMullin Centre on Statelessness

Submission to the Parliamentary Joint Committee on Intelligence and Security

Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Mr Andrew Hastie MP

Chair

Parliamentary Joint Committee on Intelligence and Security

By email: pjcis@aph.gov.au

12th March 2019

Dear Chair,

Thank you for the opportunity to submit our views on the Counter-Terrorism (Temporary Exclusion Orders Bill) 2019. In our view there are serious concerns about the legitimacy of the measures contained in the Bill from the perspective of international law. Given the very short timeframe for reporting we have confined our analysis to the following key points:

1. The exclusion of nationals -even on a temporary basis- is inconsistent with the fundamental duty of states to re-admit their own nationals, an obligation owed both to individuals and to the international community at large;

2. The exclusion of nationals also raises issues under international human rights law including the right to return to one's own country and the rights of the child.

Our submission is that the Committee recommend that the Bill is not passed in its present form.

Please do not hesitate to contact the Peter McMullin Centre on Statelessness should you require further information.

Kind regards

[redacted]

Professor Michelle Foster

Director, Peter McMullin Centre on Statelessness

Melbourne Law School

Peter McMullin Centre on Statelessness
MELBOURNE LAW SCHOOL
The University of Melbourne | Victoria 3010 | Australia
Phone: +61 3 9035 6720 | Email: law-statelessness@unimelb.edu.au
law.unimelb.edu.au/centres/statelessness

THE UNIVERSITY OF MELBOURNE

Summary of the Bill

The bill introduces a temporary exclusion order scheme to delay Australians of counterterrorism interest who are of at least 14 years of age from re-entering Australia for up to 2 years. The scheme also introduces 'return permits' which must be provided to persons subject to a TEO if they are being deported to Australia or make an application to return. The scheme will enable a mechanism to impose conditions on the return of individuals who may pose a threat to the Australian community. Even in the case of a return permit, the conditions may include that the person must not enter Australia during a specified period, which can be up to 12 months after the permit is issued.

Submission 1: The Bill is inconsistent with the fundamental duty of states to readmit nationals

Nationality is the principal link between individuals and international law. It is well established and universally agreed that every state has a duty to readmit its nationals from abroad.[1] From the perspective of an individual, '[n]ationality secures re-entry into their state of nationality'.[2] Hence, international law imposes on states a duty to admit nationals expelled from other states and, by way of corollary, a duty not to expel nationals.[3]

This obligation is not however owed only to the nationals of a particular state but is an essential element of the duties of states to the international community[4]. In particular a state that has admitted temporarily the national of another state has acted in good faith under the assumption that the state of nationality will readmit its own national.[5] Hence if a state of nationality refuses to admit one of its nationals- whether that is through denationalisation or refusal to enter- such action 'affects the right of other States to demand from the State of nationality the readmission of its nationals...'[6]

As Weis explained,

---

[1] R Jennings and A Watts (eds), *Oppenheim's International Law*, 9th edn, volume I ('Peace'), Longman 1992, Part 2 p. 857-9, para.379: The right is that of protection over its nationals abroad… The duty is that of receiving on its territory such of its nationals as are not allowed to remain on the territory of other states". Boleslaw Adam Boczek, *International Law: A Dictionary* (Scarecrow Press, 2005) 188

[2] R Jennings and A Watts (eds), *Oppenheim's International Law*, 9th edn, volume I ('Peace'), Longman 1992, Part 2 p. 849, para.376.

[3] James Crawford, *Brownlie's Principles of Public International Law* (Oxford University Press, 7th ed, 2008) 519.

[4] Guy S Goodwin-Gill, Deprivation of Citizenship, Statelessness, and International Law: More Authority (If It Were Needed…) (5 May 2014), 55-6.

[5] Ibid.

[6] P. Weis, Nationality and Statelessness in International Law, Alphen aan den Rijn: Sijthoff & Noordhoff, 2nd edn., 1979, 125, 126. See also in the context of denationalisation, Guy S Goodwin-Gill, Deprivation of Citizenship Resulting in Statelessness and its Implications in International Law: Opinion (12 March 2014), 55.

> If a State were to resort to denationalisation of nationals abroad solely for the purpose of denying them readmission or to prevent their return..., such action taken in *fraudem juris internationalis* would be contrary to international law not only as an abuse of right but as a direct infringement of the sovereign rights of the State of residence, i.e. of the right to expel aliens, which follows from its territorial supremacy.'[7]

The *Counter-Terrorism (Temporary Exclusion Orders) Bill* would implement a unilateral measure that is concerned only with the prevention of terrorism related offences in Australia, but does not account for the rights of states to expel Australian nationals whom Australia has an obligation to admit. Even where a state seeks to deport an Australian national to Australia, the Minister under this legislation would have the power to impose the condition 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'. (s 12((5)(a)). **There is no justification in international law for unilaterally deferring the rights of other states to deport Australian nationals directly to Australia.**

Submission 2: The Bill interferes with the right to return to 'one's own country' under international human rights law

The Bill imposes a limitation on the right to return to one's own country- protected under Article 12(4) of the *International Covenant on Civil and Political Rights* but seeks to justify it on the basis that it is 'reasonable, necessary and proportionate to the protection of national security and public order.'[8]

Article 12(4) of ICCPR provides that no one shall be arbitrarily deprived of the right to enter his own country. While clear on its terms, the United Nations Human Rights Committee (UN HR Committee), in its General Comment No 27, has confirmed that this right includes the right to return after having left one's own country.[9]

It is important to recall that Article 12(4) is not subject to any limitation, even on national interest or security grounds.[10] Article 12(3) of the ICCPR allows for limits to Articles 12(1)-(2), as follows:

> The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order

[7] P. Weis, Nationality and Statelessness in International Law, London: Stevens & Sons Ltd., 1956, 56–7.
[8] Statement of Compatibility with Human Rights, p 21

[9] 'United Nations Human Rights Committee, General Comment No 27: Article 12 (Freedom of Movement) 67th Sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) 5 [19].
[10] Michelle Foster, Jane McAdam, Davina Wadley 'Part Two: Prevention and Reduction of Statelessness in Australia – An Ongoing Challenge' (2016) 40 *Melbourne University Law Review* at 497.

(ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant.

However this limitation **does not apply to Article 12(4)** and hence the justifications set out by the government in the Statement of Compatibility with Human Rights- which focus on national security and public order- are not relevant to Article 12(4).

Although it is true that the deprivation must be arbitrary to violate Article 12(4), the UN Human Rights Committee considers that "the reference to the concept of arbitrariness in this context is intended to emphasize that it applies to all State action, legislative, administrative and judicial; it guarantees that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances. The Committee considers that there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable."[11]

In *Nystrom v Australia* the UN Human Rights Committee reiterated that 'there are few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable.'[12]

In our view the justifications put forward by the government **do not withstand scrutiny** when regard is had both to the text of the ICCPR and its interpretation.

Submission 3: The Bill is inconsistent with the Convention on the Rights of the Child

Article 3 of the Convention on the Rights of the Child provides 'in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration' .

When exercising the power to issue a TEO or return permit the Minister must take into account as a primary consideration the best interests of the child in circumstances where the subject of the TEO would be 14-17 years of age. However in both cases 'the protection of the community' is 'the paramount consideration'.

---

[11] Human Rights Committee, General Comment No 27; Article 12 (Freedom of Movement), 67th sess, UN Doc CCPR/C/21?Rev.1/Ass.9 (2 November 1999) [20]-[21]. This was emphasised again in both *Nystrom v Australia* and *Warsame v Canada.*

[12] Human Rights Committee, Views: Communication No 1557/2007, 102nd sess, UN Doc CCPR/C/102/D/1557/2007 (1 September 2011) '*Nystrom v Australia*'). *See also* Daniel Kanstroom, 'The Right to Remain Here as an Evolving Component of Global Refugee Protection: Current Initiatives and Critical Questions' (2017) 5(3) *Journal on Migration and Human Security* at 614, 630.

The Committee on the Rights of the Child has explained that the 'best interests' is a 'threefold concept, being a substantive right, a fundamental interpretive legal principle and a rule of procedure.[13] The Committee has further explained that the expression 'primary consideration' means that 'the child's best interests may not be considered on the same level as all other considerations'. Further, 'viewing the best interests of the child as 'primary' requires a consciousness about the place that children's interests must occupy in all actions and a **willingness to give priority to those interests in all circumstances**, but especially when an action has an undeniable impact on the children concerned'.[14]

In our view providing in the legislation for a conflicting interest to automatically trump the best interests of the child principle is not consistent with the Convention on the Rights of the Child.

[13] *General Comment No 14 on the rights of the child to have his or her best interests taken as a primary consideration* (2013), CRC/C/GC/14, para 6.

[14] Ibid at para 40