



**Law Council**  
OF AUSTRALIA

*Office of the President*

**8 March 2019**

Mr Andrew Hastie MP  
Chair  
Parliamentary Joint Committee on Intelligence and Security  
PO Box 6201  
Parliament House  
CANBERRA ACT 2600

By email: [pjicis@aph.gov.au](mailto:pjicis@aph.gov.au)

Dear Chair

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

Thank you for the opportunity to contribute to the Parliamentary Joint Committee on Intelligence and Security's inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth). Please find attached the Law Council's submission to the inquiry.

I note that the timeframe for submissions has been particularly short for this inquiry. Approximately ten business days have been provided for organisations to prepare submissions. The Law Council does not consider that this is an adequate timeframe for comprehensive submissions to be provided to the Committee to ensure adequate Parliamentary scrutiny of such significant measures. The Law Council is willing to supplement its submission as necessary and required by the Committee.

Please contact Dr Natasha Molt, Director of Policy [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] [REDACTED] if you require further information or clarification.

Yours sincerely

[REDACTED]

**Arthur Moses SC**  
President



Law Council  
OF AUSTRALIA

# Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

The Parliamentary Joint Committee on Intelligence and Security

8 March 2019

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## About the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2019 Executive as at 1 January 2019 are:

- Mr Arthur Moses SC, President
- Mr Konrad de Kerloy, President-elect
- Ms Pauline Wright, Treasurer
- Mr Tass Liveris, Executive Member
- Dr Jacoba Brasch QC, Executive Member
- Mr Tony Rossi, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.

## Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, its National Human Rights Committee, the Law Society of South Australia and the Law Society of New South Wales in the preparation of this submission.

## Executive Summary

1. The Law Council welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (**the Bill**).
2. This Bill seeks to create a new scheme for the making of a Temporary Exclusion Order (**a TEO**) and a Return Permit (**Permit**) in relation to Australian citizens who are overseas and seeking to return to Australia. The TEO scheme is designed to apply to people returning from a "conflict zone" and where the Minister of Home Affairs (**the Minister**) "suspects on reasonable grounds" that the making the order is necessary to substantially assist in preventing terrorism-related activity upon their return to Australia. The order can be in force for up to two years from the date of making the order.
3. The Law Council does not support the establishment of the proposed TEO scheme and recommends that the Bill should not be passed. It holds significant rule of law and human rights concerns in respect of the proposed TEO scheme. While matters of national security and protecting Australians from terrorism are of the utmost importance, the Australian Parliament must ensure responses are necessary, proportionate and consistent with Australia's international obligations.
4. The proposed TEO scheme is broad and it appears that the Minister may make a TEO in the absence of an assessment by the Australian Security Intelligence Organisation (**ASIO**) and without adequate judicial oversight. Further, onerous conditions may be attached to Permits by the Minister alone where terms of imprisonment are applicable where there is a breach of a TEO or Permit, including in respect of children as young as 14 years of age. Even where a risk assessment is provided by ASIO, a TEO may be made where there is only an "indirect" risk to security rather than a direct risk.
5. The introduction of TEOs could have the effect of rendering an Australian unable to legally enter Australia – or indeed any other country if they are not a citizen of another country and hence have no right to enter another country – while the order is in place. The Law Council also does not support the application of the Bill to children and considers that the laws may be inconsistent with Australia's international human rights obligations. There is also a lack of precision as to the grounds required to make a TEO and inadequate provision for procedural fairness.
6. However, if the Bill is to proceed, the Law Council makes the following recommendations:
  - proposed subsection 12(8) be amended so that the Minister is required to justify each individual condition as reasonably necessary, appropriate and adapted;
  - the TEO scheme should not apply to children;
  - if the TEO scheme is proposed to apply to children, appropriate special rules should apply in a similar manner as for control orders and preventative detention orders;
  - there be a requirement for a TEO to be made by a court rather than by the Minister;

- the Bill be amended to provide much stronger safeguards for the provision of procedural fairness including that a TEO cannot be made until the person has been served with a copy of the application and given the opportunity to be heard in relation to the application. There should also be an ability for merits review of the decision;
- consideration be given to the means by which a person can seek to have judicial review of the decision to issue a TEO while outside Australia.
- there be inclusion of additional safeguards and provision for complaint and reporting mechanisms in relation to the TEO scheme;
- there be greater restriction and precision in the grounds for making a TEO than is currently in the proposed paragraph 10(2)(b) of the Bill;
- only one TEO can be issued unless the court determines there are 'exceptional circumstances' that would warrant an extension of the TEO;
- the circumstances in which the Minister may give a Return Permit should be set out in the primary legislation rather than by way of delegated legislation;
- there be provision for judicial review of the decision to grant or refuse a Return Permit, including the conditions to be attached to the Return Permit;
- the offence provisions in relation to entering Australia when a TEO is in force require the prosecution to prove the person had knowledge of the existence of the order; and
- there be scope for independent review of the operation of the scheme and reporting obligations to Parliament.

## The proposed Temporary Exclusion Order Scheme

7. Proposed section 10 of the Bill sets out the basis upon which the Minister may make a TEO. Under proposed subsection 10(1), a TEO may be made in relation to a person if they are an Australian citizen who is located outside Australia and is at least 14 years of age and a return permit is not in force in relation to the person. Under proposed paragraph 10(2)(a), the Minister must not make a TEO in relation to a person who satisfies the criteria in subsection 10(1) unless the Minister suspects on reasonable grounds that the making of the order would substantially assist in one or more of the following:
  - (a) preventing a terrorist attack;
  - (b) preventing training being provided to, received from or participated in with a listed terrorist organisation;
  - (c) preventing the provision of, support for, or facilitation of a terrorist act; or
  - (d) preventing the provision of, support or resources to an organisation that would help the organisation engage in an activity described in paragraph (a) of the

definition of a “terrorist organisation” in subsection 102.1(1) of the *Criminal Code Act 1995* (Cth) (**the Criminal Code**)<sup>1</sup> or;

8. The Minister may also make a TEO if the person has been assessed by the Australian ASIO to be a direct or indirect risk to security<sup>2</sup> for reasons related to politically motivated violence<sup>3</sup> as provided by proposed paragraph 10(2)(b) of the Bill.
9. These circumstances are mutually exclusive, meaning that the Minister can order a TEO under proposed paragraph 10(2)(a) in the absence of an assessment by ASIO in relation to the person. However, the Bill however is silent on what happens if ASIO subsequently reaches a different conclusion to the Minister in respect of whether the person is a risk to security for reasons related to politically motivated violence.
10. The TEO can be made for a period of up to two years. As soon as practicable after a TEO is made, the Minister must “cause such steps to be taken as are, in the opinion of the Minister, reasonable and practicable, to bring to the attention of the person the content of the order”.
11. If the person is being deported to Australia or makes an application in a specified format, the Minister must give the person a Return Permit that allows them to enter Australia. The Minister has discretion to attach a number of “pre-entry” and “post-entry” conditions to a Return Permit, including that the person must not return to Australia within 12 months of the Return Permit being issued, that they must return on a specified day, and that – once they are back in Australia – the person must provide updates as to their place of residence, employment, and intention to use certain telecommunications technology. The ‘post-entry conditions’ that can be imposed on a Return Permit by the Minister are listed in proposed subsection 12(6), which include onerous reporting obligations for the person subjected to the Return Permit, such as notifying a ‘specified person’ of:
  - (a) the person’s address, place of employment or place of education;
  - (b) any contact with a specified individual;
  - (c) any intention to travel interstate or overseas;
  - (d) the use of and details of telecommunications;
  - (e) any intention to apply for a travel document; or
  - (f) any change of these circumstances within 24 hours.
12. A person could also be required to surrender an Australian travel document to a specified person or body, or be barred from applying or obtaining an Australian travel document.
13. It is a criminal offence if the person fails to comply with the conditions of the permit or if the person provides false and misleading information or documents in response to a

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<sup>1</sup> *Criminal Code Act 1995* (Cth) s 102.1(1): the definition of a terrorist organisation is: (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

<sup>2</sup> Within the meaning of the *Australian Security Intelligence Organisation Act 1979* (Cth).

<sup>3</sup> Counter Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) proposed section 10(2)(b). The definition of ‘politically motivated violence’ is within the meaning of *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 definition of ‘politically motivated violence’.



condition listed on a Return Permit.<sup>4</sup> It is also an offence for a person with responsibility for a vessel or aircraft to permit that vessel or aircraft to be used to convey a person to Australia knowing the person is entering Australia in contravention of a condition of a Return Permit that is in force.<sup>5</sup> These offences attract a maximum penalty of two years' imprisonment.

14. The TEO scheme will make it a criminal offence for a person to enter Australia in contravention of a TEO. The penalty for entering Australia if a TEO is in force is two years' imprisonment.

## Proportionality

15. The Explanatory Memorandum accompanying the Bill states that its purpose is "to ensure that if these Australians [who have travelled to joint terrorist organisations overseas] do return, it is with forewarning and carefully managed by authorities".<sup>6</sup> The Second Reading Speech delivered by the Minister regarding the Bill, makes reference to the "constantly evolving [terrorist] threat" facing Australia.
16. However, the Explanatory Memorandum to the Bill and Second Reading Speech do not adequately justify why a TEO scheme is a necessary, proportionate and legitimate response to the threat of terrorism in Australia. They do not address why the wide array of counter-terrorism powers already available are not able to meet the current national security needs of Australia.
17. The Law Council notes that, Division 104 and 105 of the Criminal Code allow considerable obligations, prohibitions and restrictions to be imposed on a person in the form of a control order or preventative detention order to achieve the purpose of protecting the public from a terrorist act or preventing the provision of support for a terrorist act. Further, effective border control mechanisms (such as Customs and Immigration procedures at ports of entry) should also provide effective safeguards in respect of managing the entry and exit of individuals who may represent a risk to security.

## Relevant international rights and obligations

18. Article 12(4) of the *International Covenant on Civil and Political Rights (ICCPR)*, which Australia has ratified, stipulates that "[n]o one shall be arbitrarily deprived of the right to enter his own country". In its General Comment 27 of 1999, the UN Human Rights Committee (**UN HR Committee**) provided guidance as to the interpretation of Article 12(4), stating that "[t]he right of a person to enter his or her own country recognizes the special relationship of a person to that country."<sup>7</sup> The UN HR Committee went on to state that:

*The reference to the concept of arbitrariness in this context [in the ICCPR] 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. A State party must not, by stripping a person*

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<sup>4</sup> Ibid proposed section 14, 16.

<sup>5</sup> Ibid proposed section 15.

<sup>6</sup> Explanatory Memorandum, *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth)* 16 [1].

<sup>7</sup> United Nations Human Rights Committee, *CCPR General Comment No. 27: Article 12 (Freedom of Movement)* UN GAOR, UN Doc CCPR/C/21/Rev.1/Add.9 ) (2 November 1999).

*of nationality or by expelling an individual to a third country, arbitrarily prevent this person from returning to his or her own country.*

19. Article 3(1) of the *United Nations Convention on the Rights of the Child (UN CRC)*, which Australia has also ratified, provides that:

*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.*

20. By providing that the best interests of the child are “a primary consideration” rather than “the” primary or the paramount consideration, Article 3(1) of the UN CRC allows decision-makers to balance the best interests of the child against other considerations.<sup>8</sup> In its General Comment 13 of 2013, the UN Committee on the Rights of the Child considered Article 3(1) of the UN CRC, and advised that:

*If harmonization [between the rights of other persons and the child's best interests] is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations.<sup>9</sup>*

21. The High Court of Australia considered the implications of Article 3(1) of the UN CRC in *Minister of State for Immigration and Ethnic Affairs v Ah Hin Teoh [1995] HCA 2* (“*Ah Hin Teoh*”) in the context of a father’s deportation, and the impacts on his children. Mason CJ and Deane J stated at 39 that:

*A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.<sup>10</sup>*

## Concerns with the Bill

### Potential incompatibility with Article 12(4) of the ICCPR

22. As outlined above, Article 12(4) of the ICCPR provides that no one shall be “arbitrarily” deprived of the right to enter his or her own country, and the UN HR Committee considers there are “few, if any, circumstances in which deprivation of the right to enter one's own country could be reasonable”. The Statement of Compatibility with Human Rights accompanying the Bill states that the limitation it places on an individual’s right to enter Australia is not arbitrary for the following reasons.

*The preconditions for issuing a TEO and return permit are provided for by law and is predictable, and is justified by being reasonable, necessary and proportionate. Further, the Minister cannot make a TEO unless they suspect on reasonable grounds that making the order would substantially assist in one of the purposes listed in s 330.3(2)(a) or that the person has been assessed by ASIO to be direct or indirect risk to security for reasons related to politically motivate violence. Importantly, the Minister must issue a return permit upon application, which facilitates that Australian's controlled return within 12 months.*

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<sup>8</sup> Australian Human Rights Commission, *Human Rights Brief 1: The Best Interests of the Child* (March 1999) <<https://www.humanrights.gov.au/publications/human-rights-brief-no-1>>.

<sup>9</sup> United Nations Committee on the Rights of the Child, *General comment No. 14: On the Right of the Child to have His or Her Best Interests Taken as a Primary Consideration*, UN GAOR, UN Doc CRC /C/GC/14, 39 (29 May 2013) art 3(1).

<sup>10</sup> *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh [1995] HCA 20*, 39.

23. Notwithstanding this defence of the Bill's compatibility with Article 12(4) of the ICCPR, the Law Council is concerned at the breadth of the grounds under which the Minister can make a TEO, preventing a citizen from returning for up to two years, without being required to determine whether that individual has citizenship or residency status in a different country.
24. Proposed subsection 10(2) of the Bill requires that the Minister "suspect on reasonable grounds" that the TEO would assist in preventing a terrorist act, prevent training from being provided to a terrorist organisation, prevent the provision of support for a terrorist act, or prevent the provision of support to an organisation that would help it engage in a terrorist act. The broad scope of this section, coupled with the speculative nature of the grounds for applying a TEO, and the lack of any right to merits review, raise the possibility that the operation of the Bill could amount to arbitrary deprivation of the right to enter one's country of citizenship. The Law Council and the Law Society of NSW note that the provisions of this Bill can apply to people who have never been convicted of an offence.
25. Further, the Explanatory Memorandum sets out that proposed paragraphs 10(2)(a) and (b) are mutually exclusive, and that paragraph 10(2)(a) enables the Minister to take preventative steps in the absence of an ASIO assessment.<sup>11</sup> The Bill, however, is silent on what happens if ASIO subsequently reaches a different conclusion to the Minister in respect of whether the person is a risk to security for reasons related to politically motivated violence.
26. Proposed subsections 10(5) and 11(5) of the Bill leave open the possibility for the Minister to issue an indefinite series of TEOs against a person, especially as the Minister may revoke Return Permits at any time on their own initiative (proposed subsection 13(1)). As there is nothing in the Bill to limit this possibility, this aspect of the Bill consistent with the assertion made in paragraph 27 of the Statement of Compatibility with Human Rights that TEOs will not exclude the subject of a TEO from entering Australia permanently.
27. The Law Council is concerned about subsection 10(6) (providing notice of the TEO to the person), given that a person subject to a TEO may be liable for imprisonment for two years if they enter Australia while subject to a TEO (proposed section 8). Proposed subsection 10(6) requires only that the Minister take such steps as are reasonable and practicable, in the Minister's opinion, to bring to the person's attention the content of a TEO, which could include electronic communications.<sup>12</sup> There is no requirement of effective notification. Further to this point, proposed section 13, which deals with the variation or revocation of a Return Permit, sets out in similar terms the Minister's notification obligations (proposed subsection 13(2)). A variation or revocation of a Return Permit takes immediate effect when the Minister varies or revokes the permit (proposed subsection 13(3)). However, in circumstances where the Minister has revoked a Return Permit and a person is already in transit and notice has not been effective, that person may then be liable for a two-year imprisonment term.

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<sup>11</sup> Explanatory Memorandum, *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth)* 6 [30].

<sup>12</sup> *Ibid* 7 [35].

## Rights to freedom of movement, freedom of expression, liberty and security of person, association, work, education and participation in cultural life

28. In addition to the concerns set out in respect of the TEO scheme, the Law Council has significant concerns about the proposed Return Permits scheme, both in respect of potential executive overreach, and in respect of various human rights.
29. Proposed subsection 12(6) permits the Minister to attach a very broad range of conditions to a Return Permit. For example, proposed paragraph 12(6)(j) could require that if the person accesses or uses (or intends to use) “specified forms of telecommunication or other technology” in Australia, the person must: (1) notify a specific person or body of the use or access or intended use or access; and/or (2) provide a specified person or body with sufficient information to enable the specific telecommunications service, account or device to be identified. The Explanatory Memorandum sets out a very broad range of examples of the types of information about telecommunication devices that may be required.<sup>13</sup> This includes phone numbers, international mobile equipment identity numbers, SIM cards, email and all social media accounts, and computers or tablet devices. Presumably this would include the use of any messaging services, online or otherwise, whether those communications are sent or received, solicited or unsolicited.
30. Given how onerous such conditions might be in respect of individual liberty, proposed subsection 12(8) sets out a very low threshold test for the imposition of these conditions – only that the Minister be satisfied that the conditions are reasonably necessary, and reasonably appropriate and adapted. The Minister is not even required to justify each individual condition as reasonably necessary, appropriate and adapted, only the conditions taken together.<sup>14</sup> The Law Council queries whether it is appropriate for the Minister to be able to exercise such a broad discretion, given that non-compliance may result in a two-year imprisonment term. There is also the potential for an individual to be, at the same time, subject to other counter-terror schemes including control orders and preventative detention orders.

### Recommendation:

- **Proposed subsection 12(8) be amended so that the Minister is required to justify each individual condition as reasonably necessary, appropriate and adapted.**

## Potential impact of the Bill on children

31. The inclusion of children as young as 14 within the scope of the Bill is of serious concern. The Law Council notes that the Bill does not include additional protections for children who are subject to a TEO, which are present in other elements of the counter-terrorism framework in Australia applicable to children under 18 under the Criminal Code, including special rules and safeguards for children (such as provisions relating to preventative detention orders). For example, section 104.28 of the Criminal Code provides for ‘special rules for young people’ which enables in control order cases the court to appoint a lawyer to represent the young person on the hearing of the application (subsection 104.28(4)). Further, in preventative detention order cases

<sup>13</sup> Ibid 10 [50].

<sup>14</sup> Ibid 10 [53].

section 105.39 of the Criminal Code provides for 'special rules' for a person under the age of 18 or a person incapable of managing their own affairs. A person under the age 18 cannot be detained with adults (section 105.33A).

32. As noted above, both the UN HR Committee and the High Court of Australia have affirmed the best interests of the children should be accorded high priority, and are not to be viewed simply as one of many competing priorities. The Law Society of NSW has submitted that by explicitly relegating the best interests of the child beneath the protection of the community in subsection 10(3), the Bill may not be in compliance with Australia's obligations under the ICCPR. Furthermore, the Law Society of NSW is concerned that by specifying the protection of the community is the "paramount consideration", while the best interests of the child are a "primary consideration", the Bill impinges upon the role of relevant decision-makers, as outlined by Mason CJ and Deane J in *Ah Hin Teoh*, namely to "look to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it".
33. Article 12 of the UN CRC provides for a child who is capable of forming and expressing their own view, to participate in the decision-making process. However, the scheme would operate in the absence of procedural fairness, effectively while the child would be abroad and excluded from any effective participation in the decision-making process. The Bill may also interfere with the right of the child to education as provided by Article 28 of the CRC by excluding them from participation in engaging in education in their country of citizenship.

**Recommendations:**

- **The TEO scheme as proposed in the Bill not be introduced as it may be inconsistent with Australia's international human rights obligations.**
- **If the TEO scheme is to proceed, it should not apply to children.**
- **If the TEO scheme is proposed to apply to children, appropriate special rules should apply in a similar manner as for control orders and preventative detention orders.**

## Constitution

34. TEOs may be issued without adequate judicial oversight, onerous conditions may be attached to Return Permits by the Minister alone, and terms of imprisonment are applicable where there is a breach of either, including in respect of children as young as 14 years of age.
35. The Law Society of NSW is deeply concerned that the proposed scheme represents significant executive overreach. In respect of both TEOs and Return Permits, the Law Society of NSW has noted that in the case of *Djalil v MIMIA* [2004] FCAFC 151, the Full Court of the Federal Court of Australia affirmed that:

*It is a fundamental principle of the Australian Constitution, flowing from Chapter III, that the adjudication and punishment of criminal guilt for offences against a law of*



*the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth.*<sup>15</sup>

36. The Full Court went on to state that Commonwealth legislation will collide with Chapter III of the Constitution if “on its true construction, it authorises the Executive to impose punishment for criminal conduct”.<sup>16</sup>

## Procedural fairness

37. There are features of the Bill which appear to interfere with established common law principles and procedural fairness. Furthermore, the Bill provides overly broad powers to the Minister to issue a TEO. The Law Council considers that such a decision should be made by a judicial officer rather than by the use of Executive power.
38. Proposed section 16, which provides that the consequence of providing false or misleading information or documents in response to a condition imposed on a Return Permit is an offence, sets out that the defendant bears the evidential burden of proof that the information or documents provided are not false or misleading in a material particular (proposed subsection 16(2)). The penalty for failing to prove that the information or documents are not false or misleading in a material particular is a two-year imprisonment term.
39. Of greater concern is proposed section 17 which states that “[t]he Minister is not required to observe any requirements of procedural fairness in exercising a power under this Act”. Given that proposed subsection 10(7) explicitly states that TEOs are not legislative instruments for the purposes of the *Legislation Act 2003* (Cth) and given the significance of the measures and penalties proposed by the Bill, if the Bill passes, it should be amended to require the Minister to follow procedural fairness, and should also provide for merits review of decisions taken under the Bill.
40. While the Explanatory Memorandum states that a person subject to a TEO or Return Permit will have access to judicial review, if procedural fairness safeguards are explicitly removed by the Bill, the Law Council queries the effectiveness of such review in safeguarding the rights of individuals.
41. Administrative and judicial review become particularly critical accountability mechanisms when parliamentary and legislative accountability mechanisms, such as public scrutiny, repeal, sunseting and disallowance, are not applicable, as is the case in this instance.
42. This is of particular concern, especially as it is proposed that this scheme will apply to children as young as 14.
43. The Statement of Compatibility with Human Rights suggests that the exclusion of procedural fairness is required, lest the policy intention of the Bill be frustrated (at [54]). The Law Council suggests that if this is indeed the case, this indicates that the desired policy settings are not compatible with the rule of law.

## Judicial Review

44. The Law Council notes that proposed section 17 of the Bill provides that while the Minister is not required to observe the requirements of procedural fairness, a person who is subject to a TEO or return permit will have access to judicial review.

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<sup>15</sup> *Djalil v MIMIA* [2004] FCAFC 151, 58.

<sup>16</sup> *Ibid* 73.

Notwithstanding this provision the Law Council considers that judicial review will be limited with respect to TEO's for the following reasons:

- (a) the person will be outside of Australia when the order is made and prevented from returning to Australia to access judicial review, to seek legal advice or to obtain support from family members;
- (b) the Minister's powers are extensive in scope, broadly defined and concern matters of national security upon which the courts have little choice but to defer to the Executive and its agencies;
- (c) TEOs are not subject to procedural fairness guarantees or any other safeguards or prescribed criteria that could be relied upon by an applicant to challenge a TEO; and
- (d) the person subject to a TEO is not entitled to reasons and, even if information was requested, meaningful information is unlikely to be provided because of claims concerning the impact on national security.

45. The Law Council therefore considers the opportunity for judicial review for a person subject to a TEO will be limited and inadequate.

### **When a Return Permit must be given**

46. The Law Council is concerned that the circumstances in which the Minister would be required to issue a Return Permit under proposed paragraph 12(1)(a) would be defined by legislative instrument, rather than in the proposed Act. Minister would be required to give a person a Return Permit where the person has applied to the Minister, in a form and manner specified by the rules, for the permit.<sup>17</sup> Pursuant to proposed section 19 of the Bill, the Minister has the power to make rules by legislative instrument.
47. Upholding the rule of law requires that Executive powers be carefully defined by law, such that it is not left to the Executive to determine for itself what powers it has and when and how they may be used. In particular, where legislation allows for the Executive to issue subordinate legislation in the form of regulations, rules, directions or like instruments, the scope of that delegated authority should be carefully confined and remain subject to parliamentary supervision.
48. The Bill does not confine the power that would be vested in the Minister to make rules relating to the form and manner by which a person must apply for a Return Permit. It is also unclear whether there would be any provision for judicial review of the decision of the Minister to grant or refuse an application for a Return Permit.
49. The Law Council considers that these requirements would be more appropriately set out in the Bill. There should also be a provision for judicial review of the decision of the Minister to grant or refuse an application for a Return Permit.
50. Proposed subsection 12(6) of the Bill permits the Minister to attach a very broad range of conditions to a Return Permit. Given how onerous such conditions might be in respect of individual liberty, the Law Council notes the proposed subsection 12(8) sets out a very low threshold test for the imposition of these conditions – only that the

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<sup>17</sup> Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) proposed section 12(1)(a).

Minister be satisfied that the conditions are reasonably necessary, and reasonably appropriate and adapted.

51. The Law Council does not support such a measure that permit the Minister to be able to exercise such a broad discretion, given that non-compliance may result in two year imprisonment.

## **Accountability and reporting mechanisms**

52. The Law Council also notes the absence of additional safeguards such as review mechanisms and accountability measures such as the provision for complaint to the Commonwealth Ombudsman, the Independent National Security Legislation Monitor or reports to Parliament.

### **Recommendations:**

- **The power to make a TEO be vested in a Court rather than with the Executive.**
- **There be a requirement for greater safeguards, including better provision, for procedural fairness before a TEO can be issued.**
- **Consideration be given to the means by which a person can seek to have judicial review of the decision to issue a TEO while outside Australia.**
- **There be inclusion of additional safeguards and provision for complaint and reporting mechanisms in relation to the TEO scheme.**
- **The grounds to be relied on for making an order should be more precise and clearly defined.**
- **Only one TEO can be issued unless the court determines there are 'exceptional circumstances' that would warrant an extension of the TEO.**
- **The circumstances in which the Minister may give a Return Permit should be set out in the primary legislation rather than by way of delegated legislation.**
- **There be provision for judicial review of the decision to grant or refuse a Return Permit, including the conditions to be attached to the Return Permit.**

## **Offence provisions**

53. The Bill makes it a criminal offence for a person to enter Australia if that person is subject to a TEO, without the requirement that the person be aware of the existence of the TEO.
54. Under the scheme once a TEO is made proposed section 8 of the Bill would make it an offence for a person who is subject to a TEO in to enter Australia and the offence is punishable by up to two years imprisonment.



55. However, there is not a requirement for the person to know that they are subject to a TEO only that they are reckless as to the circumstance that a TEO is in force in relation to the person.
56. The Law Council recommends that proposed section 8 be amended so that a person is only guilty of an offence under section 8 if there is proof that the person was aware of the order with which they were required to comply.

**Recommendation:**

- **In relation to any offence provisions, it be a requirement that the person is only guilty if they knowingly contravened a TEO such that the prosecution is required to prove the person was aware of the existence of the TEO or condition(s) of the Return Permit.**