



## **Australian Government**

Australian Government response to the  
Parliamentary Joint Committee on Intelligence  
and Security report:

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

JULY 2019

## Recommendation

### **Recommendation 1:**

The Committee recommends that the Bill be amended to require the Minister, before making a temporary exclusion order that requires the person to surrender their Australian passport or to be prevented from applying for or obtaining a new Australian passport in accordance with subclause 10(4) of the Bill, to have regard (to the extent that information is available) to whether the person has a lawful ability to stay in their current location for the duration of the order, whether the person has a lawful ability to enter a third country (for example, due to holding a passport or residency visa for that third country), and the likelihood of the person being detained, mistreated or harmed if the person has no lawful ability to stay in their current location, and no lawful ability to enter a third country, for the duration of the order.

While not restricting the ability for the Minister to issue an order, this will ensure the individual circumstances of the person are taken into account, including the likelihood of a person being detained or being unable to escape a dangerous conflict zone to seek safety in a third country.

### **Recommendation 2:**

The Committee recommends that the Bill be amended to require the Minister to give a return permit to a person 'as soon as practicable' upon receipt of an application or when a person is being deported to Australia.

## Government Response

### **The Government accepts this recommendation in principle.**

A temporary exclusion order (TEO) does not exclude a person from returning to Australia permanently, and thus does not require a person stay in the country in which they are located indefinitely. The person is entitled to apply for a return permit to return to Australia, which must be given by the Minister.

However, it is appropriate that the Minister consider these circumstances when determining the (pre-entry) conditions of a return permit, including the time and manner in which a person must re-enter Australia. The Government has amended the Bill so that the Minister must have regard to the circumstances outlined in this recommendation when determining conditions in a return permit under subsection 12(4) (pre-entry conditions), to the extent that the information is available. The effect of this amendment will be that the Minister will have regard to these circumstances when determining the pre-entry conditions of a return permit.

### **The Government accepts this recommendation.**

The Government has amended the Bill so that the Minister is required to give a return permit to a person within a reasonable period upon receipt of an application or when a person is being deported to Australia. This standard will ensure operational agencies are given enough time to assess the risks posed by the person and make appropriate arrangements for their return, including providing recommendations to the Minister on the proposed conditions of the return permit before it is given. This standard is consistent with the United Kingdom's legislation for a TEO scheme.

**Recommendation 3:**

The Committee recommends that the Bill be amended to require the Minister, when imposing or varying the conditions on a return permit, to have regard to the impact of the conditions on the person's individual circumstances, including in relation to their dependents (if any), and be satisfied that the conditions are 'reasonably necessary, and reasonably appropriate and adapted' on an individual and a holistic basis.

This will more closely align the Minister's imposition of conditions on a return permit with the matters that a court must have regard to when imposing conditions under the existing control order regime, and also to ensure the potential impact of conditions on the children of return permit applicants are taken into account.

**Recommendation 4:**

The Committee recommends that the Bill's special requirements in relation to children aged 14 to 17 – requiring the Minister, before making a temporary exclusion order or imposing conditions on a return permit, to have regard to the protection of the community as the paramount consideration and the best interests of the person as a primary consideration – be retained.

To enhance these protections, the Committee additionally recommends that, in determining the best interests of the child, the Minister be required to take into account (to the extent that information is available) the same matters that a court is required to take into account under section 104.4(2A) of the Criminal Code when determining the best interests of the child in relation to a control order. This includes the child's age, maturity, sex, background, physical and mental health, right to receive an education, and other matters.

The Minister should also be required to give the child's parent or guardian a copy of each document and notification that is required under the Bill to be given to the child.

**The Government accepts this recommendation.**

The Government has amended the Bill to align with this recommendation. However, the Bill will maintain that the Minister's paramount consideration is community safety.

**The Government accepts this recommendation.**

The Bill has been amended to align with this recommendation, to the extent that the relevant information is readily available.

Similarly, the Bill has been amended to require the child's parent or guardian to be given a copy of each document and notification that is required to be given to the child, insofar as this is reasonably practicable.

## Recommendation

## Government Response

### **Recommendation 5:**

The Committee recommends that the Bill be amended to require a temporary exclusion order to set out that the issuing authority is satisfied of the matters mentioned in section 10, a summary of the grounds on which the order is made, excluding information that is likely to prejudice national security, and the person's rights of review in relation to the order and any return permit that is made. This will align with similar requirements in the Criminal Code in relation to control orders and preventative detention orders.

### **Recommendation 6:**

The Committee recommends that clause 12(5)(a) of the Bill be amended so that the specified period during which a person cannot enter Australia must be no longer than is reasonable necessary to enable authorities to assess the threat posed by the person and make appropriate arrangements for their return.

### **Recommendation 7:**

The Committee recommends that the Bill be amended so that: subject to the third dot point below, consistent with the preventative detention order regime, a temporary exclusion order may only be issued by an 'issuing authority' (being a judge, a retired judge or a senior member of the Administrative Appeals Tribunal) on application by the Minister, the issuing authority must approve any conditions set out in a return permit, and in respect of urgent situations, the Minister may issue a temporary exclusion order, or impose a condition in a return permit, without the approval of an issuing authority, provided that: the Minister obtain the approval of an issuing authority for the temporary exclusion order as soon as reasonably practicable, and if the issuing authority does not approve of the temporary exclusion order, the Minister must immediately revoke the order.

### **The Government accepts this recommendation.**

The Bill has been amended to implement this recommendation, subject to the Government's response to recommendation 7. The Bill has been amended to provide that the issuing authority is satisfied that the Minister's decision is not legally flawed.

### **The Government accepts this recommendation.**

The Bill has been amended to implement this recommendation.

### **The Government accepts this recommendation in principle.**

The Bill has been amended to provide additional oversight from a 'reviewing authority' (being a retired judge or a senior member of the Administrative Appeals Tribunal), which will review the Minister's decision to make a TEO and consider whether the decision is legally flawed. This model closely resembles provisions in the United Kingdom's TEO scheme. The Government considers this approach appropriately balances independent oversight of the scheme with operational requirements in an international and dynamic threat environment.

The new provisions will provide that the Minister can make a TEO which comes into effect immediately and without a reviewing authority's permission if the Minister reasonably considers it necessary due to the urgency of the matter, provided that:

the reviewing authority reviews the TEO as soon as reasonably practicable, and if the reviewing authority decides the decision is flawed, the TEO will not be valid.

The reviewing authority will not review the conditions set out in a return permit.

## Recommendation

## Government Response

### **Recommendation 8:**

The Committee recommends that the Bill be amended so that:  
the circumstances in which the Minister would be required to issue a return permit under paragraph 12(1)(a), and  
the form and manner in which a person is required to apply for a return permit  
are set out exhaustively in the Bill itself rather than being defined by legislative instrument.

### **Recommendation 9:**

The Committee recommends that section 19 of the Bill be deleted and that the detailed procedures in relation to the issuing of a temporary exclusion order, the revocation of a temporary exclusion order, the revocation and modification of temporary exclusion orders, and return permits be developed and included in the Bill itself.

### **Recommendation 10:**

The Committee recommends that the Bill be amended to clarify that a person may seek judicial review of a decision of the Minister to grant or refuse an application for a return permit.

### **The Government accepts this recommendation.**

The Bill has been amended so that the form and manner in which a person is required to apply for a return permit are set out exhaustively in the Bill itself rather than being defined by legislative instrument, noting that the circumstances in which the Minister is required to issue a return permit are exhaustively defined in subsection 12(1) of the Bill.

### **The Government accepts this recommendation in principle.**

The Government has amended the Bill to delete section 19, and to provide further detail around certain procedures in relation to exercising powers. The Government notes operational requirements in an international and dynamic threat environment requires the Minister to have discretion and flexibility in exercising powers in relation to the TEO scheme.

### **The Government accepts this recommendation in principle.**

Under the TEO scheme, the Minister must not refuse an application for a return permit. Section 12 provides that the Minister must issue a return permit if a person subject to a TEO applies. The Government has amended the Explanatory Memorandum to clarify that a person may seek judicial review of a decision of the Minister to grant an application for a return permit, and that judicial remedies are available if the Minister fails to grant a return permit.

## Recommendation

### **Recommendation 11:**

The Committee recommends that the Bill be amended so that, in any prosecution for a breach of an offence provision under the Bill, the prosecution must prove that the defendant had knowledge of the existence of the temporary exclusion order or of the relevant return permit condition (as applicable).

## Government Response

### **The Government notes this recommendation.**

Amending these offences to be based on knowledge, rather than recklessness, may reduce their deterrent effect. Recklessness requires the person:

to be aware of a substantial risk that a TEO or return permit is in force;

(where a return permit is in force) to be aware of a substantial risk that the condition alleged to have been breached is imposed on the return permit;

and

having regard to the circumstances known to the person, it is unjustifiable for the person to take the risk.

Reviews of the TEO scheme by the Independent National Security Legislation Monitor (INSLM) and the Committee into the scheme's operation, effectiveness and implications will provide substantial opportunities for this recommendation to be considered further.

## Recommendation

### **Recommendation 12:**

The committee recommends that proposed section 10(2) of the Bill be amended so that the Minister must not make a temporary exclusion order in respect of a person unless the Minister reasonably suspects that the person is, or has been, involved in terrorism-related activities outside Australia, and making the order would substantially assist in preventing the provision of support for, or the facilitation of, a terrorist act; and proposed section 10(2)(b) be deleted.

## Government Response

### **The Government notes this recommendation.**

As with comparable counter-terrorism powers, the Bill enables the Minister to take into account a range of information from a variety of sources, including security and law enforcement agencies, in considering whether to make a TEO. The Bill provides that the Minister may make a TEO in one of two circumstances:

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;

or

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.

Implementing the recommendation to require the Minister to suspect the person is or has been involved in terrorism-related activities outside Australia would restrict the operation of the scheme to high risk individuals only. Proposed section 10(2) would set out a two-part test which will be significantly harder to make out, thus reducing the number of individuals eligible for a TEO and undermining the utility of the scheme.

Paragraph 10(2)(a) is intended to provide the Minister some flexibility to prioritise urgent or high risk cases, including where ASIO has not already provided an assessment in relation to a person.

The intent of paragraph 10(2)(b) is to provide for the making of a TEO based on a consistent form of assessment of terrorism threat by ASIO.

Where ASIO provides intelligence/advice in relation to the making of a TEO, this will be a communication within section 17(1)(b) of the Australian Security Intelligence Organisation Act 1979 (ASIO Act) and not a security assessment to which Part IV of the ASIO Act applies. The Government has amended the Bill to make clear that the making of a TEO is not prescribed administrative action for the purposes of Part IV of the ASIO Act, in line with the Inspector-General of Intelligence and Security's comment that this aspect of the Bill would 'benefit from greater clarity'.

## Recommendation

## Government Response

### **Recommendation 13:**

The Committee recommends that the Bill be amended so that the Minister may not, on the Minister's own initiative, revoke a return permit unless the Minister has also decided to revoke a temporary exclusion order in respect of which the return permit relates.

### **Recommendation 14:**

To improve transparency and accountability, the Committee recommends that the Bill be amended to require the Minister to table an annual report to the Parliament on the exercise of powers under the temporary exclusion order regime. At a minimum, the report should include

- the number of temporary exclusion orders made and revoked
- the number of return permits granted, refused, varied and revoked
- the number of Australian citizens entering Australia under a return permit,
- the total number of times each category or pre-entry and post-entry conditions has been imposed on a return permit, and
- information on any charges laid under the offence provisions of the Bill.

In the event of sensitivities regarding the public release of parts of this information, the classified data should be provided separately to the Parliamentary Joint Committee on Intelligence and Security.

### **Recommendation 15:**

The Committee recommends that the Intelligence Services Act 2001 be amended to provide that it is a function of the Parliamentary Joint Committee on Intelligence and Security to monitor and review the exercise of powers under the Bill.

This will ensure the Committee is able to requires briefings and examine issues in a similar manner to its monitor and review functions for other counter-terrorism powers available to law enforcement and security agencies, including control orders, preventative detention orders and police stop, search and seizure powers.

### **The Government accepts this recommendation in principle**

The Government agrees that if a return permit is revoked by the Minister, a person should not be subject to the original TEO.

However it is not necessary to amend the Bill to achieve this as subsection 11(4) provides that a TEO in relation to a person is taken to be revoked if a return permit is given to the person. The revocation takes effect immediately after the return permit is given. Therefore, it will not be the case that a person is subject to a TEO and holds a return permit concurrently.

### **The Government accepts this recommendation.**

### **The Government accepts this recommendation.**

## Recommendation

## Government Response

### **Recommendation 16:**

The Committee recommends that the Independent National Security Legislation Monitor Act 2010 (INSLM Act) be amended to include, in the definition of 'counter-terrorism and national security legislation', the Act that is created by the Bill.

This will enable the Independent National Security Legislation Monitor (INSLM) to review the operation, effectiveness, and implications of the temporary exclusion order scheme on his or her own initiative at any time.

To enhance the Committee's oversight of the scheme, and consistent with a recommendation of the 2017 Independent Intelligence Review, the INSLM Act should also be amended to enable the INSLM to provide the Committee with a copy of any report at the same time it is provided to the responsible Minister. The INSLM should be empowered to brief the Committee on his or her findings.

### **Recommendation 17:**

The Committee recommends that the Bill be amended to require the Parliamentary Joint Committee on Intelligence and Security to commence a review of the continuing need for the temporary exclusion order scheme within three years of the scheme's commencement.

The Committee makes this recommendation noting that the Bill is a response to a contemporary issue involving Australian citizens who have participated in or supported the conflict in Syria and Iraq, and seek to return home following the collapse of Islamic State's territorial control. The statutory review will allow the situation to be reassessed after an initial period of operation to determine whether a temporary exclusion order scheme continues to be necessary.

### **Recommendation 18:**

The Committee recommends that, following the consideration of the other recommendations listed in this report, the Government obtain legal advice from the Solicitor-General, or equivalent, on the constitutional validity of the final form of the Bill.

This recommendation is consistent with a previous recommendation of the Committee that was made in relation to the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016.

### **The Government accepts in part this recommendation.**

The INSLM Act will be amended through the Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Bill 2019 to enable the INSLM to review the operation, effectiveness and implications of the TEO scheme.

The Government is still considering the recommendations of the 2017 Independent Intelligence Review.

### **The Government accepts this recommendation.**

Managing the movement of those engaged in terrorist conduct is a key part of Australia's response to terrorism. The TEO scheme has been developed in response to more Australians involved in conflicts in Syria and Iraq seeking to leave the conflict zone. However, foreign fighters will continue to be a challenge for Australia's national security agencies for years to come. The TEO scheme will apply to Australians of counter-terrorism interest involved in any future conflicts or terrorist activity overseas.

### **The Government accepts this recommendation.**

**Recommendation****Government Response****Recommendation 19:**

The Committee recommends that, following implementation of the recommendations in this report, the Bill be passed by the Parliament.

N/A