Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 [and] Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Bill 2019

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This Bills Digest replaces an earlier version dated 1 April 2019 that was prepared for an earlier version of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 that lapsed on prorogation of the 45th Parliament.

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Links: The links to the Bills, their Explanatory Memoranda and second reading speeches can be found on the home pages for the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 and the Counter-Terrorism (Temporary Exclusion Orders) (Consequential Amendments) Bill 2019, or through the Australian Parliament website.

When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the Federal Register of Legislation website.

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The Bills Digest at a glance

The Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (the TEO Bill) will introduce two new orders, each of which could be made by the Minister for Home Affairs:

• a temporary exclusion order (TEO), which may prevent an Australian citizen aged 14 years or older who is overseas from returning to Australia for up to two years at a time and

• a return permit, under which the Minister may impose conditions on the person’s entry into Australia, including conditions with which the person must comply for up to 12 months after re-entering the country.

The orders are intended to enable authorities to plan for and manage the return of Australians of counter-terrorism interest (such as individuals who have fought with or otherwise supported a terrorist organisation overseas) and mitigate risks to the community posed by such individuals. Similar orders exist under United Kingdom law and have been made at least nine times since they were introduced in 2015.

An earlier version of the TEO Bill (the February Bill) was introduced into the 45th Parliament on 21 February 2019, but lapsed on prorogation of Parliament before being debated. The TEO Bill has been revised to implement most of the recommendations made by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in its report on the February Bill either in full or in part. The most significant change is that the Minister will be required to refer TEOs immediately to a reviewing authority, who must review the decision to issue a TEO as soon as reasonably practicable and determine if its issue involved one or more specified errors of law. If the reviewing authority determines that the issue of the TEO involved such an error, the TEO is taken never to have been made. Other changes include requiring the Minister to take certain matters into account before imposing conditions under a return permit, requiring the Minister to issue a return permit within a reasonable period, annual reporting, and enabling review of the new legislation by the Independent National Security Legislation Monitor (INSLM) and the PJCIS.

Stakeholders have objected to the Bill on the grounds that the Government has not demonstrated the need for the new powers, that the Bill may not be constitutionally sound, and that it may be inconsistent with international human rights law and international obligations to exercise criminal jurisdiction over people suspected of engaging in terrorism.

Some stakeholders also outlined changes that they recommended to the February Bill if it was to proceed. Key changes proposed that have not been addressed in the TEO Bill include:

• an additional threshold that must be met before a TEO may be issued, namely that the person has engaged in certain conduct while overseas (this was also recommended by the PJCIS)

• a requirement to afford a person full procedural fairness in relation to decisions made under the proposed law

• providing for merits review of decisions made under the proposed law

• only allowing TEOs to be made in relation to persons aged 18 years or older and

• if TEOs are permitted in relation to persons aged 14–17 years, requiring the best interests of the child to be given as much weight as protecting the community.

Other changes recommended by the PJCIS but not implemented include removing the ability to issue a TEO on the basis of an assessment from the Australian Security Intelligence Organisation (ASIO) and including in a TEO a summary of the grounds on which it was made.
History of the Bills

An earlier version of the TEO Bill (the February Bill) was introduced into the 45th Parliament on 21 February 2019. The February Bill lapsed on prorogation of Parliament before being debated in either House of Parliament.

The TEO Bill has been revised to implement most of the recommendations made by the PJCIS in its report on the February Bill either in full or in part. The most significant change is that the Minister will be required to refer TEOs immediately to a reviewing authority, who must review the decision to issue a TEO as soon as reasonably practicable and determine if its issue involved one or more specified errors of law. If the reviewing authority determines that the issue of the TEO involved such an error, the TEO is taken never to have been made.

The Consequential Amendments Bill has not been introduced previously, and would implement recommendations made by the PJCIS in its report on the February Bill.

Purpose of the Bills

The purpose of the TEO Bill is to introduce two new orders, each of which could be made by the Minister for Home Affairs:

- a temporary exclusion order, which may prevent an Australian citizen aged 14 years or older who is overseas from returning to Australia for up to two years at a time and
- a return permit, under which the Minister may impose conditions on the person’s entry into Australia, including conditions with which the person must comply for up to 12 months after re-entering the country.

The orders are intended to enable authorities to plan for and manage the return of ‘Australians of counterterrorism interest’ and mitigate risks to the community posed by such individuals.¹

The purpose of the Consequential Amendments Bill is to:

- enable the INSLM to review and report on the operation, effectiveness and implications of the Counter-Terrorism (Temporary Exclusion Orders) Act 2019 (the Act) and
- amend the functions of the PJCIS to include monitoring and reviewing the exercise of powers under the Act, and conducting a review of the operation, effectiveness and implications of the Act within three years of its commencement.

Background

In November 2018, the Prime Minister announced that the Government would introduce a scheme for TEOs based on that which exists in the United Kingdom (UK):²

... Exclusion Orders would enable the Minister to impose a condition on the control, return and re-entry into our community of Australians who have been in conflict zones like Syria. It will enable the Minister for Home Affairs to impose an Order for up to two years on Australian citizens of counterterrorism interests who are located offshore. It would be a criminal offence for them to return to Australia, unless a permit of this nature is provided - that is the Temporary Exclusion Order. Once the person is back in Australia it would impose controls on them to mitigate the risk to the community, such as reporting to

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². S Morrison (Prime Minister) and P Dutton (Minister for Home Affairs), Combatting Australian terrorists, media release, 22 November 2018; S Morrison (Prime Minister), Transcript of press conference: Sydney, media release, 22 November 2018.
police, curfews, restrictions on technology used and the like. Failure to comply with the terms of that Temporary Exclusion Order, would be also an offence and subject to penalties for that citizens.³

The Minister for Home Affairs provided the latest figures on Australians involved in overseas conflicts in his second reading speech for the TEO Bill:

Since 2012, around 230 Australians have travelled to Syria or Iraq to fight with or support extremist groups involved in conflict. Around 80 are still active in conflict zones.⁴

The number of Australians estimated to still be active in conflict zones is down from an estimated 100 in February 2019.⁵

He went on to outline the Government’s rationale for introducing TEOs and related return permits:

The advice of Australia's national security agencies is that many Australians of counterterrorism concern, who have travelled to Iraq and Syria to engage in that conflict, are likely to seek to return to Australia in the very near future. This bill will ensure that law enforcement agencies can effectively manage these returns in a way which will reduce the threat to the Australian community.

... It is essential that Australian authorities have the capacity to manage the risk of persons returning to Australia from foreign conflict zones.

... The government has been clear that our policy is to deal with foreign terrorist fighters as far from our shores as possible.

The bill will ensure that if an Australian of counterterrorism concern does return to Australia, it is with adequate forewarning and into the waiting hands of authorities.⁶

The foreign fighter phenomenon is not a new issue.⁷ However, a range of factors, including the large number of foreign fighters who joined the conflicts in Iraq and Syria (many of them with the Islamic State group), and the relatively high proportion from Western nations, has concerned authorities.⁸ A key concern is the potential threat these individuals may pose to domestic security upon return.⁹ Since 2014, the Australian Parliament has passed several pieces of legislation aimed at preventing Australians from joining overseas conflicts and better equipping authorities to deal with those who were nonetheless able to do so. This has included:

- the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, which introduced broad-ranging amendments primarily aimed at addressing the increased threat of terrorism

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9. Ibid.
posed by Australians engaging in, and returning from, conflicts in foreign countries. Amendments included updating existing foreign incursions offences and enacting a new offence of entering a declared area, removing the requirement for ‘terrorism-related proceedings’ to comply with the usual rules of evidence, allowing the Minister for Foreign Affairs to suspend a person’s passport pending a decision about cancellation, and expanding the control order regime.

- the *Counter-Terrorism Legislation Amendment Act (No. 1) 2014*, which included amendments to further expand the control order regime and to amend the functions of the Australian Secret Intelligence Service to explicitly include providing assistance to the Australian Defence Force in support of military operations and cooperation with the Defence Force on intelligence matters and
- the *Australian Citizenship Amendment (Allegiance to Australia) Act 2015*, which expanded the national security-related grounds on which dual citizens may lose their Australian citizenship, including by enabling citizenship loss on the basis of acting inconsistently with allegiance to Australia by engaging in specified conduct, and of having fought for or been in the service of a terrorist organisation.¹⁰

**The UK scheme**

The *Counter-Terrorism and Security Act 2015* (UK) introduced TEOs, permits to return and notices specifying obligations with which an individual subject to a TEO must comply after return to the UK.¹¹

**TEOs**

The Home Secretary may impose a TEO if:

- the Home Secretary reasonably suspects an individual is, or has been, involved in terrorism-related activity outside the UK
- the Home Secretary reasonably considers that it is necessary, for purposes connected with protecting members of the public in the UK from a risk of terrorism, for a TEO to be imposed on the individual
- the Home Secretary reasonably considers that the individual is outside the UK
- the individual has the right of abode in the UK and
- the court has given its permission for a TEO to be imposed on the individual, or the Home Secretary reasonably considers that the urgency of the case requires a TEO to be imposed without obtaining such permission (in which case, the Home Secretary must refer the imposition of the TEO to the court immediately after giving notice of the order).¹²

TEOs remain in force for two years unless revoked or brought to an end earlier, though another TEO may be imposed on the same individual.¹³

**Permits to return**

The Home Secretary may issue a permit to an individual subject to a TEO that gives the individual permission to return to the UK (a ‘permit to return’). Such a permit may only be issued on application of the individual, or if the Home Secretary considers that the individual is to be

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¹⁰. These are not the only Acts to have expanded or amended counter-terrorism laws since 2014, but are the most relevant in the context of foreign fighters.
¹². Ibid., sections 2 and 3 and Schedule 2.
¹³. Ibid., subsections 4(3) and (8).
deported to the UK or because of the urgency of the situation it is expedient to issue a permit in the absence of an application from the individual.\textsuperscript{14}

A permit may be subject to the individual complying with conditions specified therein; and must stipulate the time at which or period during which the individual is permitted to return to the UK, the manner in which the individual is permitted to return and the place where the individual is permitted to return.\textsuperscript{15}

\textbf{Obligations after return}

The Home Secretary may issue a notice imposing certain obligations on a person subject to a TEO who has returned to the UK (under a permit). The obligations able to be imposed are:

\begin{itemize}
  \item reporting to a police station, and complying with directions given by a constable about such reporting
  \item notifying the police of the individual’s place or places of residence and any changes to the same and
  \item attending appointments with specified persons or persons of specified descriptions, and complying with reasonable directions given by the Home Secretary relating to matters about which the individual is required to attend an appointment.\textsuperscript{16}
\end{itemize}

Such a notice remains in force until the TEO ends, unless it is revoked or brought to an end earlier.\textsuperscript{17}

\textbf{Offences}

Offences apply if an individual subject to a TEO returns to the UK other than under a permit to return, contravenes a requirement in a permit to return, or fails to comply with an obligation included in a notice.\textsuperscript{18}

\textbf{Use of TEOs}

There is little publicly available information on the use of TEOs in the UK. Nine TEOs were imposed in 2017, with none imposed before 2017, and no publicly available information about whether any have been imposed in 2018 or 2019.\textsuperscript{19} Information on the circumstances in which the TEOs that have been issued were made does not appear to be publicly available.

\textbf{Committee consideration}

At the time of publication of this Bills Digest, the current Bills had not been considered by any parliamentary committees. Information on consideration of the February Bill and the Government’s response is set out below.

\textsuperscript{14} Ibid., sections 5–7.
\textsuperscript{15} Ibid., subsections 5(2) and (4).
\textsuperscript{16} Ibid., section 9; \textit{Terrorism Prevention and Investigation Measures Act 2011} (UK), paragraphs 10 and 10A of Schedule 1.
\textsuperscript{17} Ibid., subsection 9(3).
\textsuperscript{18} Ibid., section 10.
Parliamentary Joint Committee on Intelligence and Security

The PJCIS inquired into the February Bill and tabled its report on 3 April 2019.20 The report included 19 recommendations, 17 of which were for amendments to the Bill, another that the Government obtain legal advice from the Solicitor-General or equivalent on the constitutional validity of the revised Bill, and the last that, following implementation of all other recommendations, the Bill be passed by the Parliament.21

The TEO Bill includes amendments to:

• implement in full recommendations 3, 4, 6, 8, 9 and 14 (about matters to be considered when imposing or varying conditions in a return permit; special requirements in relation to children; the period for which a person’s return to Australia may be delayed under a return permit; including in the Bill all the circumstances in which a return permit must be issued and how applications may be made; removing the proposed rule-making power; and reporting annually on use of the new powers)

• implement in part recommendations 2, 5 and 7 (about giving a return permit ‘as soon as practicable’, matters to be set out in TEOs, and having an issuing authority issue TEOs and approve conditions in return permits) and

• respond to recommendations 1 and 10 (about factors to be considered before making a TEO and clarifying that a person may seek judicial review of a decision to grant or refuse a return permit).

The Consequential Amendments Bill will implement recommendations 15 and 17 (relating to review of the legislation by the PJCIS) in full and recommendation 16 (relating to review of the legislation by the INSLM) in part.

The Government has not implemented:

• recommendation 11, which was for certain offences to be amended so that the prosecution would need to prove that a person knew that a TEO was in force, or that a condition had been imposed under a return permit (instead of that the person was reckless as to the relevant circumstance) or

• recommendation 12, which was for changes to the thresholds for making a TEO, specifically, including an additional matter of which the Minister must be satisfied before making a TEO and not allowing TEOs to be made on the basis of an assessment from ASIO.

No amendments are required to implement recommendations 13, 18 and 19.22

Further information on the extent to which different elements of the Bill implement recommendations of the PJCIS is noted in the ‘Key issues and provisions’ section of this Digest.


21. Ibid., pp. 46–53.

22. Recommendation 13 was for the Bill to 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 the temporary exclusion order in respect of which the return permit relates’: Ibid., p. 50. Under subclause 11(4) of the February Bill and subclause 11(5) of the TEO Bill, a TEO will be taken to be revoked when a return permit is issued in relation to the same person, meaning there would be no TEO in place for the Minister to revoke at the time a return permit is revoked. Recommendations 18 and 19 concerned obtaining legal advice and passing the Bill: Ibid., pp. 52–53.
**Senate Standing Committee for the Scrutiny of Bills**

The Senate Standing Committee for the Scrutiny of Bills (Scrutiny of Bills Committee) raised several concerns about the February Bill, none of which have been addressed through amendments in the TEO Bill.

The Committee had ‘significant scrutiny concerns’ about the decision to exclude an Australian citizen from the country resting with the Minister, and with the threshold test being set at reasonable suspicion instead of reasonable belief that an order will prevent certain conduct. \[23\] It was also concerned that TEOs may be made in relation to individuals aged 14–17 years, and that in such cases, the interests of the child are to be given lesser consideration than community protection. \[24\]

The Committee was also concerned at the exclusion of procedural fairness, lack of access to merits review of Ministerial decisions to issue a TEO or impose conditions under a return permit, and the limited scope for judicial review. It considered that it may be appropriate for the Bill to be amended to require the Minister to observe the usual requirements of procedural fairness and to allow for merits review of Ministerial decisions ‘by a tribunal with appropriate national security expertise’. \[25\]

Finally, the Committee noted the inclusion of offence-specific defences in the Bill for several offences. The Committee recognised that the defendant will bear only an evidential rather than a legal burden in relation to those defences, but nonetheless stated that it expected any reversal of the burden of proof to be justified (which had not been done in this instance). \[26\]

The Committee did not seek a response from the Minister on the matters outlined above.

**Parliamentary Joint Committee on Human Rights**

The Parliamentary Joint Committee on Human Rights (PJCHR) reported on the February Bill in April 2019. \[27\]

The PJCHR considered that the framework for imposing conditions under a return permit may be incompatible with the rights to privacy, freedom of expression and freedom of association, due to both the scope of the conditions able to be imposed and the lack of judicial involvement in their imposition. It sought the Minister’s advice on the compatibility of the measure with those rights. \[28\]

The PJCHR also considered that the exclusion of procedural fairness and lack of merits review for decisions made in relation to TEOs and return permits may make those measures incompatible with the right to a fair hearing. It noted that the Statement of Compatibility did not discuss the absence of merits review or the narrow scope for judicial review, and stated that it would require further information to fully assess whether TEOs and return permits are compatible with the right to a fair hearing. The PJCHR sought the Minister’s advice accordingly. \[29\]

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24. Ibid., pp. 35–36.
25. Ibid., pp. 36–38 (quote taken from p. 36).
29. Ibid., pp. 54–56.
It considered that TEOs and return permits may not be compatible with the rights of children, in particular the obligation to consider the best interests of the child and the right of children not to be separated from their parents against their will. The PJCHR sought the Minister’s advice on the compatibility of the measures with the rights of children and on whether the measures are framed so as to give sufficient weight to evaluating the impacts on affected children.\(^{30}\)

The PJCHR also sought the Minister’s advice on the compatibility of TEOs and return permits with the rights to freedom of movement and protection of the family. It had questions about whether it could be shown that the measures were needed to address a ‘substantial and pressing concern’ and whether they are rationally connected to a legitimate objective; and raised several concerns relating to proportionality, including the broad discretion given to the Minister, exclusion of procedural fairness, limited rights of review and the length of time for which a person may be prevented from returning to Australia.\(^{31}\)

Amendments included in the TEO Bill to respond to the PJCIS’s recommendations may go some way to addressing the PJCHR’s concerns, but some of the factors highlighted by the PJCHR as contributing to its concerns, such as the exclusion of procedural fairness and limited rights of review, remain in the TEO Bill.

The Minister’s response to the PJCHR had not been published at the time of publication of this Digest.\(^{32}\)

**Policy position of non-government parties/independents**

In additional comments to the majority PJCIS report, Labor members of the PJCIS stated that while they had ‘ultimately decided to recommend’ that the February Bill be passed with amendments, they were ‘concerned that a number of issues have not been adequately scrutinised by this Committee in the limited time available’.\(^{33}\) Their key outstanding concern was that the Bill might infringe the constitutional right of abode.\(^{34}\)

At the time of publication of this Digest, there was no public indication of the policy position of any other non-government parties or independents on the Bills.

**Position of major interest groups**

Non-government stakeholders that made submissions to the PJCIS’s inquiry into the February Bill recommended that the Bill not be passed at all, or that it not be passed in that form.\(^{35}\) The reasons stakeholders opposed the Bill included that:

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30. Ibid., pp. 51–54.
31. Ibid, pp. 40–47
32. At the time of publication of this Digest, the PJCHR’s website noted that the election was called before the response was due: PJCHR, ‘Correspondence archive’, Australian Parliament website.
34. Ibid.
35. H Irving (Professor, Sydney Law School), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 6 March 2019, p. 5; Australian Human Rights Commission (AHRC), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 8 March 2019, p. 3; R Ananian-Welsh (Senior Lecturer in Law, University of Queensland), J Blackbourn (Research Fellow, Centre for Socio-Legal Studies, University of Oxford) and N McGarrity (Senior Lecturer in Law, University of New South Wales), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 12 March 2019, 8 March 2019, p. 6; Law Council of Australia (LCA), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 8 March 2019, p. 5; Immigration Advice and Rights Centre (IARC), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 8 March 2019, p. 1; Peter McMullin Centre on Statelessness, Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 12 March 2019.
• the Government had not demonstrated the need for the new orders/the gap in existing counter-terrorism laws that the orders would fill

• the Bill may not be constitutionally sound, in particular it may:
  – deprive Australian citizens of their constitutional right of abode and
  – breach the separation of powers and

• the Bill may be inconsistent with international human rights and other laws, including the right to enter one’s country, right to privacy, right to freedom of movement, right to a fair trial, right to family life, the rights of children, and international obligations to exercise criminal jurisdiction over people suspected of engaging in terrorism.

Some stakeholders, including the Law Council of Australia (LCA), the Australian Human Rights Commission (AHRC) and legal academics, also outlined changes they would recommend to the February Bill if it was to proceed. Key changes that were suggested included:

• TEOs being issued or approved by a court, or by a retired judicial officer, instead of the Minister

• an additional threshold that must be met before a TEO may be issued, namely that the person has engaged in certain conduct while overseas

• a requirement to afford a person the full requirements of procedural fairness in relation to decisions made under the proposed law

• providing for merits review of decisions made under the proposed law

• only allowing TEOs to be made in relation to individuals aged 18 years or older

• if TEOs are permitted in relation to individuals aged 14–17 years, requiring the best interests of the child to be given as much weight as protecting the community and

• other safeguards and accountability mechanisms, including:
  – requiring the Minister to periodically review TEOs and conditions imposed under return
  permits to ensure that they remain appropriate and
  – enabling review of the new law by the INSLM.

The Consequential Amendments Bill will enable review of the new law by the INSLM, and the TEO Bill will require TEOs to be considered by a reviewing authority. The other changes outlined above have not been addressed in the TEO Bill. Further detail is included in the ‘Key issues and provisions’ section of this Digest.


38. AHRC, Submission to PJCIS, op. cit., pp. 2–3, 11–19; Ananian-Welsh, Blackbourn and McGarrity, Submission to PJCIS, op. cit., pp. 3–5; LCA, Submission to PJCIS, op. cit., pp. 8–12; IARC, Submission to PJCIS, op. cit., pp. 2–3; Peter McMullin Centre on Statelessness, Submission to PJCIS, op. cit.

39. AHRC, Submission to PJCIS, op. cit., p. 22; LCA, Submission to PJCIS, op. cit., pp. 13, 15.


41. AHRC, Submission to PJCIS, op. cit., p. 22; Ananian-Welsh, Blackbourn and McGarrity, Submission to PJCIS, op. cit., pp. 7–8.

42. AHRC, Submission to PJCIS, op. cit., p. 22; LCA, Submission to PJCIS, op. cit., pp. 13, 15.

43. AHRC, Submission to PJCIS, op. cit., p. 22; LCA, Submission to PJCIS, op. cit., p. 13.

44. AHRC, Submission to PJCIS, op. cit., p. 23; LCA, Submission to PJCIS, op. cit., p. 12.

45. AHRC, Submission to PJCIS, op. cit., p. 23; Ananian-Welsh, Blackbourn and McGarrity, Submission to PJCIS, op. cit., p. 9; Peter McMullin Centre on Statelessness, Submission to PJCIS, op. cit.

The Inspector-General of Intelligence and Security (IGIS) considered that some aspects of the February Bill ‘would benefit from greater clarity’. In particular, the IGIS suggested it be made clear whether or not the advice provided by ASIO to the Minister for the purposes of the possible imposition of a TEO is to be in the form of a security assessment in accordance with the Australian Security Intelligence Organisation Act 1979 (ASIO Act). The IGIS noted that the form of advice provided will have implications for an individual’s rights of review. The TEO Bill clarifies this point by providing that such advice does not constitute a security assessment.

Financial implications
The Explanatory Memorandum for the TEO Bill states that the financial impact of the Bill will be low, with any costs to be met from within existing resources.

The Explanatory Memorandum for the Consequential Amendments Bill states that the Bill will have no financial impact.

Statement of Compatibility with Human Rights
As required under Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011 (Cth), the Government has assessed the Bills’ compatibility with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of that Act. The Government considers that the Bills are compatible. However, the PJCHR and several stakeholders questioned the compatibility of the February Bill with some of those rights, including the right to enter one’s country, right to privacy, right to freedom of movement, right to a fair trial, right to family life, and the rights of children.

Key issues and provisions

Overview
The Bill will allow the Minister for Home Affairs to make two types of order:

- a temporary exclusion order (TEO), which may prevent an Australian citizen aged 14 years or older who is overseas from returning to Australia for up to two years at a time and
- a return permit, under which the Minister may impose conditions on the person’s entry into Australia, including conditions with which the person must comply for up to 12 months after re-entering the country.

TEOs will be reviewed by a reviewing authority (a former Justice of the High Court, a former justice or judge of a court created by the Parliament, a former judge of a state or territory)

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47. Inspector-General of Intelligence and Security (IGIS), Submission to PJCIS, Inquiry into the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 14 March 2019.
48. Ibid.
49. Clause 28 (in conjunction with the definition of security assessment in section 35 of the Australian Security Intelligence Organisation Act 1979 (ASIO Act).
52. The Statement of Compatibility with Human Rights for the TEO Bill can be found at page 27 of the Explanatory Memorandum to the Bill. The Statement of Compatibility with Human Rights for the Consequential Amendments Bill can be found at page 5 of the Explanatory Memorandum to the Bill.
53. PJCHR, Human rights scrutiny report, op. cit.; AHRC, Submission to PJCIS, op. cit., pp. 2–3, 11–19; Ananian-Welsh, Blackbourn and McGarrity, Submission to PJCIS, op. cit., pp. 3–4; LCA, Submission to PJCIS, op. cit., pp. 8–12; IARC, Submission to PJCIS, op. cit., pp. 2–3; Peter McMullin Centre on Statelessness, Submission to PJCIS, op. cit.
54. Clauses 10 and 15.
Supreme Court, or certain members of the Administrative Appeals Tribunal). If the reviewing authority determines that the issue of the TEO involved one or more specified errors of law, the TEO is taken never to have been made.\(^{55}\)

A TEO will be taken to be revoked if a return permit is issued to the person.\(^{56}\) The Minister will be required to issue a return permit to a person subject to a TEO if that person (or a representative) applies for one, and to do so within a reasonable period of receiving the application.\(^{57}\) However, a return permit may delay a person’s return to Australia by up to 12 months.\(^{58}\)

The Minister will not be required to observe any requirements of procedural fairness in exercising a power or performing a function under the TEO Act.\(^{59}\)

The reviewing authority will not have the power to review the conditions imposed under a TEO or a return permit, only the decision to issue the TEO. While the Explanatory Memorandum for the TEO Bill states that a person subject to a TEO or a return permit will have access to judicial review,\(^{60}\) aspects of the Bill, such as the exclusion of procedural fairness and of the Administrative Decisions (Judicial Review) Act 1977, will limit the extent to which such review will be practically available. The Scrutiny of Bills Committee and some stakeholders also considered that affected individuals should have access to full independent merits review (not just judicial review) of decisions relating to TEOs and return permits.\(^{61}\)

**Temporary exclusion orders**

**Conditions for issue**

The Minister will be able to make a TEO in relation to a person if:

- the person is:
  - located outside Australia
  - an Australian citizen and
  - at least 14 years of age
- one of the thresholds outlined below is met
- a return permit is not in force in relation to the person and
- where the person is 14 to 17 years of age, the Minister has, before making the TEO, had regard to the protection of the community as the paramount consideration and the best interests of the person as a primary consideration.\(^{62}\)

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55. **Clause 14.** For the meaning of *reviewing authority*, see clause 23. Having TEOs reviewed by a reviewing authority responds to a recommendation of the PJCIS. See further below under ‘Review of TEO by reviewing authority’.

56. **Subclause 11(5).**

57. **Paragraphs 15(1)(a) and 15(3)(a).**

58. **Paragraph 16(9)(a).**


61. See further below under ‘Review of Ministerial decisions’.

62. **Subclauses 10(1)–(3). Subclause 10(4) sets out matters to be taken into account when determining what is in the best interests of a person 14 to 17 years of age, implementing part of recommendation 4 of the PJCIS’s report on the February Bill: PJCIS, *Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, op. cit., pp. 38–41, 47–48. The Minister will only be required to take those matters into account to the extent that they are known to the Minister and that they are relevant: subclause 10(5).**
Thresholds for issue

There will be two possible grounds on which the Minister may make a TEO, namely if:

- the Minister suspects on reasonable grounds that making the order would substantially assist in preventing:
  - a terrorist act
  - training from being provided to, received from or participated in with a listed terrorist organisation
  - the provision of support for, or the facilitation of, a terrorist act and/or
  - the provision of support or resources to an organisation that would help the organisation to engage in an activity described in paragraph (a) of the definition of terrorist organisation in subsection 102.1(1) of the *Criminal Code Act 1995* (Criminal Code) (directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of a terrorist act) or
- the person has been assessed by ASIO to be directly or indirectly a risk to security for reasons related to politically motivated violence (where both security and politically motivated violence take the meanings of the ASIO Act). 63

The first of the two thresholds outlined above is similar to that which applies in order for a senior AFP member to seek the Minister’s consent to request an interim control order, but is more focused on the prevention of certain activities. 64

Of relevance to the second threshold, the definition of security in the ASIO Act includes the protection of Australia and its people from politically motivated violence, which is defined to mean:

(a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or

(b) acts that:

(i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and

(ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or

(ba) acts that are terrorism offences; or

(c) acts that are offences punishable under Division 119 of the *Criminal Code*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or

(d) acts that:

(i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or

63. Subclause 10(2). Listed terrorist organisation and terrorist act will take the same meanings as in section 100.1 of the *Criminal Code Act 1995* (Criminal Code): clause 4.

64. *Criminal Code*, subsection 104.2(2).
Issue: appropriateness of proposed thresholds and rejection of PJCIS recommendations

Each of the thresholds in subclause 10(2) under which a TEO may be made relate only to an assessment of the risk posed by an individual. In contrast, the UK scheme also requires a reasonable suspicion that an individual is, or has been, involved in terrorism-related activity outside the UK before a TEO can be made (that is, an assessment about the past conduct of an individual). The PJCIS recommended that that an additional threshold along the lines of the UK model be included in the Bill so that TEOs may only be made where there is a suspicion of wrongdoing on the part of an individual. The Government has not implemented that recommendation. Its response to the PJCIS report stated:

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.

The PJCIS also recommended that the second ground on which a TEO may be issued (the person has been assessed by ASIO to be directly or indirectly a risk to security for reasons related to politically motivated violence) be removed from the Bill. Ananian-Welsh, Blackbourn and McGarrity noted that this threshold is similar to one of the character tests in the Migration Act 1958, under which a person may be denied a visa or have their visa cancelled if ASIO assesses they are directly or indirectly a risk to security. They argued that the threshold raises procedural issues and that applying such a test to citizens ‘ignores the particular legal position of citizens, in terms of their rights and the reciprocal responsibilities of the State’. The Government’s response to the PJCIS report did not state its rationale for not implementing this recommendation, simply stating: ‘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’.

Issue: TEOs in relation to individuals 14–17 years of age

Allowing orders to be made in relation to children at least 14 years of age is consistent with the control order regime in Division 104 of the Criminal Code as amended in 2016, and citizenship cessation laws enacted in 2015. Nonetheless, the LCA and the AHRC objected to TEOs being able

65. ASIO Act, section 4.
66. Counter-Terrorism and Security Act 2015 (UK), subsection 2(3).
72. Criminal Code, section 104.28; Australian Citizenship Act 2007, sections 33AA, 35 and 35A (sections 33AA and 35A were inserted, and section 35 repealed and replaced by, the Australian Citizenship Amendment ( Allegiance to Australia) Act 2015). The control order regime was amended in 2016 to reduce the lower age limit from 16 to 14 years of age, in response to concerns from security intelligence and law enforcement agencies about increasing radicalisation and involvement in terrorist activities among young people: Counter-Terrorism Legislation Amendment Act (No. 1) 2016, item 30 of Schedule 2; C Barker
to be made in relation to anyone under 18 years of age, and the Scrutiny of Bills Committee was concerned about this aspect of the February Bill.\textsuperscript{73} The AHRC considered that allowing TEOs to be made in relation to children would impinge on a range of rights protected in the \textit{Convention on the Rights of the Child} (CRC), and that depriving a child of the right to re-enter Australia ‘is likely to have even more serious consequences than it would an adult, and is more likely to be arbitrary’.\textsuperscript{74}

The requirement in \textbf{subclause 10(3)} to have regard to the protection of the community as the paramount consideration and the best interests of the child as a primary consideration also mirrors requirements relating to the imposition of obligations, prohibitions and restrictions under control orders made in relation to young people.\textsuperscript{75} This approach was endorsed by the PJCIS.\textsuperscript{76} However, several stakeholders considered that requiring greater weight to be given to community protection than to the best interests of the child is inconsistent with Australia’s obligations under the CRC.\textsuperscript{77} They pointed to comments of the United Nations Committee on the Rights of the Child and a 1995 High Court judgment to argue that the interests of the child must be given either the greatest weight, or equal greatest weight with other considerations.\textsuperscript{78} The AHRC and Ananian-Welsh, Blackbourn and McGarrity recommended that community protection and the best interests of the child both be made primary considerations to be given equal weight.\textsuperscript{79}

The PJCIS recommended that in determining the best interests of a person aged 14–17 years, the Minister should be required to take into account the same matters that a court is required to consider when determining the bests interests of the child in relation to a control order (such as the child’s age, maturity, and physical and mental health, and the benefit of the child having meaningful relationships with family and friends).\textsuperscript{80} This recommendation will be implemented by \textbf{subclauses 10(4)} (for TEOs) and \textbf{16(6)} (for return permits) of the TEO Bill.

\textbf{Review of TEO by reviewing authority}

Unlike the UK scheme, the Minister will not be required to seek the prior permission of a court \textit{before} issuing a TEO.\textsuperscript{81} However, the Minister will be required to immediately refer TEOs to a reviewing authority.

\textsuperscript{73} AHRC, \textit{Submission} to PJCIS, op. cit., p. 23; LCA, \textit{Submission} to PJCIS, op. cit., p. 12; Scrutiny of Bills Committee, \textit{Scrutiny digest}, op. cit., pp. 35–36.

\textsuperscript{74} AHRC, \textit{Submission} to PJCIS, op. cit., p. 17.

\textsuperscript{75} \textit{Criminal Code}, subsections 104.4(2) and 104.24(2).


\textsuperscript{77} The concluding words of Art.3.1 [of the CRC] … give those interests first importance along with such other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight’.


\textsuperscript{80} PJCIS, \textit{Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019}, op. cit., pp. 40–41, 47–48 (part of recommendation 4).

\textsuperscript{81} See \textit{Counter-Terrorism and Security Act 2015} (UK), section 3.
Several stakeholders argued for the involvement of the courts or retired judges in the issuing of TEOs in submissions to the PJCIS’s inquiry into the February Bill. The AHRC and the LCA considered that the power to make TEOs should sit with the courts instead of the Minister, with the AHRC suggesting that orders only be made:

... where a court is satisfied on the balance of probabilities that the making of the order is necessary and proportionate to achieve the objects of the Bill, in all the circumstances of the particular case.\(^\text{82}\)

Drs Rebecca Ananian-Welsh, Jessie Blackbourn and Nicola McGarrity stated that their preferred model would be to require the Minister to apply to a retired judge for a TEO (and for issue of a return permit), pointing to the procedures in place for the issue of continuing preventative detention orders and ASIO questioning and questioning and detention warrants, and arguing:

Such an approach is consistent with the severity of the consequences which flow from a TEO, including exclusion from their country of citizenship for up to two years (or one year where a Return Permit has been issued). Whilst forced to remain overseas, there is a real risk of the person being imprisoned in another country that may have less concern for human rights than Australia. Furthermore, even after a Return Permit is issued, intrusive pre- and post-entry conditions may be imposed. The experience of the judiciary in making independent and impartial decisions in the sensitive national security space would assist in ensuring the necessity and proportionality of TEOs and Return Permits, as well as the legitimacy of the TEOs scheme in the eyes of the public.\(^\text{83}\)

In the alternative, they suggested independent judicial oversight of the Minister’s decision to issue a TEO, following the UK model.\(^\text{84}\) As noted above, except in urgent cases, one of the pre-conditions for the issue of a TEO by the UK’s Home Secretary is that the court has given the Home Secretary permission.\(^\text{85}\) The Home Secretary applies to the court for permission to issue a TEO, and the court determines whether the Home Secretary’s decisions on the other thresholds for issue are ‘obviously flawed’, applying ‘the principles applicable on an application for a judicial review’.\(^\text{86}\) If the court determines that any of the Home Secretary’s decisions were obviously flawed, it may not give its permission; in any other case, it must give its permission.\(^\text{87}\)

The PJCIS recommended 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:

82. AHRC, Submission to PJCIS, op. cit., pp. 19–22 (quote taken from p. 22); LCA, Submission to PJCIS, op. cit., pp. 13, 15.
83. Ananian-Welsh, Blackbourn and McGarrity, Submission to PJCIS, op. cit., p. 7. Issuing authorities for continuing preventative detention orders include sitting and certain retired judges who have consented to be issuing authorities and been appointed as such: Criminal Code, section 105.2. Issuing authorities for questioning warrants and questioning and detention warrants include judges who have consented to be issuing authorities and been appointed as such: ASIO Act, section 34AB.
84. Ibid., pp. 14–15.
85. If the Home Secretary reasonably considers that the urgency of the case requires a TEO to be imposed without first obtaining such permission, the Home Secretary must refer the imposition of the TEO to the court immediately after giving notice of the TEO: Counter-Terrorism and Security Act 2015 (UK), sections 2 and 3 and Schedule 2.
86. Counter-Terrorism and Security Act 2015 (UK), subsections 3(1), (2), (5) and (10).
87. Ibid., subsections 3(6) and (7).
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.88

The TEO Bill would partially implement this recommendation. The Minister will be required to refer the decision to make a TEO to a reviewing authority immediately after making it (a reviewing authority will be a former Justice of the High Court, a former justice or judge of a court created by the Parliament or a former judge of a state or territory Supreme Court, or a senior member of the Administrative Appeals Tribunal, appointed by the Attorney-General89). The reviewing authority must review the decision as soon as is reasonably practicable and determine whether:

• the making of the decision was an improper exercise of power
• the decision was induced or affected by fraud, or
• if the TEO was made on the basis of the Minister’s suspicion of relevant matters (as opposed to an ASIO assessment), there was no material before the Minister from which he or she could form the relevant state of mind.90

If the reviewing authority is of the opinion that one or more of the above applies, the TEO is taken never to have been made (and if the person has been notified of the TEO, the Minister must cause steps to be taken to notify the person of the review decision).92

The review must be conducted in the absence of the person to whom the order relates, and without that person being notified of the review or given an opportunity to make representations.93

The reviewing authority will not have the power to review the conditions imposed under a TEO or a return permit, only the decision to issue the TEO.94

Severability clause

Clause 30 provides that if section 14 (which will be about review of TEO by reviewing authority) is not a valid law of the Commonwealth, that:

• it is Parliament’s intention that the proposed legislation operate as if that section had never been enacted and
• the proposed legislation applies as if subsections 13(1) and (2) (which will set out when a TEO comes into force) were omitted and replaced with the following:

89. Clauses 4 and 23.
90. Subclause 14(1), Subclauses 14(2) and (3) will require the Minister to give the reviewing authority a written statement of reasons for the decision and all of the material that was before the Minister at the time the decision was made, except material that the Minister considers would be contrary to the public interest to disclose.
91. Subclause 14(4). Subclause 14(5) sets out when the making of the decision was an improper exercise of the power to make the decision (the list mirrors subsection 5(2) of the *Administrative Decisions (Judicial Review) Act 1977*, which sets out when a decision is taken to be an improper exercise of power under that Act).
92. Subclause 14(7). Subclause 14(8) provides that if a return permit had been issued in such circumstances, it is also taken never to have been issued.
93. Subclause 14(6).
94. The conditions of a TEO relate to the duration of the TEO and ability to retain or apply for Australian travel documents (see subclause 10(6)).
“(1) A temporary exclusion order in relation to a person comes into force immediately after the Minister makes the temporary exclusion order in relation to the person.”

**Issue: form of advice from ASIO and implications for rights of review**

One of the grounds on which a TEO may be issued is that the person has been assessed by ASIO to be directly or indirectly a risk to security for reasons related to politically motivated violence. As noted above, the PJCIS recommended that TEOs not be able to be made on this ground, but the Government has not implemented that recommendation.

As the IGIS noted, the February Bill did not appear to require ASIO’s advice to be provided in the form of a security assessment made under Part IV of the *ASIO Act*, meaning it would not be subject to review by the Administrative Appeals Tribunal (AAT). The Government has since confirmed that the advice will not be given in the form of a security assessment, and this is now reflected in the TEO Bill.

The IGIS noted that this approach would be inconsistent with the way ASIO advice is provided on Australian citizens in other contexts:

> Although neither the Bill nor the Explanatory Memorandum directly addresses this, we understand that it is the policy intention that any advice provided by ASIO for these purposes would not be required to be in the form of a security assessment, in accordance with Part IV of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). We further understand the policy underpinning the Bill to be that the imposition of a TEO would not be a ‘prescribed administrative action’ as defined in section 35 of the ASIO Act. For the avoidance of ambiguity, the Committee may wish to consider whether the Bill should be amended to make this policy intention clear.

> If this is the case, it would mean that the advice provided by ASIO to the Minister would not be subject to review by the Administrative Appeals Tribunal (as it would be if it were provided in the form of a security assessment). We note that this could create a disparity in the way that advice by ASIO is provided in relation to Australian citizens in other contexts, such as that under the *Australian Passports Act 2005*. The Committee may wish to examine this aspect further.

If ASIO furnishes an adverse or qualified security assessment to an agency in relation to an individual under Part IV of the *ASIO Act*, the individual must generally be notified in writing within 14 days of that assessment and informed of his or her right to apply to the AAT for review. To the extent that the findings of the AAT on such a review do not confirm ASIO’s assessment, those findings are to be taken as superseding that assessment for the purposes of any prescribed administrative action to which the assessment is relevant.

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95. Paragraph 10(2)(b).
96. IGIS, Submission to PJCIS, op. cit. Security assessment is defined in section 35 of the ASIO Act.
97. Government response, op. cit.; clause 28 (in conjunction with the definition of security assessment in section 35 of the ASIO Act).
98. Ibid.
99. ASIO Act, subsection 38(1). The notification requirement does not apply if section 38A applies to the assessment (this concerns assessments relating to certain provisions of the Telecommunications Act 1997 and the Security of Critical Infrastructure Act 2018) or if the Minister certifies that withholding notice to the person ‘is essential to the security of the nation’: subsections 38(1A) and (2).
100. Prescribed administrative action is defined in section 35 of the ASIO Act and includes, among others, the exercise of powers and performance of functions under the Australian Citizenship Act, the Australian Passports Act 2005 and regulations made under those Acts. Note, however, that security assessments are not relied upon in the provisions of the Australian Citizenship Act relating to cessation of Australian citizenship on national security grounds (sections 33AA, 35 and 35A).
A reviewing authority who considers a TEO made on the grounds of an ASIO assessment will have no power to consider ASIO’s assessment that a person is directly or indirectly a risk to security, and accordingly, no power to confirm or overturn that assessment.

**Duration of TEOs and ability to issue successive TEOs**

A TEO will be required to specify the period during which it is in force, which must not end more than two years after the day the TEO is made.\(^{101}\) This limit will not prevent the making of another TEO in relation to the same person.\(^{102}\)

The two year maximum duration for each TEO is the same as that which applies under the UK scheme.\(^{103}\)

The LCA suggested that a second TEO should only be able to be made in relation to the same person where ‘the court determines there are “exceptional circumstances” that would warrant’ such action.\(^{104}\)

**Other requirements for TEOs**

A TEO must: be in writing; specify the name of the person to which it relates; state that the criteria for making an order have been met; set out the effect of clauses 8 (offence of entering Australia while a TEO if in force), 11 (revocation of a TEO), 12 (application to revoke a TEO); 15 (issue of return permit) and 18 (applications relating to return permits); specify whether the person to whom it relates is permitted to apply for or obtain an Australian travel document; and state that the person may have review rights in relation to the decision to issue the TEO. If the person has an Australian travel document, the TEO must specify whether the person must surrender that document to a specified person or body.\(^{105}\)

If the TEO specifies that the person is not permitted to apply for, or to obtain, an Australian travel document, or that the person must surrender an Australian travel document, the person will be taken, for the purposes of section 12 of the *Australian Passports Act 2005*, to be prevented from travelling internationally.\(^{106}\) Ananian-Welsh, Blackbourn and McGarrity considered that the Minister should be required to ‘take into account the fundamental human rights of the subject of the TEO and any dependents before cancelling their Australian travel document or restricting their ability to obtain another’.\(^{107}\)

By requiring that a TEO states that the criteria for issue have been met and that the person may have review rights, the Government has partially implemented a recommendation of the PJCIS on the February Bill. However, the PJCIS also recommended that a TEO be required to include a summary of the grounds on which it was made (with information that is likely to prejudice national security excluded). That part of the recommendation has not been implemented.\(^{108}\)

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102. Subclause 10(7).
104. LCA, *Submission* to PJCIS, op. cit., p. 15.
105. Subclause 10(6).
106. Subclause 29(1); *Australian Passports Act*, section 12 (this section concerns applications by competent authorities for refusal to issue Australian travel documents on law enforcement or national security grounds, including where an order made under Commonwealth law prevents a person from travelling internationally).
As soon as practicable after making a TEO, 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 in relation to whom it is made the content of the order. The Explanatory Memorandum states that this could include electronic means of communication, and that the provision:

... is intended to allow the Minister flexibility to choose the most reasonable and practical means of service in the circumstances of the person being overseas, including potentially in a conflict zone.

If the person to whom the TEO relates is 14 to 17 years of age, steps must also be taken to bring the TEO to the attention of a parent or guardian, implementing part of a recommendation of the PJCIS on the February Bill.

**Issue: when a TEO comes into force and notification requirements**

As the AHRC pointed out, the proposed notification requirements (in subclause 10(8) of the TEO Bill) may fall short of those under the UK scheme. The UK scheme provides that a TEO comes into force when notice of its imposition is given. The TEO Bill provides that a TEO comes into force:

- immediately after being made if the Minister is satisfied that urgent circumstances make that necessary or
- otherwise, when the reviewing authority has reviewed the TEO and decided that its issue did not involve any of the errors of law specified in subclause 14(4)(b).

If the reviewing authority determines that the issue of the order did involve one of those errors of law, the TEO is taken never to have been made, so does not come into force.

UK regulations list the means by which notice may be given, including by hand, fax, postal service in which delivery or receipt is recorded, electronically, by document exchange, courier or collection by the person or a representative. They also provide that notice shall be deemed to have been given in certain circumstances. The Bill requires only that ‘reasonable and practicable steps’ be taken to bring a TEO to the attention of the person on whom it is imposed. The LCA was concerned about the lack of a requirement of effective notification, and the AHRC suggested that all reasonably practicable steps be required to be taken to give notice of a TEO as soon as reasonably practicable.

**Revoking a TEO**

The Minister may revoke a TEO on his or her own initiative or on application by the person to whom the TEO relates or a representative. Clause 12 sets out how an application to revoke a

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109. Subclause 10(8).
111. Subclause 10(8)(b); PJCIS, Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, op. cit., pp. 40–41, 48 (part of recommendation 4).
112. AHRC, Submission to PJCIS, op. cit., pp. 20, 22.
115. Subclause 14(7) and note to subclause 13(1).
116. The Temporary Exclusion Orders (Notices) Regulations 2015 (UK), regulations 2 and 3.
117. LCA, Submission to PJCIS, op. cit., p. 10; AHRC, Submission to PJCIS, op. cit., pp. 20, 22.
118. Subclauses 11(1) and (2).
TEO may be made and the information it must contain, as recommended by the PJCIS in its report on the February Bill.119

A TEO is also taken to be revoked if a return permit is issued to the person to whom the TEO relates.120

**Issue: no requirement for the Minister to keep the need for a TEO under review**

While the Minister may revoke a TEO on his or her own initiative, there is no explicit obligation on the Minister to keep under review whether the TEO remains necessary and appropriate. The UK scheme requires the Home Secretary to keep under review whether the TEO remains necessary for purposes connected with protecting the UK public from a risk of terrorism.121 The AHRC and Ananian-Welsh, Blackbourn and McGarrity suggested the inclusion of an equivalent requirement.122

**Offences related to TEOs**

A person will commit an offence if the person:

- is reckless as to whether a TEO is in force in relation to the person and
- intentionally enters Australia.123

The maximum penalty for this offence will be imprisonment for two years and/or a fine of 120 penalty units (currently $25,200).124

The PJCIS recommended that the offence should be amended to require the prosecution to prove that the person knew of the existence of the TEO.125 The Government has not implemented that recommendation, stating that requiring proof of knowledge rather than recklessness may reduce deterrence.126 To prove that a person was reckless as to whether a TEO was in force, the prosecution will need to prove that the person was ‘aware of a substantial risk’ that a TEO was in force and that having regard to the circumstances known to him or her, it was ‘unjustifiable to take the risk’.127

It will also be an offence for the owner, charterer, lessee, operator, agent or master of a vessel or the owner, charterer, lessee, operator or pilot in charge of an aircraft to intentionally permit the vessel or aircraft to be used to convey a person subject to a TEO to Australia.128 The offence will only apply if the person knew that a TEO was in force in relation to the other person.129

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120. Subclause 11(5).
121. *Counter-Terrorism and Security Act 2015* (UK), subsection 2(8).
122. AHRC, *Submission* to PJCIS, op. cit., pp. 20, 23; Ananian-Welsh, Blackbourn and McGarrity, *Submission* to PJCIS, op. cit., p. 10. The AHRC also suggested such a requirement be imposed in relation to conditions included in return permits.
123. Clause 8. This description of the offence takes into account the application of ‘default’ fault elements to physical elements of the offence in accordance with section 5.6 of the *Criminal Code*.
124. Clause 8; *Crimes Act 1914*, sections 4AA (value of a penalty unit) and 4B (fine may be imposed instead of or in addition to imprisonment unless the contrary intention appears).
128. Clause 9. This description takes into account the application of ‘default’ fault elements to physical elements of the offence in accordance with section 5.6 of the *Criminal Code*.
129. Paragraph 9(1)(c).
be an exception to this offence if the person conveyed was being deported or extradited to Australia.\footnote{Subclause 9(2).} A defendant will bear an evidential burden in relation to the exception, meaning he or she would need to adduce or point to evidence that suggests a reasonable possibility that the exception applies.\footnote{Subclause 9(1); Crimes Act, sections 4AA (value of a penalty unit) and 4B (pecuniary penalties for bodies corporate).} The maximum penalty will be imprisonment for two years and/or a fine of 120 penalty units for an individual, or a fine of 600 penalty units for a body corporate (currently $126,000).\footnote{Subclause 9(1); Crimes Act, sections 4AA (value of a penalty unit) and 4B (pecuniary penalties for bodies corporate).}

**Offence related to protection of information**

A person will commit an offence if the person:

- is reckless as to whether he or she is, or has been, a reviewing authority
- intentionally obtains information under subsection 14(2) of the proposed legislation and
- intentionally discloses that information.\footnote{Clause 24. This description of the offence takes into account the application of ‘default’ fault elements to physical elements of the offence in accordance with section 5.6 of the Criminal Code.}

It will be a defence to the offence if the information was disclosed for the purposes of giving effect to the proposed legislation.\footnote{Subclause 24(2). See also subclause 24(3).} The defendant will bear an evidential burden in relation to the defence, meaning he or she would need to adduce or point to evidence that suggests a reasonable possibility that it applies.\footnote{Criminal Code, section 13.3.}

The maximum penalty for this offence will be imprisonment for two years and/or a fine of 120 penalty units (currently $25,200).\footnote{Subclause 24(1); Crimes Act 1914, sections 4AA (value of a penalty unit) and 4B (fine may be imposed instead of or in addition to imprisonment unless the contrary intention appears).}

**Return permits**

The Minister will be required to issue a return permit to a person subject to a TEO if that person applies for one (or someone else applies on his or her behalf), or if the person is to be or is being deported or extradited to Australia.\footnote{Subclause 15(1). Clauses 15 and 18 set out the circumstances in which the Minister will be required to issue a return permit, and how an application to issue a return permit may be made and the information it must contain, as recommended by the PJCIS in its report on the February Bill: PJCIS, Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, op. cit., pp. 27–28, 49 (recommendation 8).} In addition, the Minister may issue a return permit to a person subject to a TEO if the Minister considers it appropriate to do so.\footnote{Subclause 15(2).} In either case, the Minister may impose conditions on the permit.\footnote{Subclause 15(3).}

**Timeframe for issue of permit**

The Minister will be required to issue a return permit ‘within a reasonable period’ of: receiving an application, after the Minister becomes aware of the person’s deportation or extradition, or otherwise makes a decision to issue a permit (whichever applies).\footnote{Subclause 15(3).} This requirement has been included in response to the PJCIS’s recommendation that the Minister be required to issue a return permit ‘as soon as practicable’ after receiving an application or when the person is being...
deported.\textsuperscript{141} It is consistent with the UK scheme, which requires the Home Secretary to issue a permit for return to an individual who has applied for one ‘within a reasonable period’ of the application being made.\textsuperscript{142}

**Duration**

A return permit must specify a period during which it is in force. That period must not end more than 12 months after the person enters Australia.\textsuperscript{143}

**Threshold for imposing conditions**

The Minister will only be permitted to impose one or more conditions on a return permit if the Minister is satisfied that each condition is, and the conditions taken together are, reasonably necessary and reasonably appropriate and adapted for the purpose of preventing:

- a **terrorist act**
- training from being provided to, received from or participated in with a **listed terrorist organisation**
- the provision of support for, or the facilitation of, a **terrorist act** and/or
- the provision of support or resources to an organisation that would help the organisation to engage in an activity described in paragraph (a) of the definition of terrorist organisation in subsection 102.1(1) of the **Criminal Code** (directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of a terrorist act).\textsuperscript{144}

The February Bill had required only that the Minister be satisfied that the conditions, taken together, met the threshold set out above. The Government has amended this provision to implement a PJCIS recommendation that the Minister also be required to be satisfied that each individual condition is reasonably necessary and reasonably appropriate and adapted.\textsuperscript{145}

**Factors to be considered before imposing conditions**

Before imposing a pre-entry condition that would prevent a person from entering Australia for a period of time, the Minister will be required to consider, to the extent known to the Minister:

- (a) whether the person has a lawful right to remain, or to enter and remain, in a country other than Australia during that period;
- (b) if the person has no lawful right to remain, or to enter and remain, in a country other than Australia during that period—the likelihood of the person being detained, mistreated or harmed if the person cannot enter Australia until the end of that period.\textsuperscript{146}

This provision has been included in response to the PJCIS’s recommendation that such factors be considered before the making of a TEO that requires a person to surrender their Australian travel documents or prevents them from applying for or obtaining Australian travel documents.\textsuperscript{147}

\textsuperscript{142} Counter-Terrorism and Security Act 2015 (UK), subsection 6(1).
\textsuperscript{143} Paragraph 15(4)(c).
\textsuperscript{144} Subclause 16(3).
\textsuperscript{146} Subclause 16(8).
The PJCIS also recommended that when imposing conditions under a return permit, the Minister should have regard to ‘the impact of the conditions on the person’s individual circumstances, including in relation to their dependents (if any)’.  

If the person is 14 to 17 years of age, the Minister will be also be required, before imposing a condition, to have regard to the protection of the community as the paramount consideration and the best interests of the person as a primary consideration. The concerns raised by stakeholders about this issue (set out above under ‘Issue: TEOs in relation to persons 14–17 years of age’) also apply to the imposition of conditions under return permits.

The PJCIS recommended that in determining the best interests of a person aged 14–17 years, the Minister should be required to take into account the same matters that a court is required to consider when determining the best interests of the child in relation to a control order (such as the child’s age, maturity, and physical and mental health, and the benefit of the child having meaningful relationships with family and friends). This recommendation will be implemented by subclauses 10(4) (for TEOs) and 16(6) (for return permits) of the TEO Bill.

Pre-entry conditions

Delayed entry

The Minister may require that the person issued a return permit must not enter Australia during a specified period. The maximum delay permitted is the period that is ‘reasonably necessary to assess the risk posed by the entry of the person to Australia and to make appropriate arrangements for that entry’ or 12 months from the issue of the permit, whichever is shorter.

The February Bill had simply included a maximum delay of 12 months. The inclusion of the alternative ‘reasonably necessary’ timeframe implements a recommendation of the PJCIS and is consistent with the UK scheme.

Entry to Australia

The Minister may require that the person issued a return permit:

• must enter Australia:
  – within a specified period of no more than three months after the permit is issued to the person or
  – on a specified date no more than three months after the permit is issued to the person and/or
  – in a specified manner.

147. PJCIS, Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, op. cit., pp. 25–26, 46 (recommendation 1). The Government did not implement this recommendation as it applies to TEOs, arguing that because a TEO does not permanently bar a person’s return to Australia (if a person subject to a TEO applies for a return permit, a permit must be issued), consideration of these factors is more appropriate to return permits: Government response, op. cit.
149. Subclauses 16(5).
151. Paragraph 16(9)(a).
152. PJCIS, Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, op. cit., p. 48 (recommendation 6); Counter-Terrorism and Security Act 2015 (UK), subsection 6(3).
The Minister could require, for example, that the person enter Australia on a specific date and flight.\(^{154}\)

**Post-entry conditions**

The Minister may impose one or more of the conditions listed in **subclause 16(10)** with which the person returning under the permit must comply once he or she re-enters Australia. The return permit must specify the period during which each condition applies, which may not extend beyond the end date for the permit.\(^{155}\) This will mean that a person may be subject to post-entry conditions for up to 12 months.\(^{156}\)

Imposition of post-entry conditions under a return permit differs from the UK scheme, under which conditions are imposed under a separate notice following the individual’s return.\(^{157}\) The proposed model will mean that an individual knows in advance the conditions to which they will be subject.

Most of the conditions that may be imposed are notification requirements, and some of them relate to the ability to hold, apply for and obtain Australian travel documents.

The notification-related conditions are summarised in the table below.\(^{158}\) The permit may specify the manner in which the person must provide the required notification, and/or any documents or information that must be provided to substantiate the matter.\(^{159}\)

In addition, the Minister may provide that:

- if the person has an Australian travel document, that he or she must surrender it to a specified person or body
- the person is not permitted to apply for an Australian travel document and/or
- the person is not permitted to obtain an Australian travel document.\(^{160}\)

If one of the travel document conditions is imposed, the person will be taken, for the purposes of section 12 of the *Australian Passports Act*, to be prevented from travelling internationally.\(^{161}\)

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153. **Subclause 16(9).**
154. [Explanatory Memorandum, TEO Bill, p. 17.](#)
155. **Paragraph 15(4)(e).**
156. **Paragraph 15(4)(c).**
158. **Paragraphs 16(10)(a)–(k).**
159. **Subclause 16(11).**
160. **Paragraphs 16(10)(l)–(n).**
161. **Subclause 29(2), Australian Passports Act,** section 12.
### Table: Permitted post-entry notification conditions

<table>
<thead>
<tr>
<th>Matter/circumstance</th>
<th>Action required</th>
<th>Time within which notification must be provided</th>
</tr>
</thead>
<tbody>
<tr>
<td>principal place of residence</td>
<td>notify specified person or body</td>
<td>n/a</td>
</tr>
<tr>
<td>place of employment</td>
<td>notify specified person or body</td>
<td>n/a</td>
</tr>
<tr>
<td>place of education</td>
<td>notify specified person or body</td>
<td>n/a</td>
</tr>
<tr>
<td>change to principal place of residence, place of employment and/or place of education</td>
<td>notify specified person or body</td>
<td>24 hours</td>
</tr>
<tr>
<td>any contact with specified individuals (within or outside Australia)</td>
<td>notify specified person or body</td>
<td>24 hours</td>
</tr>
<tr>
<td>if the person intends to enter, or enters, a state or territory other than the one in which his or her principal place of residence is located</td>
<td>notify specified person or body</td>
<td>period specified in permit</td>
</tr>
<tr>
<td>if the person intends to leave, or leaves, Australia</td>
<td>notify specified person or body</td>
<td>period specified in permit</td>
</tr>
<tr>
<td>if the person accesses or uses, or intends to access or use specified forms of telecommunication or other technology</td>
<td>notify specified person or body and/or provide a specified person or body with sufficient information to enable the specific service, account or device to be identified</td>
<td>period specified in permit</td>
</tr>
<tr>
<td>if the person intends to apply for an Australian travel document</td>
<td>notify specified person or body</td>
<td>period specified in permit</td>
</tr>
</tbody>
</table>

Whereas under a control order, a person may be prohibited or restricted from communicating with certain individuals or using specified forms of technology, a return permit may not place such restrictions on the person’s actions. Instead, these permits may require the person to notify authorities of certain actions.

### Other matters

A return permit must: be in writing; specify the name of the person to whom it relates; specify the period during which it and any conditions are to be in force; specify any conditions imposed; set

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162. *Criminal Code*, subsection 104.5(3).
out the effect of clauses 17 (varying and revoking a permit), 18 (applications relating to return permits), 20 (offence for failing to comply with conditions) and 22 (offence for providing false information and documents); and state that the person may have review rights in relation to the decision to issue the permit. The requirement to state that a person may have review rights has been included in response to a recommendation of the PJCIS. 163

The Minister must cause a copy of the permit to be served personally on the person to whom it relates. 165 If the person to whom the order relates is 14 to 17 years of age, the permit must also be served on a parent or guardian (if reasonably practicable to do so), implementing part of a recommendation of the PJCIS on the February Bill. 166

The Minister may vary or revoke a permit on his or her own initiative or on application by the person to whom the permit relates (or another person on his or her behalf). 167

**Issue: notification requirements for revocations**

A revocation under clause 17 will take effect immediately, yet as with a TEO, the Minister will only be required to ‘cause such steps to be taken as are, in the opinion of the Minister, reasonable and practicable’ to bring the revocation to the individual’s attention. 168 It is possible that a permit could be revoked after an individual has booked and paid for his or her return to Australia, and even while the individual is in transit.

It is also not entirely clear in what circumstances the Minister would revoke (as opposed to vary) a return permit on his or her own initiative, and the practical implications of such an action. If the Minister revokes a permit because he or she considers that the individual should not yet be permitted to return, the Minister would presumably impose another TEO on the individual, but would then be required to issue another return permit if the individual made a fresh application for one.

**Issue: interaction with the control order regime**

The Minister stated in his second reading speech for the February Bill that after a period of further assessment following an individual’s return, police may apply for a control order in relation to the person. 169 While this may be a reasonable course of action in relation to some individuals, the Bill does not contain any provisions to prevent a person from being subject to both conditions under a return permit and obligations, prohibitions and restrictions under a control order at the same time. Consideration could be given to inclusion of a provision stating that if a control order is imposed on an individual, a return permit in force in relation to that individual is taken to be revoked, or a provision requiring the Minister to revoke a return permit if a control order is issued.

165. Subclause 15(5).
167. Subclauses 17(1) and (2). See further subclauses 17(3)–(6) and clause 18.
168. Subclauses 17(3) and (6). A variation to vary the period during which a permit is in force or impose a new condition must be served on the person (subclause 17(4)). A variation to remove a condition from a permit carries the same notification requirement as revocation of a permit (subclause 17(6)).
Offences

There will be three offences in relation to return permits.

The first two offences will mirror those described above for TEOs (and carry the same penalties), but apply in relation to conditions imposed under return orders.\textsuperscript{170}

The PJCIS recommended that the offence for failing to comply with a condition of a return permit should be amended to require the prosecution to prove that the person knew of the existence of the return permit.\textsuperscript{171} The Government has not implemented that recommendation, stating that requiring proof of knowledge rather than recklessness may reduce deterrence.\textsuperscript{172} To prove that a person was reckless as to whether a condition was in force under a return permit, the prosecution will need to prove that the person was ‘aware of a substantial risk’ that the condition was in force and that having regard to the circumstances known to him or her, is was ‘unjustifiable to take the risk’.\textsuperscript{173}

The third offence will apply where a person knowingly provides false or misleading information or documents in response to a condition imposed on a permit given to the person.\textsuperscript{174} An exception will apply (with the defendant bearing an evidential burden) if the information or document is not false or misleading in a material particular. This offence will carry the same maximum penalty as the others (imprisonment for two years and/or a fine of 120 penalty units).\textsuperscript{175}

Issues common to TEOs and return permits

Necessity of the proposed orders

The Australian Government already has a significant suite of powers available to it to deal with the threats posed by foreign fighters, including passport suspension and cancellation; citizenship cessation powers; the control order regime; ASIO powers to investigate individuals of security concern and law enforcement powers to investigate suspected criminal conduct.\textsuperscript{176} In that context, some stakeholders have questioned the necessity of the measures proposed in the Bill and argued that the Government has not provided sufficient justification for them.\textsuperscript{177}

The LCA stated:

... 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

\textsuperscript{170} Clauses 20 (failing to comply with conditions of return permit) and 21 (permitting use of a vessel or aircraft by a person in contravention of return permit conditions).


\textsuperscript{172} Government response, op. cit.

\textsuperscript{173} \textit{Criminal Code}, subsection 5.4(1).

\textsuperscript{174} While other provisions have been changed in the TEO Bill to refer to a return permit being ‘issued’ to a person, the offence provision still refers to the permit being ‘given’ to the person.

\textsuperscript{175} Clauses 22.

\textsuperscript{176} See the ‘Background’ section of this Digest and Australian Government, ‘\textit{Laws to combat terrorism}’, Australian national security website.

\textsuperscript{177} Most of these concerns were raised in the context of the February Bill. However, see also: P Maley, ‘\textit{Concerns over new returning jihadi law}’, \textit{The Australian}, 22 May 2019, p. 7; J Coyne, ‘\textit{Why is the Morrison Government pushing for new terrorism legislation?}’, Australian Strategic Policy Institute, 4 July 2019; S Pillai, ‘\textit{There’s no clear need for Peter Dutton’s new bill excluding citizens from Australia}’, \textit{The Conversation}, 5 July 2019.
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.\(^{178}\)

Similar sentiments were expressed by the AHRC, IARC and Professor Helen Irving in submissions to the PJCIS’s inquiry into the February Bill, and by others elsewhere.\(^{179}\)

Ananian-Welsh, Blackbourn and McGarrity stated:

> We submit that no evidence has been presented to demonstrate that the anti-terrorism legislation which Australia has enacted to date is inadequate and, furthermore, that the proposed TEOs scheme fills an identified gap. We are concerned that the TEOs scheme would be relied upon to circumvent the safeguards of the criminal justice system, which should be given primacy, and even the limited safeguards of the control orders regime.\(^{180}\)

They also questioned whether TEOs could even prove to be counter-productive:

> Refusal of entry into Australia on relatively flimsy grounds could further a person’s sense of injustice and heighten the risk of them, or those close to them, committing terrorist acts overseas or upon their return to Australia at some point in the future.\(^{181}\)

The Department of Home Affairs was asked at a PJCIS hearing about what gap the Bill sought to fill. The Department responded that there is not currently a mechanism for the managed return of individuals of counter-terrorism interest in the absence of evidence to enable a prosecution.\(^{182}\)

While there is not currently a specific mechanism of that kind, passport cancellation and control orders used in combination would go some way towards managing the return of such individuals. If a person’s passport has been cancelled, the Department of Foreign Affairs and Trade can issue a short-term travel document to facilitate an individual’s return to Australia.\(^{183}\)

**Constitutional issues**

Some organisations and legal academics have suggested that TEOs and return permits may not be constitutionally sound.

Professor Irving argued that Australian citizens have a constitutional right of abode, and that the Bill would breach that right.\(^{184}\) She noted that in a 1988 case, the High Court stated:

> The right of the Australian citizen to enter the country is not qualified by any law imposing a need to obtain a licence or “clearance” from the Executive.\(^{185}\)

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178. LCA, Submission to PJCIS, op. cit., p. 8.
179. AHRC, Submission to PJCIS, op. cit., pp. 13–15; IARC, Submission to PJCIS, op. cit., p. 4; Irving, Submission to PJCIS, op. cit.; Pillai, “There’s no clear need for Peter Dutton’s new bill excluding citizens from Australia”, op. cit; Maley, “Concerns over new returning jihadi law”, op. cit.
181. Ibid., p. 5. With respect to TEOs, see also Coyne, “Why is the Morrison Government pushing for new terrorism legislation?”, op. cit.
182. PJCIS, Official committee Hansard, 15 March 2019, pp. 11–12.
183. S Kimmorley, “Here’s what happens to the Australians who have had their passports cancelled in the Middle East”, Business Insider (online edition), 9 December 2014.
185. Air Caledonie International v Commonwealth [1988] HCA 61 (1988) 165 CLR 462 at para [10]. Irving also stated: ‘That the citizen’s right of abode is protected by international law has also been recognised by the High Court in its constitutional jurisprudence’ (in Re Canavan; Re Ludlam; Re Waters; Re Roberts [No 2]; Re Joyce; Re Nash; Re Xenophon [2017] HCA 45): Irving, Submission to PJCIS, op. cit., p. 2.
Irving considered:

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

The fact that the exclusion is temporary does not qualify the character of the Bill as a law that would prevent a citizen from exercising his or her right of abode.186

Irving and the LCA also contended that the February Bill may breach the separation of powers. The LCA made this argument on the basis that a TEO may represent punishment imposed by the Executive for criminal conduct.187 Irving submitted:

Nothing in the Bill suggests that the making of a TEO requires a prior judicial determination of guilt or even an application before a court or judicial officer. In making it an offence to enter Australia, the Bill will punish a person for what is, effectively, a pre-determination of guilt by the Executive, signified by a penalty (the imposition of the TEO), the breach of which is the only relevant demonstration of unlawful conduct.188

The Department of Home Affairs indicated that it had legal advice concerning the constitutionality of the February Bill and that while it considered that a right of abode exists, ‘it’s not a right that can’t be modified by a statute’.189

In additional comments to the PJCIS report, Labor members expressed concern about the constitutional issues raised by submitters and stated that the Government should:

- specifically ask the Solicitor-General to provide it with advice on how the Bill could be amended (if at all) to ensure that it has strong prospects of withstanding any constitutional challenge; and
- provide a copy of the Solicitor-General’s advice to the Committee for review.190

The Government has reportedly ruled out sharing the legal advice it has received on TEOs.191

**Exclusion of procedural fairness**

Clause 26 will provide that the Minister is not required to observe any requirements of procedural fairness in exercising a power or performing a function under the Act. While the content of procedural fairness is not fixed, it generally involves two requirements being met—the fair hearing rule (which ‘requires a decision maker to afford a person an opportunity to be heard before making a decision affecting their interests’) and the rule against bias (which ‘ensures that the decision maker can be objectively considered to be impartial and not to have pre-judged a decision’).192 In a practical sense, a key implication is that the Minister will not be obliged to give a

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person notice that he or she intends to make a TEO, impose a condition under a return permit, or revoke or vary a return permit; or an opportunity to present information that might be relevant to such a decision.

Several stakeholders objected to the exclusion of procedural fairness from a scheme that carries such significant consequences for individuals, and the Scrutiny of Bills Committee was concerned about this aspect of the February Bill. The Explanatory Memorandum to the February Bill provided limited justification for the exclusion. It noted that an individual subject to a TEO or a return permit will have access to judicial review, and stated:

Procedural fairness requirements, specifically enabling the potential subject of a TEO to respond to allegations made against them, can frustrate the policy intention of this Bill by providing advance notice that they are being considered for a TEO. Such a requirement may also be practically difficult to implement in circumstances where that individual is overseas, potentially in conflict zones.

The LCA noted that explanation (which has since been included in the Explanatory Memorandum for the TEO Bill) and suggested that if providing procedural fairness would frustrate the policy intent of the Bill, ‘this indicates that the desired policy settings are not compatible with the rule of law’.

Review of Ministerial decisions

Stakeholders were concerned at the lack of access to independent review of ministerial decisions relating to TEOs and return permits. As noted above, the Explanatory Memorandum for the TEO Bill states that a person subject to a TEO or a return permit will have access to judicial review. However, one avenue of such review will be excluded by clause 27, which will provide that the Administrative Decisions (Judicial Review) Act 1977 does not apply to decisions made under the Act. The Explanatory Memorandum states that this clause, which was not included in the February Bill, has been included because review under that Act ‘largely replicates the review that is already undertaken by the reviewing authority’. This ignores the fact that the making of a TEO, which will be the only decision reviewed by a reviewing authority, is only one of several decisions that the Minister will be able to make (others for which individuals may wish to seek review include the variation of a TEO, imposition of a condition under a new or varied return permit, and revocation of a return permit).

Further, the LCA and Ananian-Welsh, Blackbourn and McGarrity consider that several aspects of the Bill will mean that judicial review will be ‘limited and inadequate’ because:

(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;

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196. LCA, Submission to PJCIS, op. cit., p. 13.
197. Explanatory Memorandum, TEO Bill, pp. 24–25 (on p. 25: ‘… judicial review of both the Minister’s temporary exclusion order decision and the review authority’s consideration is available under section 75(v) of the Constitution and section 39B of the Judiciary Act 1903’).
198. Ibid., p. 25.
(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. 199

The AHRC, LCA and the Scrutiny of Bills Committee also considered that affected individuals should have access to full independent merits review (not just judicial review) of decisions relating to TEOs and return permits. 200 While judicial review is limited to consideration of whether a decision involved an error of law, merits review considers all evidence about the merits of a decision to determine whether the ‘correct or preferable’ decision was made. 201

**Reporting and review**

**Annual reports**

Clause 31 will require the Government to report annually on the operation of the Act, and set out certain information to be included in each report. The Minister will be required to table a copy of an annual report in each house of Parliament within 15 sitting days of receiving it. Information that the Minister is satisfied is likely to prejudice national security may be excluded from the tabled report, but must be provided to the PJCIS.

This provision implements a recommendation of the PJCIS on the February Bill. 202

**Review of the proposed law**

The Consequential Amendments Bill will

- enable the INSLM to review and report on the operation, effectiveness and implications of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (the Act) (partially implementing a recommendation of the PJCIS) and

- amend the functions of the PJCIS to include monitoring and reviewing the exercise of powers under the Act, and conducting a review of the operation, effectiveness and implications of the Act within three years of its commencement, implementing recommendations of the PJCIS. 203

The TEO Bill does not include a sunset clause. 204 The PJCIS asked the Department of Home Affairs whether consideration had been given to the inclusion of such a clause. An officer stated:

> This is one particular moment in time, but there'll be other circumstances where there'll be foreign fighters offshore. It doesn't require a rise of the Caliphate for this to be the point in time. It's just that

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203. Items 1 and 2 of Schedule 1 (amending the *Independent National Security Legislation Monitor Act 2010* and the *Intelligence Services Act 2001* respectively); PJCIS, Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, op. cit., pp. 44–45, 51–52 (recommendations 15 and 17 (PJCIS) and 16 (INSLM)).

204. A sunset clause provides that the provisions to which it relates will cease to have effect after a particular date unless extended by a further legislative amendment.
we have a number of people who are offshore. This will be a long time in the running, but, no, there’s no reason a sunset clause hasn’t been put in at the moment. 205

Concluding comments
The Australian Government already has a significant suite of powers available to it to deal with the threats posed by foreign fighters. The Bill would add to the existing framework by providing a specific mechanism to facilitate the managed return of individuals of counter-terrorism interest where there is insufficient evidence to support extradition and immediate prosecution.

Stakeholders have objected to the Bill on the grounds that the Government has not demonstrated the need for the new powers, that the Bill may not be constitutionally sound, and that it may be inconsistent with international human rights law and international obligations to exercise criminal jurisdiction over people suspected of engaging in terrorism.

Some of the concerns raised by stakeholders will be addressed through amendments in the TEO Bill (compared to the February Bill) and through the Consequential Amendments Bill, both of which will implement PJCIS recommendations. However, the Government has chosen not to implement those recommendations in full (failing to implement some altogether, and implementing some in part). Some stakeholder concerns, including allowing the imposition of TEOs on minors, exclusion of procedural fairness and lack of merits review, were not the subject of PJCIS recommendations and have not been addressed in the Bills.

205. PJCIS, *Official committee Hansard*, 15 March 2019, p. 23 (Linda Geddes, then Deputy Secretary Commonwealth Counter-Terrorism Coordinator).
Counter-Terrorism (Temporary Exclusion Orders) Bill 2019

Moving to a new section...

...and concluding the page with necessary legal and copyright information.