

28 October 2022



Law Council
OF AUSTRALIA

Office of the President

Mr Peter Khalil MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
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CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

Supplementary Submission: Review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019*

The Law Council of Australia appreciates the opportunity to have appeared before the Parliamentary Joint Committee on Intelligence and Security (**Committee**) on 17 October 2022 in relation to its Review of the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) (**TEO Act**).

In the course of the Law Council's appearance, the following line of questioning from the Deputy Chair, Mr Andrew Wallace MP, was taken on notice:

... can you give us a bit of an understanding as to the UK provisions and their legislation? When an application is brought to the court, an interim order may be made or the minister may in fact be able to make an interim order. But what's the effect of that interim order in the UK legislation? Is that something that has a sunset clause on it that has to be revisited on a regular basis whilst the process is working its way through? How does it work?

The Law Council provides the following information in relation to the operation of the Temporary Exclusion Order (**TEO**) in the United Kingdom (**UK**).

UK TEO regime—issuing grounds

Section 2 the *Counter-Terrorism and Security Act 2015* (UK) (**UK Act**) provides the Secretary of State (**Secretary**) with the power to issue a TEO. To impose a TEO, the Secretary must:

- reasonably suspect that the individual 'is, or has been, involved in terrorism-related activity' outside the United Kingdom; and
- reasonably consider that it is necessary to impose a TEO, for purposes connected with protecting members of the public in the United Kingdom from a risk of terrorism.¹

¹ *Counter-Terrorism and Security Act 2015* (UK) ss 2(3)-(4). The individual must also be outside the UK but have a right to abode in the UK: ss 2(5)-(6).

Under the Australian regime, the first ground for issuing a TEO requires that the Minister suspect, on reasonable grounds, that making the order would ‘substantially assist’ in preventing:

- (i) a terrorist act;
- (ii) the provision of training to a listed terrorist organisation (or preventing participation in training with such an organisation);
- (iii) preventing the provision of support for, or the facilitation of, a terrorist act; or
- (iv) preventing the provision of support or resources to an organisation that would enable that organisation to directly or indirectly engage in conduct that is preparatory or ancillary to a terrorist act.²

In the Law Council’s view, the Australian approach, in contrast to the UK approach, is broad, speculative, and imprecise. As a result, the Australian regime, which significantly intrudes on the rights of Australian citizens, may operate in a broader, potentially unintended, context than the stated objective of the TEO regime to respond to the threat of returning ‘foreign terrorist fighters’. The Law Council considers the condition of reasonable suspicion that the individual ‘is, or has been, involved in terrorism-related activity’, as set out in the UK Act, to be an important safeguard in this regard.

As such, the Law Council recommends that paragraph 10(2)(a) of the TEO Act should be amended to include an additional issuing criterion, requiring the Minister to suspect on reasonable grounds that the person has engaged in a terrorism-related activity of the kind specified in subparagraphs (i)–(iv) outside of Australia. This recommendation directly accords with the Committee’s recommendation in relation to the originating Bill in 2019 (adopting the UK approach) that paragraph 10(2)(a) be amended to include an additional, explicit issuing criterion to this effect.³

Role of the court in the UK process

Under subsection 2(7) of the UK Act, the Secretary may only grant a TEO if:

- (a) the court gives the Secretary of State permission under section 3; or
- (b) the Secretary of State reasonably considers that the urgency of the case requires a temporary exclusion order to be imposed without obtaining such permission.⁴

Subsection 3(2) of the UK Act states that it is the function of the court to ‘determine whether the relevant decisions of the Secretary of State are obviously flawed’.⁵ In determining the application, the court must apply the principles applicable on an

² *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 10(2)(a).

³ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (April 2019), rec 12.

⁴ Note under subsection 14(2) ‘court’ is defined to mean, the High Court in England and Wales, or (in the case of proceedings relating to an individual whose principal place of residence is in Scotland) the Outer House of the Court of Session, or (in the case of proceedings relating to an individual whose principal place of residence is in Northern Ireland) the High Court in Northern Ireland.

⁵ The English Court of Appeal in *Mohamed and Cf v Secretary of State for Home Department* [2014] EWCA Civ 559 [31] (in the context of terrorism prevention and investigation measures which also require permission from the Court based on the ‘obviously flawed’ threshold), noted that the ‘obviously flawed’ threshold requires a ‘relatively low level of scrutiny’ but is still an ‘an important constitutional safeguard.’

application for judicial review.⁶ If the court determines that the decisions of the Secretary are obviously flawed, the court may not give permission for the TEO to be granted.⁷ In any other case, the court must give permission.⁸

Urgent TEOs

Schedule 2 to the UK Act sets out the details of the TEO regime where the Secretary determines that the urgency of the case requires a TEO to be imposed without obtaining permission from the court. Schedule 2 is extracted at **Attachment A** for ease of consideration by the Committee.

Under paragraph 2 of schedule 2, the TEO must include a statement that the Secretary reasonably considers that the urgency of the case requires the order to be imposed without obtaining the permission of the court under section 3.

Where an urgent TEO is made, it takes effect from the point at which notice is given to the individual on whom it is imposed.⁹

However, immediately after giving notice of the imposition of the TEO, the Secretary must refer to the court the imposition of the order on the individual.¹⁰ The function of the court is to consider whether the urgent case decisions were obviously flawed.¹¹ The court's consideration of the reference must begin within the period of 7 days beginning with the day on which notice of the imposition of the temporary exclusion order is given to the individual.¹²

Paragraph 4 of schedule 2 sets out the possible decisions by the court. Under subclause 4(1), where the court determines that any of the relevant decisions (that is, the decisions as to the making of a TEO, rather than as to the urgency) are obviously flawed, the court must quash the TEO. If subparagraph (1) does not apply, the court must confirm the TEO.¹³ However, if the court determines that the decision of the Secretary that the urgency condition is met is obviously flawed, the court must make a declaration about that determination (whether it quashes or confirms the TEO).¹⁴

Law Council's position on the UK model in relation to urgent TEOs

As noted at recommendation 2 of the Law Council's primary submission to this Review, the Law Council is of the view that section 10 and related provisions of the TEO Act should be amended to provide that superior court judges, rather than the Minister for Home Affairs (**Minister**), may issue TEOs.¹⁵ This accords with the previous recommendation of the Committee in relation to the originating Bill in 2019.¹⁶ A judicial authorisation model would ensure that the primary decision to issue a TEO attracts the

⁶ *Counter-Terrorism and Security Act 2015* (UK) s 3(5).

⁷ *Ibid* s 3(6).

⁸ *Ibid* s 3(7).

⁹ *Ibid* s 4.

¹⁰ *Ibid* sch 2 subparagraph 3(1).

¹¹ *Ibid* sch 2 subparagraph 3(2).

¹² *Ibid* sch 2 subparagraph 3(3).

¹³ *Ibid* sch 2 subparagraph 4(2).

¹⁴ *Ibid* sch 2 subparagraph 4(3).

¹⁵ Law Council of Australia, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (29 November 2021) 13-15.

¹⁶ Parliamentary Joint Committee on Intelligence and Security, *Advisory Report on the Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (April 2019), rec 7.

independence, rigour and standing of decision-making by judicial officers of superior courts.¹⁷

In June 2021, the UK Government, in a Memorandum to the Home Affairs Committee of the UK Parliament summarising the use of TEO provisions, indicated that no TEOs had been granted based on the urgent circumstance mechanism up to that point.¹⁸ This would appear to indicate that seeking judicial permission is not incompatible with managing the risks of return in a timely and efficient manner. However, the UK Government did also note on this point that Counter-Terrorism Policing is of the view that, in urgent cases, there may be a need to expedite the TEO process to ensure that the objectives of risk-managed return and in-country obligations are not lost.¹⁹

On balance, the UK experience indicates that requiring judicial oversight of the issuing of TEOs may be a proportionate and efficient mechanism compatible with the policy objectives of the scheme.

Should the Committee agree with the Law Council's view that superior court judges should issue TEOs, but remain concerned about potential delay in urgent circumstances, the Law Council suggests that the Committee give consideration to recommending a model similar to that which applies in the UK.

Further information

Thank you again for the opportunity for the Law Council to participate in this Review. The Law Council would be pleased to provide any further assistance the Committee may require.

Please contact Mr John Farrell, Senior Policy Lawyer, on (02) 6246 3724 or at john.farrell@lawcouncil.asn.au in the first instance if you require further information or clarification.

Yours sincerely



Mr Tass Liveris
President

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¹⁷ Law Council of Australia, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (29 November 2021) 13.

¹⁸ Home Office, *Memorandum to the Home Affairs Committee: Post-Legislative Scrutiny of the Counter Terrorism and Security Act 2015* (CP 455, June 2021) 10 <<https://www.gov.uk/government/publications/post-legislative-scrutiny-of-the-counter-terrorism-and-security-act-2015>>.

¹⁹ *Ibid* 11.