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Australia’s Foreign Fighters: The Temporary Exclusion “Solution”

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Australian immigration laws have tended to be at the mercy of political, not legal, considerations. Those arriving are at the historical mercy of the minister with that portfolio, one ever motivated by the expediency that position brings. Judges, as far as possible, tend to be excluded; ministers on brief appointments make the running in laws that are arbitrary and often shallow in application.

The bill proposed (to be more accurate, revived) last month by **Peter Dutton**, known as the *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019*, was merely another one to add to 75 pieces of legislation that already hang heavily on the shelves of lawmakers and the shoulders of citizens. As Sangeetha Pillai has noted on this conspicuous act of over larding,

> “the government has not made it clear how the bill would fill an identified gap in Australia’s already extensive national security regime.”

Dutton’s pet project is security over-egging. Having no vision in a portfolio that, admittedly, tends to resist the liberal and laterally minded, he does what he knows best: propose more security measures, increasingly draconian and increasingly ineffective in their purpose. Despite lapsing in April this year prior to the election, the Temporary Exclusion Orders bill was revived and returned for reconsideration in the new parliament. There was little need for it, but Labor was raw and ripe for capitulation after their election loss. Opposition would be seen as softness towards terrorism, weakness before returning jihadis.

The basis of the TEO law is unabashedly ideological, a statement of Australia’s commitment against those who it claims are fighting against its interests, and those of its allies, in Syria and Iraq. It broadness is such that it could be used, as Greg Barns rightly observes, against the press. Its immediate and odious application is against Australian citizens, preventing them, courtesy of executive fiat, returning for up to two years at a time. Keep out the bad, radicalised eggs, goes the presumption, at least for a time.

While the TEO is in place, the subject person would only be able to return to Australia on the issue of a return permit, again subject to ministerial discretion. That return order is also the subject of conditions on when and how the person is to arrive in Australia. Breaches of both the TEO and the return order can lead to imprisonment for up to two years.

The act brings in the usual, shoddy efforts that ride roughshod over matters of citizenship. Ministerial discretion is involved (reasonable suspicion, as if that was ever reliable, that the TEO would prevent terrorism-related acts) and ASIO’s involvement. ASIO, naturally, does

not need to abide by any evidential burden in its assessments, given free rein on what might constitute a security risk.

Labor, as has become the norm, decided to murmur with some irritation, simulate the taking of a strong stance in abject defiance, then acceded to the wishes of the Coalition, a white flag shown to all. The proviso for caving in in passing the bill in the lower house was an attempt to reroute it back to the Joint Committee on Intelligence and Security or move amendments reflecting the 18 recommendations of that committee. (Students of the JCIS will be familiar that many of its recommendations are rarely worth the screen gazing time on a computer when it comes to balancing liberty and security.) As Labor's increasingly unimpressive shadow home affairs minister **Kristina Keneally** put it,

> "some of these people affected by [this bill] represent a threat to the Australian community."

The upshot of this is the realisation that Keneally is not an opposition spokesman on the subject so much as Dutton's actual shadow.

The proposed amendments by the JCIS did, to a modest extent, soften the beastly nature of the bill. One suggested that any temporary exclusion order can only be issued by a judge, retired judge, or a senior member of the Administrative Appeals tribunal on application of the Minister. Another proposed that prosecution for breaching the provisions of the law requires proof (the degree is not stipulated) that the defendant had knowledge of the existence of the TEO or of the relevant return permit condition.

As matters transpired, the JCIS, for the most part, was ignored, prompting concerns from the Law Council of Australia that an important body in the political process had been marginalised. The ministerial monopoly on determining whether returning individuals from Syria and Iraq are foreign fighters remained intact.

On July 25, the consequential bill intended "to review the operation, effectiveness and implications of the temporary exclusion orders scheme", along with the main TEO legislation, passed both Houses, being assented to on July 30. The bill has, in its attachment, a fairly meaningless, procedurally heavy "statement of compatibility with human rights". Reading it gives little reason for optimism that Australia's parliamentarians have seen any liberating light. "The consequential amendments in this Bill do not directly engage any specific human rights or freedoms. Rather, the broad oversight mechanism that the Bill introduces provide additional protections to ensure that any limitations placed on the human rights by the TEO scheme are reasonable, necessary and proportionate." Some fine and fairly empty words.

A nasty little case of over-legislation in the name of fighting spectral threats, these are unlikely to be removed any time too soon. The security mindset is in the ascendency, and it remains to be seen whether the measures to prevent a constitutional challenge to the law have been adequate. As the Law Council of Australia President, **Arthur Moses**, SC, has noted with concern,

> "A ministerial decision to grant a TEO is arguably punitive, and arguably invalid. In granting a TEO, a minister is effectively determining and imposing punishment for a citizen's alleged conduct – or prospective offence – in the

form of an order preventing re-entry."

Such approaches show a dogmatic streak in the nature of Australian lawmaking. Apart from its latent authoritarianism, it is ahistorical. Foreign fighters, and their impedimenta, are easily packaged by state demonology, but their history is varied, circumstances distinct. Not all will return mad, bad, and best incarcerated or subject to control orders. As **Nir Arielli** of the University of Leeds poses,

> "Historically, foreign war volunteers, whether in Spain or in other conflicts, have never been homogenous in terms of their motivations, commitment and postwar trajectories."

Volunteers are also driven by various motivations and triggers for radicalisation: they are to be treated as subjects of reform, not merely punishment. Such points of subtlety will not emerge in this debate; in most quarters, it has ceased to even be one. **Senator Rex Patrick** of the Centre Alliance was certainly correct in calling the TEO Bill "an extraordinary piece of legislation". Extraordinary, and brutish.

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