



# REPATRIATION OF AUSTRALIAN NATIONALS IN THE SYRIA-IRAQ CONFLICT ZONE

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POLICY BRIEF - ANITA XIE

# EXECUTIVE SUMMARY

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Since the fall of ISIL-controlled territories in the Syria-Iraq conflict zone, the detention of Australian nationals – both foreign fighters and their dependents – under the Kurdish-led Syrian Democratic Forces (SDF) in Syria has represented an ongoing challenge for the Australian Government.

Australia has maintained its stance of non-repatriation, introducing in July 2019 a scheme of ‘temporary exclusion orders’ (TEOs) which impinge upon a citizen’s right of entry to Australia. While guided by valid national security concerns, this policy response should be re-evaluated in light of the Turkish incursion into north-eastern Syria in October 2019 following the withdrawal of American forces in the region. Indeed, increased instability in the region threatens the collapse of SDF-controlled detention camps and the subsequent release of Australian foreign fighters.

The potential resurgence of the terrorist threat, alongside consideration of Australia’s responsibility as a good international citizen to participate in the global collaborative effort against terrorism, make Australia’s current response increasingly untenable. There may also be issues relating to Australia’s compliance with fundamental human rights obligations to its citizens.

As such, this policy brief recommends the amendment of the TEO scheme and the immediate repatriation of those falling under the threshold of a TEO to better balance Australia's national security interests against its broader interests of maintaining a 'rules-based' international order.[1]

## BACKGROUND

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ISIL and its affiliated extremist networks have created ongoing challenges for the national security of Australia. In the wake of the physical collapse of ISIL's former caliphate in north-eastern Syria, the Australian Security Intelligence Organisation (ASIO) has assessed that the terrorism threat level to Australia remains 'probable'. [2] In particular, security concerns emerging from the potential repatriation of those who have travelled to Iraq and Syria to support ISIL are of increasing significance. Of the approximate 230 Australian nationals who have travelled to these conflict zones since 2012, [3] 8 foreign fighters are estimated to be under SDF custody with a further estimated 60 dependents held in unstable conditions at the Kurdish-controlled al-Hawl camp. [4] Following Turkish military advancement into north-eastern Syria in October 2019, the collapse of detention camps along with the potential 'breakout' of Australian foreign fighters held in SDF's custody has escalated the urgency of repatriation. [5]

In July 2019, the Counter-Terrorism (Temporary Exclusion Orders) Act 2019 [6] (Act) came into force. Under the Act, Australian citizens over the age of 14 who have travelled to a conflict zone – including those who hold sole citizenship – can be prevented from returning to Australia for up to two years if subject to a TEO. [7] TEOs can be issued by the following means:

- The discretion of the Department of Home Affairs (DHA) Minister on the grounds of suspicion of an intention to provide support or assistance to terrorist organisations.
- By ASIO on suspicion of a threat to national security for 'reasons related to politically motivated violence'. [8]

Such broad discretionary powers to issue a TEO reflect the DHA's need to implement strict control measures on the re-entry of Australians of 'counter-terrorism interest'. [9] Notably, the Act is one of a growing number of legislative measures introduced to manage the risks of terrorism to national security.

# THE PROBLEM

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Both short and long-term strategies are needed to manage the movement of Australian nationals that remain in formerly Islamic State-controlled territories.

The practical effect of the TEO scheme in its current iteration will result in Australian citizens kept offshore.

ASIO has indicated that the onshore threat presented by the repatriation of the whole contingent of Australian foreign fighters and their dependents in the Syria-Iraq conflict zone could place a significant strain on the resource and security capabilities of ASIO and Australia's other security authorities.[10] DHA Minister Dutton has previously expressed the urgency of managing the security challenges of Australian foreign fighters "as far from [Australia's] shores as possible".[11] Concerning dependents detained at al-Hawl, Dutton has stated that some hold "the potential and capacity to come back [to Australia] and cause a mass casualty event".[12]

Nonetheless, ASIO has noted that keeping foreign fighters offshore may exacerbate other manifestations of the terrorist threat, including radicalisation of those in detention camps and the potential for the resurgence of ISIL.[13]

This is particularly so given recent increased instability and volatility in the region which threaten the capabilities of the SDF to maintain control of those held in their custody. It follows that there may also be evident disadvantages of Australia's current policy – expressed through its TEO scheme – in relation to its effect on Australia's standing as an international partner in global counter-terrorism efforts. Similarly, concerns regarding the encroachment of Australia's fundamental human rights obligations to its citizens under international law are also of considerable significance.[14]

As such, Australia's current policy should be re-evaluated to determine its suitability to carry out its legislative purpose of securing Australia's national security interests as balanced against broader foreign policy objectives of good international citizenship.

## POLICY RECOMMENDATIONS

# 1

### **Adopt the key recommendations of the Parliamentary Joint Committee on Intelligence and Security (PJCIS)**

In its current state, the Act – with its absence of recourse to merits review coupled with its enlivening of broad discretionary powers – lacks the usual requirements of procedural fairness.[15] Accordingly, amendments should be made to better balance issues of national security – which may warrant an imposition on certain rights – against Australia's obligations to both its citizens and the international community at large. Following the advisory report on the Counter-Terrorism (TEO) Bill 2019 [16] prepared by the PJCIS, several key recommendations should be adopted:

- Decision-making powers to be from the DHA Minister to a court or retired judicial officer;
- Addition of an avenue of merits review by a tribunal holding 'appropriate national security expertise' to allow reconsideration of the facts, law, and policy aspects of a decision; and

Narrowing of the grounds for issuing a TEO with the addition of a threshold of having fought in a conflict zone or having joined or associated with a terrorist organisation while abroad.

In the repatriation of Australian citizens in the Syria-Iraq conflict zone, strong consideration should be given to the resource strain on ASIO and other agencies in the unrestricted return of all nationals of counter-terrorism interest.[17] Implementing the above key recommendations of the PCJIS, through an amendment of the Act, will restrict the operation of the TEO scheme to those that pose a significant threat to national security. It will also allow others – including dependents taken to conflict zones against their will – to be managed onshore through more appropriate mechanisms in Australia’s existing counter-terrorism framework.

Notably, although better aligning the TEO scheme to conform with Australia’s human rights obligations, thresholds which prevent the immediate repatriation of all nationals in the conflict zone still infringe upon key obligations recognised under international law, such as the right of abode and the right to a fair trial. [18]While similar policies have been condemned by the United States and numerous advocacy groups as the eschewing of responsibility,[19] the policies of most other Allied powers suggest Australia would not be at risk of losing political standing in issuing TEOs. In particular, since 2015 several European powers, including the United Kingdom, have shown an unwillingness to repatriate foreign fighters where comparable legislative measures to the TEO scheme have been in force.[20]

# 2

## **Commence the immediate repatriation of Australian nationals in the Syria-Iraq conflict zone that do not reach the threshold of a TEO**

Those detained in the Syria-Iraq conflict zone that do not fall under the amended TEO scheme should be immediately repatriated. While the repatriation of nationals would impose a significant resource impost on Australia's security agencies in the identification, processing, and management of individuals upon return, such national security concerns should be balanced against broader interests in maintaining a collaborative, rules-based international order. That is, where unilateral efforts against terrorism have proven insufficient, a coordinated and collaborative global approach remains vital to Australia's security interests.[21]

As stated by the UNHCR, an effective returns process is integral to establishing the system of accountability required to meaningfully address future radicalisation and extremism.[22] Similarly, repatriation is required for Australia to meet its fundamental human rights obligations, among these are the guarantee of the right to due process, the right of entry, and the overarching protection of the fundamental rights and freedoms enjoyed by its citizens.

Where the conditions of detention camps in north-eastern Syria risk further deterioration alongside collapse following the instability created by the recent conflict between Turkey and the SDF, there is an increased urgency for Australia to repatriate its nationals.

# CONCLUSION

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Recent conflict in north-eastern Syria and the subsequent instability of SDF-controlled territories warrants an adapted policy response from the Australian Government regarding the repatriation of its nationals under SDF custody. Where the current TEO scheme has effectively denied the repatriation of all foreign fighters and dependents in the Syria-Iraq conflict zone, the Act represents an increasingly untenable position for Australia as a good international citizen. As such, this policy brief recommends the amendment of the Act to better reflect an accurate proportionality assessment of the balance between national security and Australia's fundamental human rights obligations.

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