

A CRITIQUE OF THE *COUNTER-TERRORISM (TEMPORARY EXCLUSION ORDERS) ACT 2019 (CTH)* IN LIGHT OF AUSTRALIA'S OBLIGATIONS UNDER THE UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

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This article challenges the position of the Australian executive that the Counter-Terrorism (Temporary Exclusion Orders) Act 2019 (Cth) is compatible with the United Nations Convention on the Rights of the Child ('CRC'). Placing the discussion in the context of Australian children detained in Kurdish camps in Northern Syria on the ground of their involvement, or their parents' involvement, with Islamic State of Iraq and the Levant, the article contends that the Act does not permit the best interests of the child to be meaningfully taken into consideration (contrary to article 3(1) of the CRC). The article also argues that the Act has negative consequences for nationality rights and rights concerning the protection of the relationship between children and their parents (articles 7–9 and 16 of the CRC).

I INTRODUCTION

The involvement of nationals in conflict zones abroad poses significant challenges for states. In particular, the so-called Islamic State of Iraq and the Levant ('ISIL')¹ has attracted followers from states around the world – including Australia.² The presence of foreign fighters and their families in conflict zones

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1 On the origins of the name, see Jonathan Hogeback, 'Is It ISIS or ISIL?', *Encyclopaedia Britannica* (online, 15 February 2020) <<https://www.britannica.com/story/is-it-isis-or-isil>>.

2 According to the Lowy Institute, there are 194 known foreign fighters from Australia: Lowy Institute, *Typology of Terror* (Web Page, 2021) <<https://interactives.lowyinstitute.org/features/typology-of-terror/>>. The ages of 168 Australian foreign fighters are known; of those, 6.5% are under the age of 18: Lowy Institute, 'Age', *Typology of Terror* (Web Page, 2 September 2021) <<https://interactives.lowyinstitute.org/features/typology-of-terror/age/>>. The Lowy Institute data includes individuals who were convicted of terrorism offences in Australia and might not have travelled overseas.

associated with ISIL activities raises complex issues.³ Some states have preferred to address them through controversial measures that are questionable from a domestic and international law perspective. One such measure⁴ is the introduction in Australia of temporary exclusion orders ('TEOs') through the *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) ('*TEO Act*'),⁵ which permits Australia to control the timing and conditions of the return to Australia of nationals suspected of terrorism-related activities. TEOs are based on the United Kingdom ('UK') model.⁶ So far, three orders have been made in Australia.⁷

A better understanding of the arguments made in this article requires a brief overview of the relevant provisions in the *TEO Act*. Section 10 reads:

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- 3 An ongoing concern for the international community is the situation of foreign fighters and their families who are held in detention in various camps in Syria. For details on the numbers of foreign children in ISIL-connected detention, the dire conditions of their detention, and their extreme vulnerability, see Human Rights Council, *Report of the Special Representative of the Secretary-General for Children and Armed Conflict*, UN Doc A/HRC/40/49 (26 December 2018) 7 [18] ('*Report of the Social Representative for Children*'); UN Office for the Coordination of Humanitarian Affairs, *Syria: Humanitarian Response in Al Hol Camp*, (Situation Report No 5, 5 July 2019); 'Children of ISIL Terrorists Likely Held in "Secret Detention Facilities"', Human Rights Office Warns', *UN News* (online, 21 May 2019) <<https://news.un.org/en/story/2019/05/1038901>>; Vivian Yee, 'Thousands of ISIS Children Suffer in Camps as Countries Grapple with Their Fate', *The New York Times* (online, 8 May 2019) <<https://www.nytimes.com/2019/05/08/world/middleeast/isis-prisoners-children-women.html>>; Human Rights Council, *They Have Erased the Dreams of My Children: Children's Rights in the Syrian Arab Republic Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic*, UN Doc A/HRC/43/CRP.6 (13 January 2020) <https://uploads.guim.co.uk/2020/01/17/A_HRC_43_CRP_6_EN.pdf>; Ben Doherty, 'Three-Year-Old Australian Girl in Syria's Al-Hawl Camp May Lose Fingers to Frostbite', *The Guardian* (online, 17 February 2020) <<https://www.theguardian.com/australia-news/2020/feb/17/three-year-old-australian-girl-in-syrias-al-hawl-camp-may-lose-fingers-to-frostbite>> ('*Three-Year-Old Australian Girl*').
 - 4 Another controversial measure was the automatic loss of citizenship by dual nationals over the age of 14 as a result of involvement in terrorism-related conduct: see *Australian Citizenship Amendment (Allegiance to Australia) Act 2015* (Cth), now superseded by the *Australian Citizenship Amendment (Citizenship Cessation) Act 2020* (Cth).
 - 5 Initially introduced on 21 February 2019: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 74 of 2018–19, 1 April 2019. Reintroduced with amendments on 4 July 2019 after it lapsed on prorogation of the 45th Parliament. The Bill was passed on 25 July 2019 and was assented to on 30 July 2019. See 'Counter-Terrorism (Temporary Exclusion Orders) Bill 2019', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6361>. All official documents in relation to the Bill (the full text, the Explanatory Memorandum and the relevant Bills Digests) have been accessed at the above link.
 - 6 Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (Report, April 2019) pt C <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CTTEOBil2019/Report> ('*Advisory Report*'). See the *Counter-Terrorism and Security Act 2015* (UK). As at March 2020, 25 TEOs have been made in the United Kingdom ('UK'): see Secretary of State for the Home Department (UK), *HM Government Transparency Report: Disruptive Powers 2018/19* (Report, March 2020) 21 <<https://www.gov.uk/government/publications/transparency-report-disruptive-powers-2018-to-2019>>.
 - 7 Department of Home Affairs (Cth), *2020–21 Annual Report* (Report, September 2021) 67.

10 Making a temporary exclusion order

- (1) Subject to subsections (2) and (3), the Minister may make an order (a **temporary exclusion order**) under this subsection in relation to a person if:
 - (a) the person is located outside Australia; and
 - (b) the person is an Australian citizen; and
 - (c) the person is at least 14 years of age; and
 - (d) a return permit is not in force in relation to the person.
- (2) The Minister must not make a temporary exclusion order in relation to a person unless either:
 - (a) the Minister suspects on reasonable grounds that making the order would substantially assist in one or more of the following:
 - (i) preventing a terrorist act;
 - (ii) preventing training from being provided to, received from or participated in with a listed terrorist organisation;
 - (iii) preventing the provision of support for, or the facilitation of, a terrorist act;
 - (iv) preventing the provision of support or resources to an organisation that would help the organisation engage in an activity described in paragraph (a) of the definition of **terrorist organisation** in subsection 102.1(1) of the *Criminal Code*; or
 - (b) the person has been assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security (within the meaning of the *Australian Security Intelligence Organisation Act 1979*) for reasons related to politically motivated violence (within the meaning of that Act).
- (3) If the person is 14 to 17 years of age, the Minister must, before making a temporary exclusion order in relation to the person, have regard to:
 - (a) the protection of the community as the paramount consideration; and
 - (b) the best interests of the person as a primary consideration.
- (4) In determining what is in the best interests of a person for the purposes of paragraph (3)(b), the Minister must take into account the following matters:
 - (a) the age, maturity, sex and background (including lifestyle, culture and traditions) of the person;
 - (b) the physical and mental health of the person;
 - (c) the benefit to the person of having a meaningful relationship with his or her family and friends;
 - (d) the right of the person to receive an education;
 - (e) the right of the person to practise his or her religion;
 - (f) any other matter the Minister considers relevant.
- (5) The Minister must take into account the matters in subsection (4):
 - (a) only to the extent that the matters are known to the Minister; and
 - (b) only to the extent that the matters are relevant.

Under the *TEO Act*, TEOs must be immediately sent to a reviewing authority⁸ and reviewed ‘as soon as is reasonably practicable’.⁹ The reviewing authority consists of former judges or senior members of the Administrative Appeals Tribunal appointed by the Attorney-General and acting in their personal capacity.¹⁰

A TEO ceases to operate when it is revoked by the Minister for Home Affairs (‘Minister’) or when the Minister issues a return permit. It can be revoked on the Minister’s own initiative or on application by, or on behalf of, the concerned person.¹¹ The Minister must issue a return permit within a reasonable period of time after receiving the application,¹² but may attach pre- and post-entry conditions. When conditions are attached to an order concerning a child, the Minister must consider the best interests of the child – including the factors in sections 16(5)–(7), which replicate the text of sections 10(3)–(5) above. The conditions may require that the return to Australia be delayed for a certain period of time even after a permit has been issued.¹³ The Minister must also issue a return permit if the person is in the process of being deported or extradited to Australia.¹⁴

As specified in section 10(1)(c) of the *TEO Act*, children as young as 14 can become subjects of TEOs. In addition, children of all ages (whether in Australia or accompanying their parents abroad) may be negatively affected by TEOs issued in relation to their parents. Despite these significant negative effects, the executive argued during the scrutiny process under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) (‘*Scrutiny Act*’) that the proposed law was compatible with the *Convention on the Rights of the Child 1989* (‘*CRC*’).¹⁵ The aim of this article is to test that argument.

The article will refer to the situation of Australian children and their families who left Australia to join ISIL in Syria and Iraq, some of whom are currently detained in Syrian camps guarded by Kurdish forces.¹⁶ These Australians prompted the initiation of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth)

8 *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14(1) (‘*TEO Act*’).

9 *Ibid* s 14(4).

10 *Ibid* ss 23(1), (5).

11 *Ibid* ss 11, 12.

12 *Ibid* s 15(1) read with s 15(3)(a).

13 *Ibid* s 16(9)(a).

14 *Ibid* s 15(1)(b).

15 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (‘*CRC*’). Australia ratified the *CRC* on 17 December 1990: ‘Status of Treaties: *Convention on the Rights of the Child*’, *United Nations Treaty Collection* (Web Page, 16 March 2022) <https://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=en> (‘UNTC: Status of the *CRC*’).

16 In December 2019, it was reported that there were 20 Australian women held in detention in Al-Hawl (or Al-Hol), a camp controlled by Kurdish forces, together with 47 children under the age of five: see Ben Doherty, ‘Birth of Boy Sparks Renewed Calls to Rescue Australians in Syria’s Squalid Al-Hawl Camp’, *The Guardian* (online, 11 December 2019) <<https://www.theguardian.com/world/2019/dec/11/birth-of-boy-sparks-renewed-calls-to-rescue-australians-in-syrias-squalid-al-hawl-camp>>. Save the Children reported in July 2019 that there were some 40 Australian children detained in Syrian camps, of whom two were above the age of 14: Save the Children, ‘Temporary Exclusion Order Bill Fails to Take into Account Best Interests of Children’ (Media Release, 26 July 2019) <<https://www.savethechildren.org.au/media/media-releases/temporary-excl-order-reaction>>.

(‘TEO Bill’)¹⁷ and are therefore potential subjects of TEOs. The *TEO Act* does not apply exclusively to them, but their situation of extreme vulnerability best reveals the significant negative impact of the *TEO Act* on the rights of children and squarely confronts the executive’s view that the *TEO Act* is compatible with the *CRC*.

Following this introductory Part I, Part II of this article contains a brief discussion of the *CRC* and its relationship with Australian law. Part III assesses the compatibility of the *TEO Act* with article 3(1) of the *CRC* (the best interests of the child). Part IV provides a similar analysis in relation to articles 7–9 and 16 (rights in relation to nationality, family relations and privacy). Part V contains an analysis of the aspects of the *TEO Act* which provide some protection against the limitation it causes to human rights. The purpose is to establish whether these protective aspects can justify the interference with the *CRC* rights discussed in Parts III and IV. Part VI concludes that the *TEO Act* in its current form is not compatible with the *CRC*.

II THE *CRC* AND AUSTRALIAN MUNICIPAL LAW

The *CRC* was ratified by Australia in 1990¹⁸ but has not been fully incorporated into domestic law. Australia’s commitment to the *CRC* has been described as ‘more than a little uncertain’¹⁹ and the effect given to it has been ‘limited and piecemeal’,²⁰ with Australia remaining ‘obstinate in its refusal’²¹ to implement the *CRC* domestically. Australia follows a dualist approach to the relationship between international treaties and domestic law,²² and the absence of legislative incorporation means that the *CRC* is not directly applicable as law.²³ Also, incompatibility with the *CRC* does not affect the validity of legislation.²⁴

The fragile legal status of the *CRC* in Australia does not deprive it of influence,²⁵ including in the judicial interpretation of domestic statutes. Where

17 See response to recommendation 17: Australian Government, ‘Australian Government Response to the Parliamentary Joint Committee on Intelligence and Security Report: Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019’ (July 2019) 9.

18 UNTC: Status of the *CRC* (n 15).

19 Frank Bates, ‘Australia: The Certain Uncertainty’ in Elaine E Sutherland (ed), *The Future of Child and Family Law: International Predictions* (Cambridge University Press, 2012) 47, 48 <<https://doi.org/10.1017/CBO9781139035194.003>>.

20 John Tobin, ‘The Development of Children’s Rights’ in Lisa Young, Mary-Ann Kenny and Geoff Monahan (eds), *Children and the Law in Australia* (LexisNexis Butterworths, 2nd ed, 2017) 25, 26.

21 *Ibid.*

22 Former Chief Justice Robert French used the phrase ‘clear cut dualism’: RS French, ‘Oil and Water? International Law and Domestic Law in Australia’ (Speech, The Brennan Lecture, Bond University, 26 June 2009) 15 [30] <<https://cdn.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26June09.pdf>>. See also Annemarie Devereux and Sarah McCosker, ‘International Law and Australian Law’ in Donald Rothwell and Emily Crawford (eds), *International Law in Australia* (Thomson Reuters, 3rd ed, 2017) 23.

23 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–7 (Mason CJ and Deane J), 315 (McHugh J) (‘*Teoh*’).

24 *Minister for Immigration and Multicultural and Indigenous Affairs v B* (2004) 219 CLR 365, 425 [171] (Kirby J) (‘*Minister v B*’).

25 Some statutes have been influenced by the *CRC* (n 15): see, eg, *Family Law Act 1975* (Cth) part VII ‘Children’. Others make the *CRC* a relevant consideration in the exercise of power under them: see,

there is ambiguity in a statute, a court is entitled to interpret it consistently with the *CRC*, because it is presumed that Parliament did not intend to legislate contrary to Australia's international obligations.²⁶ Nonetheless, when legislation is clear, it must be applied as it is, regardless of its incompatibility with obligations arising from the *CRC*.²⁷

For the purposes of this article, most relevant is the effect which the *CRC* can have on the lawmaking process. Under the *Scrutiny Act*,²⁸ the Member of Parliament who proposes a Bill must produce a statement of its compatibility with human rights, which is then presented to the relevant House of Parliament.²⁹ The 'human rights' defined in section 3 of the *Scrutiny Act* include the *CRC* rights.³⁰ The statement of compatibility prepared by the executive is considered by the Parliamentary Joint Committee on Human Rights ('PJCHR'), which prepares a report on the compatibility of the proposed legislation with human rights.³¹

By design, the control of legislation under the *Scrutiny Act* is abstract in form.³² Thus, only some of the human rights implications of proposed legislation can be anticipated during this process. Further, the absence of a statement of compatibility or advice from the PJCHR that a Bill is incompatible with human rights does not prevent the passing of legislation and does not affect its validity.³³ A positive aspect of the *Scrutiny Act* processes is that it legitimises the use of the *CRC* – even though it is not fully incorporated domestically – as a quality control tool in relation to proposed legislation. Moreover, the compatibility assessment takes place against

eg, *Enhancing Online Safety for Children Act 2015* (Cth) section 12. The *CRC* is one of the declared instruments under the *Australian Human Rights Commission Act 1986* (Cth) and thus the Commission may investigate violations of the *CRC*: see s 11(f). The *CRC* may also influence the exercise of administrative power and executive discretion: see Devereux and McCosker (n 22) 36–44. See generally Rita Shackel, 'The UN Convention on the Rights of the Child: Tracing Australia's Implementation of the Provisions Relating to Family Relations' in Olga Cvejić Jančić (ed), *The Rights of the Child in a Changing World* (Springer, 2016) 37 <https://doi.org/10.1007/978-3-319-23189-1_2>.

26 *Teoh* (n 23) 287 (Mason CJ and Deane J). There are other judicial avenues to give effect to the *CRC* (n 15), but they are not directly relevant for this article: see *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298, 305 (Gummow J); *Acts Interpretation Act 1901* (Cth) s 15AB.

27 *Minister v B* (n 24) 425 [171] (Kirby J).

28 For more on the process and its effectiveness, see George Williams and Daniel Reynolds, 'The Operation and Impact of Australia's Parliamentary Scrutiny Regime for Human Rights' (2015) 41(2) *Monash University Law Review* 469.

29 *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) ss 8(1)–(2) ('*Scrutiny Act*').

30 One of the shortcomings of the *Scrutiny Act* processes in relation to the *TEO Act* is that the section 3 definition of 'human rights' does not include the rights in the *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, opened for signature 25 May 2000, 2173 UNTS 222 (entered into force 12 February 2002) ('*Optional Protocol*'), to which Australia acceded in 2006. The depth of the human rights scrutiny process might have been improved had the Bill been assessed against this *Optional Protocol*, which requires, inter alia, that states parties provide assistance for the physical and psychological recovery and reintegration in society of child soldiers: see articles 6 and 7. Overall, the *Optional Protocol* enjoins states to treat child soldiers as victims. The provisions of the *TEO Act* are averse to that vision.

31 *Scrutiny Act* (n 29) s 7(a).

32 That is, it is not performed in the context of a 'live' case as is done when the constitutionality of legislation is challenged in a court.

33 *Scrutiny Act* (n 29) s 8(5).

the *CRC* itself, in its own wording.³⁴ This creates an opportunity to capitalise on the interpretation of the *CRC* by the Committee on the Rights of the Child ('CRC Committee').³⁵ In brief, the *Scrutiny Act* creates an opportunity, albeit not a legal obligation, for the *CRC* to be considered in the legislative process.

The statement of compatibility with human rights prepared in accordance with part 3 of the *Scrutiny Act* and attached to the Explanatory Memorandum to the TEO Bill stated that the Bill was compatible with the *CRC*.³⁶ The TEO Bill was passed by both Houses, despite cogent concerns raised during the scrutiny that it was not in fact compatible.³⁷ This passing of the *TEO Act* despite cogent human rights concerns fits within a trend in the anti-terrorism legislation enacted after September 2001, namely a 'greater willingness to encroach upon basic democratic rights'.³⁸ The remainder of this article seeks to strengthen the arguments that the Bill, and consequently the *TEO Act*, is not *CRC* compliant. It focuses primarily on the problematic approach to article 3(1) of the *CRC* taken by the executive and its sidelining of provisions such as articles 7 (the right to acquire a nationality), 8 (the right to preserve one's nationality), 9 (the right not to be separated unlawfully from one's parents) and 16 (privacy rights).³⁹

34 This is to be distinguished from, for example, statements of compatibility under section 28 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('*Charter*'), which are conducted not in relation to the rights as formulated in the international treaties but in relation to these rights as transformed (that is, rephrased and adapted) in the *Charter*. Sometimes, there are legally relevant differences in the wording of international human rights and domestic legislation. Compare, for example, the different approaches to the best interests of the child in article 3(1) of the *CRC* (n 15) and section 17(2) of the *Charter* respectively. Such difference may have legal effects.

35 The output of the Committee on the Rights of the Child ('CRC Committee'), like that of other treaty bodies, is not binding on Australia and other states parties to the *CRC* (n 15) but is an authoritative and/or influential interpretation of the *CRC*. For general discussions of the legal status of the output of treaty bodies, see Rosanne Van Alebeek and André Nollkaemper, 'The Legal Status of Decisions by Human Rights Treaty Bodies in National Law' in Helen Keller and Geir Ulfstein (eds), *UN Human Rights Treaty Bodies: Law and Legitimacy* (Cambridge University Press, 2012) 402; Conway Blake, 'Normative Instruments in International Human Rights Law: Locating the General Comment' (Working Paper No 17, Centre for Human Rights and Global Justice, 2008) <https://chrgj.org/wp-content/uploads/2020/02/WPS-NYU-CHRGJ-Blake_Final.pdf>; International Law Association, Committee on International Human Rights Law and Practice, *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies* (Report, Berlin Conference, 2004).

36 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) 11–12 [68]–[79], 16 [105]–[8].

37 See Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report No 2, 2 April 2019) ('*Report 2*'); Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* (Digest No 3 of 2019, 24 July 2019) ('*Scrutiny Digest 3*'); Parliamentary Joint Committee on Human Rights, *Human Rights Scrutiny Report* (Report No 3, 30 July 2019) ('*Report 3*'). In *Report 2*, the PJCHR sought the advice of the executive on the compatibility of the Bill with some *CRC* (n 15) provisions: at 46 [1.177]. In *Report 3*, it states that no advice was received from the executive, the Bill having been passed without a Committee report on compatibility with the *CRC* or otherwise: at 15 n 2. For the parliamentary history of the Bill, see 'Counter-Terrorism (Temporary Exclusion Orders) Bill 2019', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bld=r6361>.

38 George Williams 'The Legal Assault on Australian Democracy' (2016) 16(2) *Queensland University of Technology Law Review* 19, 40 <<https://doi.org/10.5204/qltr.v16i2.651>>.

39 In addition to article 3 of the *CRC* (n 15), the executive concluded that the Bill was compatible with articles 10 (family reunification), 12 (participation), 28 (education) and 31 (rest, leisure and play):

III THE BEST INTERESTS OF THE CHILD: ARTICLE 3(1) OF THE CRC

Article 3(1) of the *CRC* is a ubiquitous presence in the children's rights discourse.⁴⁰ The scope of the provision is wide, as is its interpretation by international and domestic actors.⁴¹ Arguably, the essence of what it means to be treated by the law *as a child* (that is, differently from adults and, generally, more leniently or generously) is encapsulated in the general 'best interests' provision of the *CRC*, in article 3(1). The scope of the concept, which was previously used in fields such as family law and child protection,⁴² has now been broadened. It can inform the exercise of functions by legislatures, administrative bodies and many other domestic actors, and it applies in very diverse areas of law such as immigration, the sentencing of parents, the detention of juveniles, to name but a few.⁴³

Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 11–12 [68]–[79], 16 [105]–[8]. Issues in relation to article 12 will be touched upon in the discussion relating to article 3(1). The rights in articles 28 and 31 have been considered by the executive, but only in relation to the conditions attached to the return permit and not in relation to the making of TEOs. While that assessment was not irrelevant, it did not expose the most serious consequences of the proposed Bill, and thus these articles are not addressed here. Article 10(1) is not relevant because it does not deal with the right to return to one's own country. Article 10(2) is not relevant for the children likely to be most seriously affected by the Act: the children of Australian foreign fighters who are together with their parents overseas. Article 10(2) is, however, relevant in relation to children left in Australia by their foreign fighter parents. In that case, given the exceptional circumstances, the compatibility assessment by the executive may be *prima facie* correct. See the executive's position in the Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 11–12 [71]–[76].

- 40 For recent analyses, see Michael Freeman, 'Article 3: The Best Interests of the Child' in André Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2007) <<https://doi.org/10.1163/ej.9789004148611.i-80>>; Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, 2016) <<https://doi.org/10.1017/9781316662977>>; Nigel Cantwell, 'Are "Best Interests" a Pillar or a Problem for Implementing the Human Rights of Children?' in Ton Liefwaard and Julia Sloth-Nielsen (eds), *The United Nations Convention on the Rights of the Child: Taking Stock after 25 Years and Looking Ahead* (Brill Nijhoff, 2016) 61 <https://doi.org/10.1163/9789004295056_006>; John Eekelaar and John Tobin, 'Article 3: The Best Interests of the Child' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 73.
- 41 An indication of its complex and diverse normative content is reflected in Committee on the Rights of the Child, *General Comment No 14 on the Right of the Child to Have His or Her Best Interests Taken as a Primary Consideration (Art 3, Para 1)*, 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013) ('*General Comment No 14*').
- 42 See generally Philip Alston, 'The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights' (1994) 8(1) *International Journal of Law, Policy and the Family* 1 <<https://doi.org/10.1093/lawfam/8.1.1>>; Ursula Kilkelly, 'The Best Interests of the Child: A Gateway to Children's Rights?' in Elaine E Sutherland and Lesley-Anne Barnes Macfarlane (eds), *Implementing Article 3 of the United Nations Convention on the Rights of the Child: Best Interests, Welfare and Well-Being* (Cambridge University Press, 2016) 51 <<https://doi.org/10.1017/9781316662977>>; Stephen Parker, 'The Best Interests of the Child: Principles and Problems' (1994) 8(1) *International Journal of Law, Policy and the Family* 26 <<https://doi.org/10.1093/lawfam/8.1.26>>.
- 43 See, eg, Sutherland and Macfarlane (n 40).

Article 3(1) envisages the best interests of the child to be, *inter alia*,⁴⁴ a legal standard of quasi-constitutional status and scope:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

Despite significant developments in international and comparative foreign law,⁴⁵ there is no explicit constitutional protection of the best interests of the child in Australian law.⁴⁶ Thus, the concept does not operate as an express constitutional limitation on the exercise of legislative power, such as the *TEO Act*. Further, there are no provisions in federal statutes that mandate or enable the mainstreaming of the best interests of the child ‘in all actions concerning children’, including lawmaking, as envisaged by article 3(1).

However, article 3(1) was considered at various junctures in the parliamentary processes leading to the passing of the *TEO Act*, including the statement of compatibility with human rights by the executive and the work of three parliamentary committees: the PJCHR, the Parliamentary Joint Committee on Intelligence and Security (‘PJCIS’), and the Standing Committee for the Scrutiny of Bills. Submissions made to the PJCIS stressed that the TEO Bill was contrary to, *inter alia*, article 3(1),⁴⁷ and even recommended that the Bill should not apply to children.⁴⁸ The PJCIS did not embrace that recommendation.⁴⁹ Instead, it recommended that certain additional safeguards be introduced, including several considerations to inform the Minister’s assessment of the best interests of the

44 The Committee envisages article 3(1) as containing a principle, a rule of procedure and an independent right: *General Comment No 14* (n 41) 4 [6].

45 See above n 40.

46 States where the best interests of the child have received constitutional protection include South Africa, Norway and Ireland. See, eg, A Skelton, ‘Constitutional Protection of Children’s Rights’ in Trynie Boezaart (ed), *Child Law in South Africa* (Juta, 2nd ed, 2017) 327; Kirsten Sandberg, ‘Best Interests of the Child in the Norwegian Constitution’ in Trude Haugli et al (eds), *Children’s Constitutional Rights in the Nordic Countries* (Brill, 2019) 133. The Irish Constitution refers to the best interests of the child only in relation to protection proceedings and adoption, guardianship, custody and access: *Constitution of Ireland 1937* s 42A(4) (Ireland).

47 The Australian Human Rights Commission, the Law Council of Australia, Peter McMullin Centre on Statelessness and the Immigration Advice and Rights Centre made submissions in this regard: see ‘Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019: Submissions’, *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/CTEOBill2019/Submissions>. Similar concerns were raised in the parliamentary scrutiny process: see the sources listed in above n 37.

48 Law Council of Australia, Submission No 5 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019) 5 [5], 12 [33]. For comparative purposes, it should be noted that the *Counter-Terrorism and Security Act 2015* (UK) has no special provisions concerning children. The TEOs apply to children as they do to adults, but strict statutory requirements, such as the direct involvement in terrorism, intentional rather than coerced involvement, and a TEO being necessary to protect the public against the risk of a terrorist attack, may prevent the application of TEOs to children. See Jessie Blackbourn, Deniz Kayis and Nicola McGarrity, *Anti-Terrorism Law and Foreign Terrorist Fighters* (Routledge, 2018) 91 <<https://doi.org/10.4324/9781351605441>>.

49 Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 6). See the relatively extensive discussion of submissions at 38–42 [2.85]–[2.95].

child.⁵⁰ These recommendations were accepted by the executive⁵¹ and reflected in the TEO Bill as reintroduced in July 2019.⁵²

The statement of compatibility in the Bill's Explanatory Memorandum says the following in relation to article 3(1):

Where a child may pose a threat to the Australian community, the Government must balance the protection of the Australian community with the best interests of the child. The Bill enables this balance. When exercising the power to issue a TEO or return permit, the Minister must take into account as a primary consideration the best interests of the child in circumstances where the subject of the TEO would be 14 to 17 years of age ...

Australia is required to take into account the best interests of the child as a primary consideration, not *the only* primary consideration. Further, the Minister may only issue a TEO where it would substantially assist to prevent the circumstances outlined in subsections 10(2), or if the person has been assessed by ASIO as being a risk to security. The circumstances include prevention of a terrorist act or the support or facilitation of a terrorist act or preventing the training with or the provision of support or resources to a terrorist organisation listed under subsection 102.2(1) of the Criminal Code. This clearly limits the circumstances in which a TEO would impact the best interests of a child to scenarios where there is a clear risk to community safety. Where a child poses a threat to the Australian community, it is appropriate that the legitimate objective of protecting the Australian community is the paramount consideration with the best interests of the child being a primary consideration.⁵³

These views have major weaknesses from an article 3(1) perspective, as discussed below.

A Factors Guiding the Consideration of the Best Interests of the Child

The considerations relevant for establishing the best interests of the child when making a TEO, as listed in section 10(4) of the *TEO Act*, are useful in principle. They could improve the uniformity of decision-making by guiding the Minister's discretion and they enable the consideration of certain matters pertaining to individual children. However, these factors do not fully address the concerns in relation to the *TEO Act's* alignment with article 3(1) of the *CRC*.

In the Explanatory Memorandum to the TEO Bill, the government defended its approach to the best interests of the child by referring to division 104 of the schedule to the *Criminal Code Act 1995 (Cth)* ('*Criminal Code*'), which deals

50 As discussed below, these are the same factors that apply in best interests assessments in relation to control orders under section 104.4(2A) of the *Criminal Code Act 1995 (Cth)* ('*Criminal Code*'). See Parliamentary Joint Committee on Intelligence and Security, *Advisory Report* (n 6) 41 [2.93], 47–8 [2.117]. This Committee accepted the Law Council of Australia recommendations that if the TEOs apply to children, additional guarantees should be included in the Act. Another accepted recommendation was that a parent/guardian of a child be given notification and that a copy of the document be given to the child.

51 Australian Government (n 17). Interestingly, the recommendations of the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') were largely accepted by the executive, while the questions raised by the Parliamentary Joint Committee on Human Rights ('PJCHR') in relation to the compatibility of the Bill with the *CRC* (n 15) went unanswered by it.

52 *TEO Act* (n 8) s 10(4).

53 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 36 [69]–[70] (emphasis in original).

with terrorism and provides for control orders to be made in relation to relevant persons⁵⁴ – including children.⁵⁵ Section 104.4(2) of the *Criminal Code* provides that, in establishing the obligations, prohibitions and restrictions attached to a control order, a court

must take into account:

- (a) as a paramount consideration in all cases – the objects of this Division (see section 104.1); and
- (b) as a primary consideration in the case where the person is 14 to 17 years of age – the best interests of the person;⁵⁶

Section 104.4(2A) provides the factors that must be taken into account by a court when it establishes the best interests of the child. These factors are identical to those in section 10(4) of the *TEO Act* cited above in Part I. The reasoning of the executive seems to be that if control orders are best interests-compliant because of various purported safeguards, so too must be the TEOs which mirror them in that regard. The Explanatory Memorandum justifies making the best interests of the child a *primary* consideration and the safety of the community of *paramount importance*, stating that:

This is consistent with Division 104 of the Criminal Code, which relates to control orders. This subsection, taken together with subsection 10(4), provides additional safeguards for children recognising their particular vulnerability, consistent with Australia’s international obligations, and protection of the Australian community.⁵⁷

In relation to the factors listed in section 10(4) of the *TEO Act*, the Explanatory Memorandum states that these ‘are consistent with section 104.4(2A) of the *Criminal Code*, which relates to control orders’.⁵⁸ Further:

This subsection, when taken with subsection 10(3) provides additional safeguards for children recognising their particular vulnerability, consistent with Australia’s international obligations, and protection of the Australian community.

54 Control orders are made against individuals by designated courts, at the request of senior members of the Australian Federal Police, in order to protect the public against terrorist acts or to prevent support being provided for terrorist activities domestically or abroad: *Criminal Code* (n 50) s 104.1. The orders are not preceded by a criminal conviction on terrorism offences and do not depend on a criminal investigation unfolding against the individual concerned. They may contain various obligations, prohibitions and restrictions. The constitutional validity of control orders was challenged but upheld by the High Court in the case of *Thomas v Mowbray* (2007) 233 CLR 307 (*‘Thomas v Mowbray’*). See Andrew Lynch, *‘Thomas v Mowbray: Australia’s “War on Terror” Reaches the High Court’* (2008) 32(3) *Melbourne University Law Review* 1182.

55 The executive stated that ‘[t]he minimum age requirement of 14 years is consistent with Division 104 of the *Criminal Code*, which relates to control orders’: Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 6 [33].

56 Since the 2016/2017 reporting cycle, the Department of Home Affairs has been recording and reporting on the number of control orders issued against children. In the latest recording cycles (2016/2017, 2017/2018, 2018/2019 and 2019/2020), no control orders have been made against children. For the relevant Department of Home Affairs reports, see ‘Annual Reports’, *Australian National Security* (Web Page) <<https://www.homeaffairs.gov.au/reports-and-publications/reports/annual-reports>>.

57 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 7 [36].

58 *Ibid* 7 [38].

While both the *TEO Act* and the relevant provisions of the *Criminal Code* deal with terrorism-related measures, they operate in vastly different contexts, thus eroding the strength of the executive's analogical reasoning.

First, while control orders may have some similarities with TEOs when applied to 14 to 17-year-olds, section 104.28 of the *Criminal Code* limits the duration of control orders applicable to that age category to three months (renewable).⁵⁹ Under the *TEO Act*, children may be subject to TEOs for the same duration as adults.

Second, the compatibility of the *TEO Act* with the best interests of the child cannot be defended by analogy with control orders concerning children under the *Criminal Code*. The making of control orders involves the judiciary,⁶⁰ which is bound to assess the best interests of the child when making the order. There is no judicial involvement in the making of TEOs and the automatic review process does not provide sufficient safeguards for an independent consideration of the best interests of the children concerned.⁶¹

Third, the *Criminal Code* applies to persons envisaged to be on Australian territory, while the *TEO Act* concerns those outside the country. Factors that may be relevant and ascertainable when dealing with children residing in Australia may not be so for Australian children overseas.⁶² *Prima facie*, the factors in section 10(4) of the *TEO Act* are not objectionable as aides in determining the best interests of the child, but in the given context they are open to an application that could undermine the very interests that they are meant to safeguard, or they may be unascertainable or irrelevant.

Assume, for example, that the Minister, in considering making a TEO in relation to a 16-year-old boy associated with ISIL and held in a camp in Syria, wants to determine the best interests of this child in accordance with section 10(4). Do the criteria of sex and maturity in section 10(4)(a) work in favour of or against making a TEO? What about the criteria of culture, traditions and religion in section 10(4)(a) and (e)? What if – as is likely the case – the child is of Muslim faith? Would this mean that a TEO is in the best interests of the child because it gives the child a further opportunity to be immersed in the traditions of a Muslim community? What about the relationship with family members specified in section 10(4)(c)? There have been no reports (to this writer's knowledge) about Australian teenagers going to conflict areas without their parents. Thus, in most cases, Australian children would be in conflict zones with their families (if they have survived).⁶³ In most

59 Point made by the Senate Standing Committee for the Scrutiny of Bills: *Scrutiny Digest No 3* (n 37) 10.

60 In *Thomas v Mowbray* (n 54), a majority of the High Court decided that in issuing control orders courts exercise judicial rather than executive powers. See Lynch (n 54) 1200.

61 See Part V of this article below.

62 The factors in section 104.4(2A) of the *Criminal Code* can meaningfully inform the determination of the best interests of the child in the context of control orders: see, eg, *Criminal Code* (n 50) s 104.5(3)(f).

One of the limitations to individual freedoms which could be included in a control order is 'a prohibition or restriction on the person accessing or using specified forms of telecommunication or other technology (including the internet)'. It makes sense, therefore, that in considering the best interests of the child when deciding whether to attach certain conditions to a control order, a court considers the mental health of the child and his/her right to receive an education: *Criminal Code* (n 50) s 104.4(2A)(b), (f).

63 The family of the well-known Australian terrorist Khaled Sharrouf is an example. Sharrouf left Australia in 2014 to join ISIL in Syria and was followed by his wife and five children. Sharrouf, his wife and two

cases, they would have made friends. Would these family and social ties enable the Minister to conclude that a TEO is in a child's best interests? These interrogations show that some of the factors in section 10(4) are reasonably open to an application that favours the making of an order that is quintessentially contrary to the best interests of the child. Among the factors listed in section 10(4), there are arguably only two that could weigh against the making of a TEO: physical and mental health in sub-section (b) and the right to receive an education in sub-section (d).

There are notable absences among the factors included in section 10(4), such as the physical safety of the child, the risk of arbitrary detention or detention in inhumane conditions, ill treatment, and lack of access to basic necessities, to name just a few. Surprisingly, when imposing conditions on a return permit, the Minister must consider whether the person has a lawful right to remain in or enter the territory of another state. If no such right exists, the Minister must consider whether the person would likely be detained, mistreated or harmed if not returning to Australia.⁶⁴ It seems arbitrary for these factors to be considered as relevant when issuing return permits but not when issuing TEOs.⁶⁵ Had the concern about the mistreatment of nationals – including children – overseas been genuine, this requirement would have been made a consideration during the *making* of TEOs.

When the legislative process was underway, it was common knowledge that Australian children who may become subjects of TEOs are at risk in terms of their safety, liberty and basic necessities. Arguably, the omission of those factors from section 10(4) permits the Minister to make decisions in which giving paramount importance to the interests of the community appears legally and morally unassailable, since the potentially devastating consequences that a TEO could have in relation to Australian children are not elicited. The fact that under section 10(4)(f) the Minister must take into consideration 'any other matter the Minister considers relevant' is positive but ultimately insufficient. Rather than being explicit considerations under the *TEO Act*, such factors remain at the discretion of the Minister – and this discretion is subject to weak controls.⁶⁶ Assuming that a TEO is taken on judicial review, there is the additional hurdle of demonstrating that the factors are relevant.⁶⁷ Ultimately, TEOs are at their core contrary to the best

of their sons were apparently killed, leaving three of their children stranded in Syria: see Blackburn, Kayis and McGarrity (n 48) 90. The older of the Sharrouf girls gave birth to two children while in Syria and was pregnant with a third at the time of repatriation. The Sharrouf children, and the three orphans of another Australian ISIL fighter (Yasin Rizvic), were brought home with the government's assistance: Rachel Clun, David Wroe and Kate Geraghty, 'Scott Morrison Opens the Door to Khaled Sharrouf's Children Coming Home', *The Sydney Morning Herald* (online, 5 April 2019) <<https://www.smh.com.au/world/middle-east/khaled-sharrouf-s-children-can-return-to-home-scott-morrison-20190405-p51b39.html>>; Helen Davidson, 'Children of Isis Terrorist Khaled Sharrouf Removed from Syria, Set to Return to Australia', *The Guardian* (online, 24 June 2019) <<https://www.theguardian.com/australia-news/2019/jun/24/children-isis-terrorist-khaled-sharrouf-return-australia-removed-syria>>.

64 *TEO Act* (n 8) s 16(8).

65 Point raised by Senator Keneally during the Senate debates on the Bill: Commonwealth, *Parliamentary Debates*, Senate, 25 July 2019, 861 ('*Senate Debate*').

66 See the discussion on the reviewing authority in Part V of this article.

67 In *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, Mason J said at 39–40 that when not explicit, the relevant considerations 'must be determined by implication from the subject-matter,

interests of the child. This cannot be remedied by transplanting into the *TEO Act* mandatory considerations designed for different purposes.

B Decisions Affecting Children Indirectly

Under the *TEO Act*, giving a primary consideration to the best interests of the child is a requirement *only* when a TEO concerns a child *directly* (that is, the child is the subject of the TEO). In its *General Comment No 14*, the CRC Committee stressed that the best interests of the child is a primary consideration in all actions that concern a child, whether directly (when the child is the subject of certain measures) or indirectly (when the child is not the target of the measures, but is affected by them).⁶⁸

No consideration of the best interests of the child is envisaged by the *TEO Act* when TEOs are made against the parents,⁶⁹ despite such orders affecting children. Children born abroad to Australian parents detained on account of their association with ISIL or taken abroad by their parents are particularly affected, given the obstacle created by TEOs to the return of the family unit to Australia.⁷⁰ The executive and legislators take no responsibility regarding these children, whose fate they consider the exclusive responsibility of their parents⁷¹ – a position contested in Part IV below. The situation of the children affected by TEOs against their parents is considered twice in the *TEO Act*: section 18(3)(d) requires that an application for a return permit provide information about any children of the TEO subject; and section 16(4) states that the Minister must consider the impact of imposing certain conditions on the return permit of a parent. However, neither provision requires that the best interests of the children be a primary consideration. Instead, children are made a marginal consideration so late in the decision-making process that by the time they are given any attention, their rights will have been significantly limited.

C Giving Meaningful Consideration to the Best Interests of the Child

The *TEO Act* mentions the ‘best interests’ of the child,⁷² but seems to pay mere lip service to a concept that is too well-accepted to be completely ignored.

scope and purpose of the Act’. It can be argued, therefore, that considerations in relation to the safety and wellbeing of a child who has contravened anti-terror laws are not relevant considerations in the context of an Act whose main purpose is to protect the Australian community from terrorist activity. Nonetheless, it can be counter-argued that it would be consistent with the other factors in section 10(4) of the *TEO Act* to approach factors relating to the safety and wellbeing of the children concerned as relevant considerations. As illustrated in this brief discussion, what counts as relevant considerations in the context of section 10(4)(f) is likely to be contentious.

68 *General Comment No 14* (n 41) 7 [19].

69 The same view was expressed by Save the Children (n 16).

70 Children left behind in Australia by foreign fighters are also affected but, considering that they have access to state and possibly family support, their situation may be less critical.

71 In her speech during the second reading of the Bill, Senator Reynolds said that ‘[s]ome of these people even took their own children with them to be trained to hate, to become martyrs, to become murderers, to become jihadi’: *Senate Debate* (n 65) 815. But this is as far as the moral outrage and the compassion for these children went.

72 *TEO Act* (n 8) ss 10(3)(b), (4), 16(5)(b), (6).

The *TEO Act* undermines the process of establishing what is in the best interests of the concerned child, which requires having relevant and sufficient information to do so. As put by the CRC Committee, '[f]acts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment'.⁷³ One 'vital element'⁷⁴ in establishing what is in the best interests of a child is listening to the views of the child in that respect. The *TEO Act* fails in relation to both requirements.

First, the *TEO Act* is silent on how and from where the relevant information for making a best interests assessment is to be gathered. For example, issues pertaining to the maturity and mental health of a child, or the benefit to the child of having a meaningful relationship with her/his family – all factors in section 10(4) – can only be ascertained through close and specialised contact with the child. Such contact is not anticipated by the *TEO Act* and in any case would be difficult to achieve due to the child being overseas. Further, the *TEO Act* does not require that a specific report be provided to the Minister, or that the Minister seek information proactively.⁷⁵ In the absence of a direct engagement with the child or another effective mechanism to gather information, it is difficult to gauge what type and amount of relevant information would be available to the Minister to assess the best interests of the child.

The *TEO Act* goes further in undermining the best interests of the child by providing the Minister with a valid defence to remaining passive where information about a child is insufficient. As specified in section 10(5)(a), the factors mentioned in section 10(4) must be taken into consideration 'only to the extent that the matters are known to the Minister'.⁷⁶ Thus, the review processes (by the reviewing authority or a court, as discussed in Part V) are likely to be ineffective, since the Minister can simply argue lack of awareness of relevant matters affecting the child. Furthermore, the Minister is not required to disclose to the reviewing authority materials relating to the TEO decision if he/she considers this contrary to public interest.⁷⁷ It is also generally unclear what amount of information concerning individuals is needed for the Minister to justify a TEO, considering that an order made under section 10(2)(b) is based on an individual security assessment, while one made under section 10(2)(a) is not. By implication, children who individually might not present a clear

73 *General Comment No 14* (n 41) 19 [92].

74 *Ibid* 18 [89].

75 Comparable legislation is unhelpful in this regard. As mentioned previously, the *Counter-Terrorism and Security Act 2015* (UK) (part 1, chapter 2, titled 'Temporary exclusion from the United Kingdom') has no age-related restrictions in relation to TEOs and no separate provisions relating to children.

76 *TEO Act* (n 8) s 10(5)(a). Arguably, this provision protects the Minister against his/her decision being set aside in judicial review on grounds of unreasonableness as a result of the Minister's failure to conduct reasonable inquiries in relation to the situation of the child. For a discussion of reasonable inquiries and unreasonableness as grounds of judicial review of administrative action, see Michael Head, *Administrative Law: Context and Critique* (Federation Press, 4th ed, 2017) 193. The failure to make an inquiry may lead to a decision being found to be unreasonable: see, eg, *Minister for Immigration and Citizenship v SZLAI* [2009] 83 ALJR 1123 [20] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

77 *TEO Act* (n 8) s 14(3).

security risk could be prevented from returning to Australia⁷⁸ on account of an uncertain or diffuse risk to the Australian community.

Second, in exercising the powers under the *TEO Act*, the Minister ‘is not required to observe any requirements of procedural fairness’.⁷⁹ The subject is not present or even notified, and has no opportunity to make representations, when the reviewing authority conducts its review of TEOs.⁸⁰ Indeed, neither the child nor any other interested person is entitled to make any submissions in the making or review of the TEO. This is, ultimately, an interference with articles 3(1) and 12 of the *CRC* (a child’s right to be heard in decisions concerning her/him), which the executive defended by arguing that the affected child was entitled to apply for and obtain a return permit.⁸¹ However, as discussed in Part V, the return permit process is not an effective protection mechanism against interference with the relevant *CRC* rights.

Another major flaw in the executive’s approach to the best interests of the child is the distortion of the procedural dimension of article 3(1) of the *CRC*.⁸² Although internationally accepted,⁸³ this procedural dimension is not meant to defeat the substance of the best interests standard⁸⁴ or to allow for a formalistic consideration of the best interests of the child – as seems to be the case in the *TEO Act*. Sections 10(3)–(5) of the *TEO Act* sideline the internationally accepted requirements regarding the best interests of the child, such as flexibility in decision-making, responsiveness to individual circumstances, and sufficient information to enable an informed decision.⁸⁵

Article 3(1), as interpreted by the *CRC* Committee and by the High Court in *Minister of State for Immigration and Ethnic Affairs v Teoh* (‘*Teoh*’),⁸⁶ does

78 The same concern was raised by the PJCHR in *Report 2* (n 37) 43 [1.167].

79 *TEO Act* (n 8) s 26. On procedural fairness, see *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 335 [30] (Kiefel, Bell and Keane JJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 70 [53] (Gleeson CJ and Hayne J).

80 *TEO Act* (n 8) s 14(6).

81 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 37–8 [77]–[79].

82 That is, giving consideration to the best interests of the child. It is reminded that according to *General Comment No 14*, article 3(1) contains, inter alia, a rule of procedure: *General Comment No 14* (n 41) 4 [6].

83 *Ibid.*

84 Which is ‘to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity’: *ibid* 3–4 [4]–[5].

85 See *General Comment No 14* (n 41), which provides that the best interests of the child ‘should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs’: at 9 [32]. The focus on individualised assessments is further developed in part V of the *General Comment*. It is interesting to note that the PJCHR draws significantly from this *General Comment: Report 2* (n 37) 52–3 [1.200]–[1.202]), which is nonetheless conspicuously absent from the Explanatory Memorandum.

86 *Teoh* (n 23). Mr Teoh was a Malaysian national who lived in Australia on a temporary visa. He was denied permanent residency and faced deportation as a result of being involved in drug-related crimes. He successfully challenged the denial of a visa on the basis that the decision-maker did not consider Mr Teoh’s legitimate expectation, arising from the ratification by Australia of the *CRC* (n 15), that the best interests of his children would be given a primary consideration in the decision-making process as required by the *CRC*.

not require that the best interests of the child prevail at all times when in conflict with other legitimate interests, provided that certain guarantees are respected when balancing those interests. According to the Committee, to prioritise other interests, a decision-maker must ‘demonstrate, in a credible way, why the best interests of the child were not strong enough to be [sic] outweigh the other considerations’.⁸⁷ Further, ‘[i]t is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained’.⁸⁸

This position is similar to that taken by Mason CJ and Deane J in *Teoh*.⁸⁹ While some aspects of *Teoh* have been controversial,⁹⁰ the interpretation of article 3(1) by these two Justices has not been challenged and should inform the assessment of compatibility with human rights under the *Scrutiny Act*.⁹¹

A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.⁹²

When the best interests of the child are an afterthought that can override a decision compliant with policy only if something ‘compelling enough’⁹³ is shown, they are not a ‘primary consideration’.⁹⁴

A central aspect of the CRC Committee and High Court interpretations of article 3(1) is the basic premise of any balancing process: weighing up conflicting

87 *General Comment No 14* (n 41) 20 [97].

88 *Ibid.*

89 See, eg, Law Council of Australia (n 48) 12 [32].

90 The controversial aspect of the case concerned the reliance by the majority on the concept of legitimate expectation as a vehicle to give legal effect to a ratified but unincorporated international treaty (ie, the *CRC* (n 15)). According to Mason CJ and Deane J (with whom Toohey J agreed), a ratified international treaty created a legitimate expectation that in exercising statutory discretion, administrative decision-makers would comply with the treaty in certain conditions: *Teoh* (n 23) 291 (Mason CJ and Deane J), 301 (Toohey J). A strong dissent was written by McHugh J: at 305 ff. The criticism of *Teoh* has focused on the majority’s approach to legitimate expectation: see, eg, McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 28–31 [84]–[96]. Yet, the interpretation of article 3(1) of the *CRC* drew little critical attention. For general discussions on *Teoh*, see Matthew Groves, ‘Treaties and Legitimate Expectations: The Rise and Fall of *Teoh* in Australia’ (2010) 15(4) *Judicial Review* 323; Matthew Groves, ‘Is *Teoh*’s Case Still Good Law?’ (2007) 14(3) *Australian Journal of Administrative Law* 126; Michael Taggart, ‘“Australian Exceptionalism” in Judicial Review’ (2008) 36(1) *Federal Law Review* 1 <<https://doi.org/10.22145%2Fflr.36.1.1>>.

91 Mason CJ and Deane J’s interpretation of article 3(1) of the *CRC* (n 15) in *Teoh* (n 23) resonates with subsequent comparative law developments. See, eg, *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817; *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)* [2004] 1 SCR 76 (especially the majority judgment penned by McLachlin CJ); *ZH (Tanzania) (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2011] UKSC 4. For cases taking a similar approach in France, see Meda Couzens, ‘France’ in Ton Liefwaard and Jaap E Doek (eds), *Litigating the Rights of the Child: The UN Convention on the Rights of the Child in Domestic and International Jurisprudence* (Springer, 2015) 123 <<https://doi.org/10.1007/978-94-017-9445-9>>.

92 *Teoh* (n 23) 292 (Mason CJ and Deane J).

93 *Ibid.*

94 For a different view, see Margaret Allars, ‘One Small Step for Legal Doctrine, One Giant Leap towards Integrity in Government: *Teoh*’s Case and the Internationalisation of Administrative Law’ (1995) 17(2) *Sydney Law Review* 204, 232.

interests is realistically possible only where the decision-maker is open to multiple possibilities. Balancing is negated when the solution is predetermined by legislation. As put by the CRC Committee, taking into account the best interests of the child as a primary consideration implies ‘a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned’.⁹⁵ Thus, while article 3(1) does not demand an automatic prioritisation of the best interests of the child, it does require, at a minimum, a statutory framework that permits these interests to be prioritised when possible and decision-makers who are willing to do so.

The government portrayed the Bill as enabling a balancing of the best interests of the child with the safety interests of the community.⁹⁶ This is disingenuous, since the Bill explicitly and automatically prioritises community safety as the ‘paramount consideration’, creating a tension between the Bill and the *CRC*.⁹⁷ The PJCHR⁹⁸ and the Standing Committee for the Scrutiny of Bills⁹⁹ raised similar concerns with the executive, but recommendations to make both community safety and the best interests of the child primary considerations went unheeded.¹⁰⁰

The sidelining of the best interests of the child is facilitated by the *TEO Act*’s general requirements for the making of a TEO. Most children aged 14–17 who are in conflict zones pose (or could be presented as posing) *some* risk to Australian society,¹⁰¹ even when they have not been involved in fighting or supported ISIL.¹⁰² Indoctrination and socialisation have made the ‘jihadist caliphate’ the reference

95 *General Comment No 14* (n 41) 10 [40].

96 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 36 [69].

97 *TEO Act* (n 8) s 10(3). Numerous submissions to parliamentary committees have expressed the same concern: see Rebecca Ananian-Welsh, Jessie Blackburn and Nicola McGarrity, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019) 9; Immigration Advice and Rights Centre, Submission No 6 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019) 3; Australian Human Rights Commission, Submission No 2 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019); Peter McMullin Centre on Statelessness, Submission No 7 to Parliamentary Joint Committee on Intelligence and Security, *Review of the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (8 March 2019) 5. The Law Council of Australia submitted that this approach was contrary to the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (‘*ICCPR*’): Law Council of Australia (n 48) 12 [32].

98 *Report 2* (n 37) 51–2 [1.197]–[1.199].

99 Senate Standing Committee for the Scrutiny of Bills, *Scrutiny Digest* (Digest No 2 of 2019, 28 March 2019) 35–6 [1.121]. The same concerns were raised after the Bill was reintroduced in July 2019: *Scrutiny Digest 3* (n 37) 10 [1.30].

100 Ananian-Welsh, Blackburn and McGarrity (n 97) 9.

101 The Special Rapporteur on the situation of children in armed conflict argued that children should not be distinguished based on the degree of risk they pose, as all children are in need of reintegration and rehabilitation services: *Report of the Special Representative for Children* (n 3) 7 [20].

102 On the potential for radicalisation in Al-Hawl, see Louisa Loveluck and Souad Mekhennet, ‘At a Sprawling Tent Camp in Syria, ISIS Women Impose a Brutal Rule’, *The Washington Post* (online, 3 September 2019) <https://www.washingtonpost.com/world/at-a-sprawling-tent-camp-in-syria-isis-women-impose-a-brutal-rule/2019/09/03/3fcd14-c4ea-11e9-8b7f-cde2d9e09055_story.html>.

point for the identity of many children.¹⁰³ As put by the Independent National Security Legislation Monitor, ‘once someone was in ISIL’s controlled territory it was almost impossible for them to remain neutral: in practice, either they became an ISIL victim or they had to serve ISIL or act under its instruction’.¹⁰⁴ Returnees (adults and children) from conflict zones pose potential danger in relation to the planning of attacks and the recruitment and radicalisation of others.¹⁰⁵ They are expected to be influential because of their experience in conflict zones and their security awareness, connections and ability to conceal their illicit activities.¹⁰⁶ It appears, therefore, easy to make the case that by simply being in a conflict zone marred by terrorist activity, children pose *some* terror-related danger to society that would justify the Minister suspecting ‘on reasonable grounds that making the order would substantially assist’ in, for example, preventing a terrorist act.¹⁰⁷ This would justify the interests of the community being prioritised over the best interests of the child. The Explanatory Memorandum seeks to justify the priority given by the Bill to community security through the *threat* posed by some children.¹⁰⁸ But there is a disjuncture between this justification and the wording of the *TEO Act*, because a ‘threat’ posed by an individual child is not a prerequisite for the making of a TEO.¹⁰⁹ If averting threats was so central to the Bill, it is surprising that the term is not used in the relevant sections of the *TEO Act*.

The problems identified above illustrate that the executive and the legislature paid only perfunctory attention to the best interests of children in drafting the *TEO Act*. At a minimum, genuine concern would have been reflected in a differentiated approach to children in order to reduce the *TEO Act*’s negative impact on them. For example, the *TEO Act* could have excluded the application of TEOs to children, requiring instead an advanced notification of the intention to return,¹¹⁰ or it could have required, like its UK counterpart, some indication that the child was involved in terrorist activity overseas.¹¹¹ Further, the *TEO Act* could have prescribed a shorter maximum length for orders in relation to children, or it could have made TEOs in relation to children exceptional or non-renewable. The *TEO Act* does not recognise that children perceive time differently: a period of two years has a very different significance for a 15-year-old and a 30-year-old.¹¹² If the safely managed

103 Gina Vale, ‘Cubs in the Lions’ Den: Indoctrination and Recruitment of Children within Islamic State Territory’ (Research Report, International Centre for the Study of Radicalisation, 2018) 27.

104 Independent National Security Legislation Monitor, *Report to the Attorney-General: Review of the Operation, Effectiveness and Implications of Terrorism-Related Citizenship Loss Provisions Contained in the Australian Citizenship Act 2007* (Report, 2019) 53 [6.68].

105 Ibid; Australian Security Intelligence Organisation, *Annual Report 2017–18* (Report, 25 September 2018) 22 <<https://www.asio.gov.au/previous-reports-parliament.html>>.

106 Australian Security Intelligence Organisation (n 105) 22.

107 *TEO Act* (n 8) s 10(2).

108 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 36 [70].

109 *TEO Act* (n 8) ss 10(2)(a), (b).

110 *Report 2* (n 37) 45 [1.173].

111 See especially *Counter-Terrorism and Security Act 2015* (UK) ss 2(2)–(3). See also Blackbourn, Kayis and McGarrity (n 48) 91.

112 The African Committee of Experts reminds us that ‘a year in the life of a child is almost six percent of his or her childhood’: *Institute for Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative (on Behalf of Children of Nubian Descent in Kenya) v the Government of Kenya*,

return of foreign fighters was the purpose of the *TEO Act*,¹¹³ it is doubtful that executive agencies need up to two years, or even more, to prepare for the return of Australia's troublesome citizens – including children.¹¹⁴ An option more fitting with the managed return approach claimed by the executive would have been for the *TEO Act* to provide for short-term TEOs, with a duration limited to that necessary to decide on and prepare for the implementation of conditions attached to return permits.

Contrary to assertions by the executive, the *TEO Act* does not comply with article 3(1) of the *CRC* because, overall, it does not permit the best interests of children to be a primary consideration in making TEOs. The factors that must be considered by the Minister under section 10(4) are problematic and sometimes irrelevant; awareness or otherwise of the existence of these factors is controlled by the Minister; the affected children and those acting on their behalf are explicitly excluded from the decision-making process; and the best interests of the child are automatically subsidiary to community safety. It is difficult to see how an argument can be made by the executive, in good faith, that the *TEO Act* complies with article 3(1). That the executive insisted throughout the scrutiny process that the Bill was compliant is surprising and unsettling.

IV NATIONALITY, IDENTITY, FAMILY AND PRIVACY RIGHTS: ARTICLES 7, 8, 9 AND 16 OF THE *CRC*

This Part focuses on four relevant articles of the *CRC* that are notably absent from the compatibility assessment conducted by the executive and the relevant parliamentary committees: articles 7 (the right to acquire a nationality, *inter alia*), 8 (the right to preserve one's identity, including nationality), 9 (rights in relation to separation from parents) and 16 (privacy rights). It is not clear why these rights were omitted, but two possibilities can be suggested. First, they may have been misconceived as being beyond the territorial jurisdiction of Australia. Second, they may have been sidelined because they are interfered with indirectly, as a result

(African Committee of Experts on the Rights and Welfare of the Child, Decision No 002/Com/002/2009, 22 March 2011) 7 [33] (*'Nubian Children case'*). Addressing the safeguards for the protection of the best interests of the child, the *CRC* Committee states that '[t]he passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve': *General Comment No 14* (n 41) 19 [93].

113 In the second reading speech on 4 July 2019, Minister Peter Dutton stressed that the Bill ensures that 'law enforcement agencies can effectively manage these returns' in conditions of safety for the Australian community: Commonwealth, *Parliamentary Debates*, House of Representatives, 4 July 2019, 298 (*'House of Representatives Debate'*). This can be disputed, with the *TEO Act* better described as pursuing a managed *delay* of the return.

114 Professor Helen Irving has noted that '[t]he question remains whether the power to make or review a TEO amounts, in itself, to an (invalid) exercise of judicial power': Helen Irving, 'Can We Come Home Now? *Temporary Exclusion Orders Act* Raises Serious Constitutional Concerns' [2019] (59) *Law Society Journal* 68, 69. That the constitutionality of the *TEO Act* is genuinely in dispute is perhaps illustrated by the fact that only three TEOs have been made since the *Act* was passed: Department of Home Affairs (Cth) (n 7) 67. The executive has further refused to make available the advice of the Solicitor-General in relation to the constitutionality of the *TEO Act*. See *Senate Debate* (n 65) 794 (Rex Patrick).

of TEOs made against parents. As argued below, these rights should have been considered in the scrutiny process.

A Articles 7 and 8 of the CRC

Article 7 of the CRC reads:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and as far as possible, the right to know and be cared for by his or her parents.
2. States Parties shall ensure the implementation of these rights in accordance with their national law and their obligations under the relevant international instruments in this field, in particular where the child would otherwise be stateless.

Article 8(1) requires that ‘States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference’.

Both articles are rich in normative content, encompassing a variety of rights. It is the nationality-related rights in these articles that are the focus of this discussion. A literal reading of the articles might question their relevance to the current discussion, since the *TEO Act* does not prevent a child from acquiring a nationality (article 7) and does not withdraw nationality from an Australian child (article 8(1)). However, a closer examination reveals that these rights are in fact engaged by the *TEO Act*.

The CRC Committee is yet to dedicate a general comment to the complex issues of nationality and citizenship¹¹⁵ in a children’s rights context.¹¹⁶ The intricacies of these issues go beyond the CRC and remain largely governed by domestic law, although some restrictions may be imposed by international law.¹¹⁷

Article 7 is most relevant in relation to children born abroad to Australian foreign fighters who may be subjects of TEOs.¹¹⁸ Although these children are not automatically Australian citizens, their parents’ nationality makes them eligible to

115 Nationality is regulated by both domestic and international law and has multiple dimensions (human rights and inter-state). See, eg, Alice Edwards, ‘The Meaning of Nationality in International Law in an Era of Human Rights: Procedural and Substantive Aspects’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 11, 24 <<https://doi.org/10.1017/CBO9781139506007.002>>.

116 For controversies in relation to the interpretation of this article, see Ineta Ziemele, ‘Article 7: The Right to Birth Registration, Name and Nationality, and the Right to Know and Be Cared for by Parents’ in André Alen et al (eds), *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff, 2007) <<https://doi.org/10.1163/ej.9789004148635.i-32.11>>; Serena Forlati, ‘Nationality as a Human Right’ in Serena Forlati and Alessandra Annoni (eds), *The Changing Role of Nationality in International Law* (Routledge, 2013) 18 <<https://doi.org/10.4324/9780203436974>>.

117 Ziemele (n 116) 24. For the tension between state sovereignty and the human right to a nationality, see Forlati (n 116); Edwards (n 115) 23–4.

118 A clear picture of the profile of children born to Australian foreign fighters is difficult to obtain. According to Rodger Shanahan, *Typology of Terror: The Background of Australian Jihadis* (Report, 21 November 2019) 9:

Some children were taken from Australia to Syria; some were born in Syria to Australian jihadi parents; others were born to an Australian mother and a foreign jihadi father; others were born to an Australian jihadi father and a foreign jihadi or local Syrian or Iraqi mother. In some instances, jihadis may have informally adopted children and/or had multiple partners of differing nationalities.

obtain citizenship by applying under section 16(2) of the *Australian Citizenship Act 2007* (Cth).¹¹⁹ The Minister must approve such applications,¹²⁰ but citizenship does not begin until the date of approval¹²¹ and this may take some time to obtain. TEOs made against the parents would compound the existing difficulties in applying for Australian nationality on behalf of children born, for example, to Australian fighters currently in Syria. These difficulties include the detention of families by a non-state group, military conflict, and the absence of Australian consular representation in the area. The situation is even more complex when the TEO subject is required to surrender his/her passport¹²² and is thus prevented from travelling to a location where making an application for nationality is possible. These issues make the application process¹²³ practically inaccessible, leaving children with Australian parents in a citizenship limbo. If the children do not have Syrian fathers,¹²⁴ or a parent with the nationality of a state that recognises the citizenship of children born to nationals, the children will be left stateless at least for some time.¹²⁵ While the making of a TEO is clearly not the only obstacle to children of Australian foreign fighters acquiring a nationality, it nonetheless creates serious hurdles.

Article 8 introduced an innovation in human rights by recognising the right of the child to preserve her/his identity, including nationality.¹²⁶ This is relevant for those children who already have Australian nationality and are in conflict

119 *Australian Citizenship Act 2007* (Cth) s 16(2)(a). Doherty indicates that 47 children born to Australian mothers detained in Al-Hawl are under the age of five (of a total of 67 detainees, mothers and children): Doherty, 'Three-Year-Old Australian Girl' (n 3). It is likely that at least some of these children have been born in the conflict zone.

120 *Australian Citizenship Act 2007* (Cth) s 17(3).

121 *Ibid* s 19.

122 *TEO Act* (n 8) s 10(6)(e).

123 *Australian Citizenship Act 2007* (Cth) s 16(1).

124 This would automatically make the children Syrian nationals. Syrian nationality laws confer citizenship on children born on the territory of the Syrian Republic to foreign parents only if the children are not 'entitled' to foreign citizenship through their parents: *Legislative Decree 276* (Syria) Nationality Law (24 November 1969) art 3D <<https://www.refworld.org/pdfid/4d81e7b12.pdf>>. Children born to Australian fighters are entitled to Australian citizenship and thus do not qualify for Syrian citizenship. See also Norwegian Refugee Council and Institute on Statelessness and Inclusion, 'Nationality, Documentation and Statelessness in Syria', *Toolkit: Understanding Statelessness in the Syria Refugee Context* (Web Page, 2019) <<http://www.syrianationality.org/index.php?id=18>>.

125 Arguably, 'a person not considered as a national by any state under the operation of its law is stateless even if he or she could acquire the nationality of a state by simple registration': Council of Europe, Committee of Ministers, *Recommendation CM/Rec(2009)13 of the Committee of Ministers to Member States on the Nationality of Children (adopted by the Committee of Ministers on 9 December 2009 at the 1073rd meeting of the Ministers' Deputies)* 18 [14] <<https://www.refworld.org/docid/4dc7bf1c2.html>>. On child statelessness, see United Nations High Commissioner for Refugees, *Guidelines on Statelessness No 4: Ensuring Every Child's Right to Acquire a Nationality through Articles 1–4 of the 1961 Convention on the Reduction of Statelessness*, HCR/GS/12/04 (21 December 2012) ('UNHCR Guidelines on Statelessness No 4') <<https://www.unhcr.org/en-au/protection/statelessness/5465c9ff9/guidelines-statelessness-nr-4-ensuring-childs-right-acquire-nationality.html>>.

126 John Tobin and Jonathan Todres, 'Art 8: The Right to Preservation of a Child's Identity' in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 281 <<https://doi.org/10.1093/law/9780198262657.001.0001>>. This right is now also recognised by article 25 of the *International Convention for the Protection of All Persons from Enforced Disappearance*, opened for signature 6 February 2007, UN Doc A/RES/61/177 (entered into force 23 December 2010): Tobin and Todres (n 126) 283.

zones. The right can be breached directly, when children are subjects of TEOs, or indirectly, when their parents are subjects of TEOs. A child's right to preserve her/his nationality is, arguably, best understood as offering protection on a sliding scale, from protection against limited interferences with the benefits or entitlements arising from nationality¹²⁷ to protection against the withdrawal or denial of nationality. Denying the benefits of nationality to children because of TEOs made against them and/or their parents interferes with the children's right to preserve their Australian nationality.

Two issues raised by articles 7 and 8 call for further attention with regard to the *TEO Act*: compliance with the positive obligations under article 7 and with the obligations under articles 7 and 8 interpreted in accordance with Australia's obligation to prevent statelessness.¹²⁸ These issues are addressed below.

1 Positive obligations under Article 7 of the CRC

Arguably, by enacting the *TEO Act*, Australia breaches the positive obligations arising from article 7 to take appropriate measures to facilitate the acquisition of Australian nationality by children who have a legitimate claim. The *TEO Act* ignores a group of extremely vulnerable Australian children whose existence is known to the government and who cannot obtain formal recognition of their Australian nationality without positive action by the state.¹²⁹ The difficulty is that this argument implies that Australia has positive *extraterritorial* obligations in relation to the acquisition of nationality by children who have a link with it. The existence of such obligations is, admittedly, uncertain, considering that the positive obligations under article 7 are generally linked to the state of birth.¹³⁰

Some international developments suggest, however, that positive obligations in relation to the acquisition of nationality by children are incumbent not only on the state of birth. The African Committee on the Rights and Welfare of the Child¹³¹ stated that 'implied in Article 6(4) [of the *African Charter*] is the obligation to implement the provision proactively in cooperation with other States, particularly when the child

127 Such as the right to return to the state of nationality; the right to obtain identification and travel documents from that state; or the possibility that the state of nationality may exercise diplomatic protection in relation to that child.

128 Such obligations exist under the *Convention on the Reduction of Statelessness*, opened for signature 30 August 1961, 989 UNTS 175 (entered into force 13 December 1975) ('*1961 Convention*'). Under article 31(3)(c) of the *Vienna Convention on the Law of Treaties 1969*, opened for signature 23 May 1968, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*'), in the interpretation of treaty norms 'any relevant rules of international law applicable in the relations between the parties' shall be taken into consideration.

129 This is not likely to be forthcoming, since, by preventing their return to Australia, the *TEO Act* disables the capacity of the parents to help their children.

130 See, eg, Forlati (n 116) 22–3.

131 The Committee monitors the implementation of the *African Charter on the Rights and Welfare of the Child 1990*, opened for signature 11 July 1990, CAB/LEG/24.9/49 (1990) (entered into force 29 November 1999) ('*African Charter*').

may be entitled to the nationality of another State'.¹³² Similarly, the Human Rights Committee stressed that 'States are required to adopt every appropriate measure, both internally and in cooperation with other States, to ensure that every child has a nationality when he is born'.¹³³ At a minimum, there is an emphasis on the obligation of states to cooperate so as to avoid child statelessness. The emphasis on cooperation suggests that positive obligations under article 7 of the *CRC* may be shared between the state of birth and other states with which the child has a link (including Australia, in the context of this discussion). The *TEO Act*, however, appears antithetical to the idea of cooperation, since it 'outsources' to other members of the international community Australia's challenging nationals and their children.

It has been suggested that fairness is the test for the lawfulness of a state's conduct in regard to the conferral of nationality when this involves positive obligations.¹³⁴ Arguably, extraterritorial positive obligations under article 7(1) would not be unfair on Australia and might even be required should the article be interpreted in good faith.¹³⁵ Positive obligations are unfair if they are excessively burdensome on a state, but they are not so in the context of at least some children born to Australian foreign fighters overseas. For example, some of the families concerned are held in camps, making them accessible and available to Australian officials to assist with birth registration and applications for nationality.¹³⁶ The United States, Kurdish militants, and international agencies such as the United Nations High Commissioner for Refugees ('UNHCR') have offered assistance should Australia decide to take action in relation to detained Australians and their children.¹³⁷ This

132 *Nubian Children case* (n 112) 11 [51]. Article 6(4) of the *African Charter* (n 131) reads:

States Parties to the present Charter shall undertake to ensure that their Constitutional legislation recognize the principles according to which a child shall acquire the nationality of the State in the territory of which he has been born if, at the time of the child's birth, he is not granted nationality by any other State in accordance with its laws.

133 Human Rights Committee, *CCPR General Comment No 17: Article 24 (Rights of the Child)*, 35th sess (7 April 1989) 3 [8].

134 Forlati (n 116) 22.

135 *VCLT* (n 128) art 31(1).

136 The Australian government has refused to assist the Australians held in Syrian camps because of the danger this would allegedly present for the Australian officials. Prime Minister Scott Morrison declared: 'I'm not going to put one Australian life at risk to try and extract people from these dangerous situations, I think Australians would certainly support that': Prime Minister of Australia, 'Doorstop with the Minister for Health, Assistant Minister for Treasury and Finance' (Media Release, 1 April 2019) <<https://www.pm.gov.au/media/doorstop-minister-health-assistant-minister-treasury-and-finance>>. It should be noted, however, that aid workers, journalists, and family members of some detainees have been allowed access to the camps, and other foreign governments have repatriated some of their children: Emma Broches, 'What Is Happening with the Foreign Women and Children in SDF Custody in Syria?', *Lawfare* (Blog Post, 24 March 2020) <<https://www.lawfareblog.com/what-happening-foreign-women-and-children-sdf-custody-syria>>.

137 Jane Norman, 'US Offers to Rescue Australian Islamic State Families in Syria', *ABC News* (online, 16 November 2019) <<https://www.abc.net.au/news/2019-11-16/us-offers-to-rescue-australian-islamic-state-families-in-syria/11710924>>; Michael Bachelard, 'Bring Them Back: It's Time the Government Brought IS Wives to Australia', *The Sydney Morning Herald*, (online, 16 February 2020) <<https://www.smh.com.au/politics/federal/bring-them-back-it-s-time-the-government-brought-is-wives-to-australia-20200216-p5418t.html>>. Save the Children's director of international programs and policy, Mat Tinkler, reportedly told *The Guardian* that '[i]t is eminently possible to repatriate these families, there is no practical barrier to it, all that is needed at the moment is the political will to do so': Doherty, 'Three-Year-Old Australian Girl' (n 3).

offsets the difficulties arising from Australia having no diplomatic relations with the Arab Syrian Republic (Syria), on whose de jure territory these families are held. Lastly, one concern in relation to exercising governmental functions (such as birth registrations and related formalities) outside Australian territory is that, by doing so, Australia may breach the territorial sovereignty of another state (that is, Syria). In such conditions, an expectation of positive acts by Australia could be unfair. However, Syria has not protested the repatriation of children of foreign fighters held in detention camps by other states,¹³⁸ indicating that it does not see such operations as a violation of its territorial integrity and sovereignty.¹³⁹ In addition, repatriation operations of foreign fighters and their children are encouraged by international organisations, which see them as beneficial not only for the individuals concerned but also for the security of the world.¹⁴⁰

2 The Obligation to Prevent Statelessness

Statelessness is discouraged by international law because it leaves individuals without the protection of a state.¹⁴¹ Article 7(2) of the *CRC* requires that the rights in article 7(1) shall be ensured in accordance with other international obligations, especially when the child would otherwise be left stateless. Obstacles to claiming and enjoying Australian nationality, such as TEOs, create a danger of statelessness for children, contrary to article 7 of the *CRC* and the 1961 *Convention on the Reduction of Statelessness*.¹⁴²

138 According to documents presented to the CRC Committee, in 2019 states such as Canada, the Netherlands, Portugal and the Russian Federation were organising the repatriation of their nationals, and France repatriated 17 children: Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No 79/2019 and No 109/2019*, UN Doc CRC/C/85/D/109/2019 (2 November 2020) 3 [2.7], 5 [2.14]. The Arab Syrian Republic has not protested against such repatriations. Neither has it protested against Australia's own repatriation of the Sharrouf and Rizvic children: see above n 63.

139 The exercise of extraterritorial jurisdiction by a state is not contrary to international law if it does not breach the sovereignty of another state: *SS 'Lotus' (France v Turkey) (Judgment)* [1927] PCIJ (ser A) No 10.

140 United Nations Counter-Terrorism Implementation Task Force (Working Group on Promoting and Protecting Human Rights and the Rule of Law while Countering Terrorism), *Guidance to States on Human Rights-Compliant Responses to the Threat Posed by Foreign Fighters* (UN, 2018) 29 <<https://www.ohchr.org/EN/newyork/Documents/Human-Rights-Responses-to-Foreign-Fighters-web%20final.pdf>>; Office of the High Commissioner for Human Rights, *Opening Statement by UN High Commissioner for Human Rights Michelle Bachelet 41st Session of the Human Rights Council* (24 June 2019) <<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24724&LangID=E>>; Panos Moutmtzis, UN regional coordinator for Syria, quoted in 'UN Chides EU for Refusing to Take Back Its Members of Daesh', *PressTV* (online, 18 April 2019) <<https://www.presstv.com/Detail/2019/04/18/593758/Syria--alHol-camp-UN-Europe-Britain-US-Panos-Moutmtzis>>.

141 Hugh Massey, *UNHCR and De Facto Statelessness* (UNHCR, 2010) 2.

142 1961 *Convention* (n 128). The 1961 *Convention* allows for citizenship to be denied or withdrawn, even if statelessness ensues, provided that the state has made a specific declaration under article 8 – which Australia has not done: see 'Status of Treaties: *Convention on the Reduction of Statelessness*', *United Nations Treaty Collection* (Web Page) <https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=V-4&chapter=5#EndDec>.

Article 7(2) does not identify the state against which a claim to nationality can be made.¹⁴³ According to UNHCR, articles 3 and 7 of the *CRC* require that

a child must not be left stateless for an extended period of time: a child must acquire a nationality at birth or as soon as possible after birth. The obligations imposed on States by the *CRC* are not only directed to the State of birth of a child, but to all countries with which a child has a relevant link, such as through parentage or residence.¹⁴⁴

The state of nationality of the parents – Australia, in this case – therefore has obligations in relation to the children concerned. This is strengthened by article 4(1) of the *1961 Convention*,¹⁴⁵ to which Australia is a party, which places subsidiary obligations to avoid statelessness on the state of nationality of the parents.¹⁴⁶

Children who are subjects of, or affected by, TEOs are caught in a twilight zone: some cannot obtain formal recognition of their Australian nationality and others cannot access (for potentially extended periods of time) the benefits of their Australian nationality. In addition to creating the risk of de jure statelessness, TEOs would leave Australian children de facto stateless.¹⁴⁷ De facto stateless persons are deprived of the concrete benefits of citizenship,¹⁴⁸ including the protection of their state of nationality,¹⁴⁹ and have ‘a nationality that is somehow ineffective’.¹⁵⁰ The lack of national protection may result from the refusal or inability of the state

143 Forlati (n 116) 20.

144 UNHCR, *Guidelines on Statelessness No 4* (n 125) 3 [11].

145 This article reads, in part: ‘A Contracting State shall grant its nationality to a person, not born in the territory of a Contracting State, who would otherwise be stateless, if the nationality of one of his parents at the time of the person’s birth was that of that State.’ This is relevant because Syria is not a party to the *1961 Convention* (n 128), article 1 of which provides for the obligations of a state party on whose territory a potentially stateless person is born.

146 The UNHCR *Guidelines on Statelessness No 4* (n 125) clarify that when a child is born to nationals of a state party on the territory of a non-party state, a subsidiary obligation arises for the state of nationality of the parents to grant nationality to a child who would otherwise be stateless: at 7 [30], 11 [51].

147 For a critical discussion of de facto statelessness, see Massey (n 141).

148 A de jure stateless person is defined as ‘a person who is not considered as a national by any State under the operation of its law’ in the *Convention Relating to the Status of Stateless Persons*, opened for signature 28 September 1954, 360 UNTS 117 (entered into force 6 June 1960) article 1(1).

149 Massey (n 141) 61. Also endorsed by Office of the United Nations High Commissioner for Refugees, *Expert Meeting: The Concept of Stateless Persons under International Law* (Prato, 27–8 May 2010) 6 <<https://www.unhcr.org/en-au/protection/statelessness/4cb2fe326/expert-meeting-concept-stateless-persons-under-international-law-summary.html>> (‘Prato Guidelines’); United Nations High Commissioner for Refugees, *Guidelines on Statelessness No 1: The Definition of ‘Stateless Person’ in Article 1(1) of the 1954 Convention Relating to the Status of Stateless Persons*, UN Doc HCR/GS/12/01 (20 February 2012) <<https://www.refworld.org/docid/4f4371b82.html>>. Van Waas clarifies that ‘protection’ in this context includes the exercise of diplomatic protection by the state of nationality or, more generally, diplomatic and consular assistance, including in relation to the return to the country of nationality: Laura van Waas ‘The UN Statelessness Convention’ in Alice Edwards and Laura van Waas (eds), *Nationality and Statelessness under International Law* (Cambridge University Press, 2014) 64, 81 <<https://doi.org/10.1017/CBO9781139506007>>.

150 Van Waas (n 149) 79. There is some caution about creating a new legal category (de facto stateless people), considering that the statelessness treaties do not refer to it: United Nations High Commissioner for Refugees, *Handbook on Protection of Stateless Persons Under the 1954 Convention Relating to the Status of Stateless Persons* (2014) 5, 7 <<https://www.unhcr.org/en-au/protection/statelessness/53b698ab9/handbook-protection-stateless-persons.html>> (‘UNHCR, Handbook’).

of nationality to exercise protection.¹⁵¹ Denying the right to return to Australia, possibly for an undetermined period of time,¹⁵² places TEO subjects and/or their families in a situation of de facto statelessness¹⁵³ by depriving them of important aspects of their nationality: the right to return to their own country¹⁵⁴ and the assistance of the Australian government.

The legal implications of de facto statelessness are not entirely clear.¹⁵⁵ States do not seem to have a duty to prevent de facto statelessness because an ineffective nationality does not necessarily render an individual de jure stateless,¹⁵⁶ although it may amount to a violation of nationality-related rights.¹⁵⁷ While de facto statelessness might not in itself be contrary to international law, the concept is a useful analytical tool to illustrate the negative impact of the *TEO Act* on nationality rights. Arguably, this should have attracted a more careful consideration in the human rights scrutiny process for at least two reasons. The first is a child-specific reason based on article 8 of the *CRC*. Thus, if state conduct renders the nationality of a child ineffective, arguably there is an interference by the state with the child's right to preserve her/his nationality. The second is an argument applicable to everyone, which rests on the idea that some rights associated with nationality are so important that their violation may amount to a denial of nationality. Under customary international law,¹⁵⁸ states have a duty to admit or readmit their nationals and allow them to take up residence therein.¹⁵⁹ This is 'clearly one of the defining features of nationality as a matter of international law'.¹⁶⁰

[T]he case where a state denies an individual of the right to enter, re-enter and reside in its territory (considered as the essence of nationality as a matter of public

151 Massey (n 141) 64. According to Massey, a state may be unable to exercise protection – for example, due to the absence of diplomatic relations with the relevant states.

152 The *TEO Act* (n 8) provides that TEOs can be renewed and does not put a cap on the number or duration of renewals: s 10(7).

153 Those 'unable to return to the country of their nationality will also always be de facto stateless': Massey (n 141) 65 [11.4] (footnotes omitted). See also *Prato Guidelines* (n 148) 7.

154 Or, more specifically to the Australian context, the citizen's right of abode (ie, a right to enter Australia which is 'not qualified by any law imposing a need to obtain a licence or "clearance" from the Executive' as per *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 469); Irving (n 114) 69. As Professor Irving shows, the compatibility of the TEO Bill with the right of abode has not been considered by the PJICIS, although there are concerns about the constitutionality of the *TEO Act*.

155 For example, Edwards points out that 'for international law purposes, there are only two relevant categories: being a national or being (de jure) stateless': Edwards (n 115) 41. Others argue that de facto stateless persons should be treated in the same way as de jure stateless persons: Massey (n 141) 32; UNHCR, *Handbook* (n 150) 44 [124]; Council of Europe (n 125) 15 [7].

156 UNHCR, *Handbook* (n 150) 22 [53]; Edwards (n 115) 40–1. It is worth mentioning that in the *Nubian Children case*, the African Committee equated the lack of effective nationality with absence of nationality. However, the Nubian children were also de jure stateless.

157 UNHCR, *Handbook* (n 150) 22 [53].

158 Customary international law is relevant because of article 7(2) of the *CRC* (n 15) and article 31(3)(c) of the *VCLT* (n 128), to which Australia is a party. The customary law aspects of nationality pertain primarily to interstate relations. From a human rights perspective, although there is no fixed list of rights associated with nationality, several are generally accepted as such. These include the right to leave and return to one's own country, the right to consular assistance, participation in public life and socio-economic and cultural rights: Edwards (n 115) 40.

159 Edwards (n 115) 30.

160 *Ibid* 36.

international law) ... could be interpreted as that state effectively denying that the individual is its national. However, this could only be determined on the individual case at hand and considering all the relevant facts.¹⁶¹

The discussion above shows that there were sufficient grounds for articles 7 and 8 of the *CRC* to have been considered in the human rights scrutiny process of the *TEO Act*.

B Articles 9 and 16 of the *CRC*

Article 9(1) of the *CRC* provides in part:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

Because the families are abroad, Australia would not be able to separate actively the children of Australian foreign fighters from their parents who are subjects of TEOs unless it offers to repatriate *only* the children. There is no indication that this path is considered by the executive, although some states have reportedly pressured their nationals detained in the conflict zones to accept the repatriation of their children alone.¹⁶² Nonetheless, TEOs made against parents may indirectly result in them being separated from their children. Arguably, this would amount to a ‘constructive’ or ‘disguised’ separation,¹⁶³ in that there may be no other reasonable choice for the parents given the dire conditions in the detention camps, the uncertain duration of the detention, and the renewability of the TEOs. Such separation would not be subject to judicial review or to a best interests of the child assessment, contrary to the requirements of article 9(1).¹⁶⁴

If this approach to article 9 is not accepted, article 16 of the *CRC* – a right with a ‘more residual role’¹⁶⁵ – provides further protection to the relationship between

161 Ibid 41.

162 Dan Sabbagh, ‘UK’s Attempt to Repatriate British Children from Syria to Be Rejected’, *The Guardian* (online, 16 January 2020) <<https://www.theguardian.com/world/2020/jan/15/uks-attempt-to-resettle-refugee-children-from-syria-to-be-rejected>>.

163 This approach is borrowed from the literature on expulsion, which refers to ‘constructive’ or ‘disguised’ expulsion as being the forcible departure of a migrant from a state as a result of the actions of that state (or those tolerated by it), which are aimed at provoking such departure: see Richard Perruchoud, ‘State Sovereignty and Freedom of Movement’ in Brian Opeskin, Richard Perruchoud and Jillyanne Redpath-Cross (eds), *Foundations of International Migration Law* (Cambridge University Press, 2012) 123, 145 <<https://doi.org/10.1017/CBO9781139084598>>. The forum state does not actively expel a foreign resident but, through its actions, leaves the migrant no other option but to leave.

164 For an analysis of article 9, see John Tobin and Judy Cashmore, ‘Art 9: The Right Not to Be Separated from Parents’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 307 <<https://doi.org/10.1093/law/9780198262657.001.0001>>.

165 John Tobin and Sarah M Field, ‘Art 16: The Right to Protection of Privacy, Family, Home, Correspondence, Honour, and Reputation’ in John Tobin (ed), *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, 2019) 551, 580 <<https://doi.org/10.1093/law/9780198262657.001.0001>>. The authors note that several rights, including those in articles 7, 8 and 9, inform the content of the right of the child to have his/her family protected, and are more often applied to protect the relationship between the child and the family. Nonetheless, the authors argue that there is scope for article 16 to develop ‘an independent sphere of meaning’.

children and their parents. Article 16, which is ‘essentially a restatement’ of article 17 of the *International Covenant on Civil and Political Rights 1966* (‘*ICCPR*’),¹⁶⁶ reads:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

There are many ways in which TEOs interfere with article 16 rights of different categories of children. They interfere with the family life of children who are subjects of TEOs and who cannot return to their families in Australia, and with the family life of children residing in Australia whose parents cannot return home because of TEOs. TEOs also interfere with the family life of children who accompany abroad their parents who are subjects of the orders. The impact of TEOs on the latter category of children is severe. As children themselves are not TEO subjects, they can – if their Australian nationality has been formally established – return to Australia (although this may be unachievable in the current context of detention in camps and the COVID-19 pandemic). A return to Australia without their parent or parents would significantly interfere with the children’s family life in that they would be deprived of the care of the only adults with whom they have a secure bond. This would further add to the trauma already experienced by these children, which would no doubt be exacerbated by the fact that the TEOs against parents may be extended for indeterminate periods of time.

Article 16 only proscribes interferences that are arbitrary or unlawful, which arguably describes the TEOs. To avoid arbitrariness, an interference with article 16 must be reasonable and proportionate to the aim pursued.¹⁶⁷ The proportionality inquiry involves, *inter alia*, an inquiry into ‘reasonably available alternative[s] which would have minimized the interference with the child’s right’.¹⁶⁸ The children whose article 16 rights are most dramatically affected in the current context – those who accompany their parents abroad – have hardly been considered in the *TEO Act*, which makes no effort to minimise the interference with their rights. In order to be lawful under article 16, ‘the law which legitimizes the interference must be consistent with the principle and provisions of international law’.¹⁶⁹ As discussed throughout this article, the *TEO Act* is not consistent with some *CRC* provisions and thus cannot be considered a lawful interference with the right to family life under article 16.

To conclude, articles 7–9 and 16 of the *CRC* are engaged by the *TEO Act* and should have been canvassed in the processes under the *Scrutiny Act*.

166 *Ibid* 552; *ICCPR* (n 97) art 17.

167 Tobin and Field (n 165) 556.

168 *Ibid* 557.

169 *Ibid*.

C Extraterritorial Jurisdiction and the *TEO Act*

It has been suggested above that articles 7–9 and 16 of the *CRC* may have been excluded from the statement of compatibility and the scrutiny process more generally because some of the children concerned are outside Australian territory and thus beyond Australia’s jurisdiction. This reasoning is open to criticism, as discussed below.

International instruments bind states only ‘within their jurisdiction’.¹⁷⁰ In the absence of jurisdiction, the state has no obligation to comply with human rights treaties. Jurisdiction is primarily territorial but, exceptionally, a state has extraterritorial jurisdiction.¹⁷¹ Establishing the existence of Australian jurisdiction in a TEO context is not straightforward and the executive itself lacks a coherent position in this regard.

The Explanatory Memorandum states that ‘[t]o the extent the child concerned is within Australia’s jurisdiction, the Bill would engage Article 3 of the *CRC*’.¹⁷² The reference to Australia’s ‘jurisdiction’ rather than its ‘territory’ acknowledges that its jurisdiction may extend beyond its borders. The *TEO Act* confirms its extraterritorial reach by requiring consideration of the best interests of the child concerned (aged 14–17), despite the child being outside Australian territory. The executive therefore accepts extraterritorial jurisdiction in relation to the best interests of the child *to the extent* that the child is within Australia’s jurisdiction. Implied in this position is that a child in relation to whom a TEO is made may be within Australia’s jurisdiction in relation to *some* matters but not others. The difficulty lies in establishing *the extent* to which an individual child subject of a TEO is within the jurisdiction of Australia, especially when the executive accepts the existence of jurisdiction in relation to considering the best interests of the child but *not* in relation to those rights which inform what is best for the child¹⁷³ – including the rights in articles 7–9 and 16 of the *CRC*.

The executive is of the view that Australia has no jurisdiction in relation to articles 17 and 23 of the *ICCPR* with regard to TEO subjects:

While Australia’s obligation may not be engaged with respect to the TEO subject on account of their location outside the *territory* and *jurisdiction* of Australia, it would be engaged with respect to members of the TEO subject’s family in Australia.¹⁷⁴

170 *Andreou v Turkey (Admissibility)* (European Court of Human Rights, Application No 45653/99, 3 June 2008) (*‘Andreou’*) 9, citing *Ilaşcu v Moldova and Russia* (European Court of Human Rights, Grand Chamber, Application No 48787/99, 8 July 2004) [311]. See also *CRC* (n 15) art 2(1).

171 On jurisdiction in international law, see Malcolm Shaw, *International Law* (Cambridge University Press, 8th ed, 2017) 483 <<https://doi.org/10.1017/9781316979815>>. Domestically, see *XYZ v Commonwealth* (2006) 227 CLR 532.

172 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 11 [69].

173 *General Comment No 14* (n 41) 3 [4] stresses the interdependence between the best interests of the child and the rights of the child.

174 Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 35 [63] (emphasis added). The Human Rights Committee does not share this view. In 2015, it analysed the UK report and indicated clearly that the TEOs in the relevant legislation raised concerns under articles 12(4) and 23(3) of the *ICCPR* (n 97). The Committee did not consider these rights as being outside of the reporting state’s jurisdiction: Human Rights Committee, *Concluding Observations on the Seventh*

This may reflect the view of the executive vis-à-vis jurisdiction in relation to articles 7–9 and 16 of the *CRC*,¹⁷⁵ which overlap to some extent with articles 17 and 23 of the *ICCPR*.¹⁷⁶

The inconsistency in the approaches to jurisdiction in relation to article 3(1) of the *CRC* and the cited *ICCPR* articles is puzzling. One possible justification – not provided in the Explanatory Memorandum – is that the two categories of norms create different obligations, and that it is *only* the obligations under article 3(1) that bring a child within Australia’s jurisdiction. This reasoning does not withstand scrutiny. Articles 17 and 23 of the *ICCPR* are rich in normative content and only *some* of the obligations they create are intrinsically connected to the physical presence of an individual within Australia’s territory. For example, a temporary denial of entry into one’s country of nationality engages article 17(1) and falls within Australia’s jurisdiction,¹⁷⁷ but an unauthorised entry by Kurdish guards in Al-Hawl into the tent of a detained Australian foreign fighter does not. If a child is forcibly separated from her/his mother by the camp administration in Al-Hawl, Australia is not responsible for a breach of article 23(1) of the *ICCPR* (or article 9 or 16 of the *CRC*) because the incident is not within its jurisdiction; however, preventing the return to Australia of the mother and child would bring the matter under its jurisdiction.

It is, therefore, important to bear in mind that some human rights obligations and breaches (and, ultimately, the jurisdiction of Australia) depend on the individual’s presence in Australian territory while others do not. Thus, Australia’s extraterritorial jurisdiction in relation to certain rights, including *CRC* rights, in a TEO context rests on the capacity of official Australian conduct to interfere with the rights of Australians overseas. Arguably, this capacity has as its basis the ‘bond of nationality’,¹⁷⁸ which confers on Australia the necessary level of control over the concerned individuals so as to bring them under its jurisdiction.

Nationality does not always equate to jurisdiction. For example, an Australian travelling overseas will not always be under the jurisdiction of Australia simply because he/she has Australian nationality.¹⁷⁹ Arguably, however, in matters related

Periodic Report of the United Kingdom of Great Britain and Northern Ireland, UN Doc CCPR/C/GBR/CO/7 (17 August 2015) <<https://digitallibrary.un.org/record/804708?ln=en>>.

175 The executive also eschews assessment in relation to article 24 of the *ICCPR* (n 97), which, relevantly, reads: ‘2. Every child shall be registered immediately after birth and shall have a name. 3. Every child has the right to acquire a nationality.’

176 Article 17 of the *ICCPR* (n 97) reads: ‘1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. 2. Everyone has the right to the protection of the law against such interference or attacks.’ Article 23(1) reads: ‘The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.’

177 The Joint Standing Committee on Human Rights pointed to a possible interference with the *ICCPR* rights of TEO subjects who are required to surrender their travel documents (even when abroad). This would prevent them from being reunited with their family members: *Report 2* (n 37) 41 [1.159]. See *TEO Act* (n 8) s 10(6)(e).

178 To borrow the terminology used in a diplomatic protection context: *Panevezys-Saldutiskis Railway (Estonia v Lithuania)* [1939] PCIJ (ser A/B) No 76, 16.

179 A state may exercise extraterritorial jurisdiction in relation to serious crimes committed by its nationals overseas. See Shaw (n 170) 493. For examples of the nationality principle in Australian law, see section

to citizenship, a citizen is necessarily under the control of the state of nationality wherever he/she may be.¹⁸⁰ This meets the test on which extraterritorial jurisdiction rests: the effective control or authority exercised extraterritorially by a state. International bodies accept that while jurisdiction is primarily territorial, the state may, exceptionally, be held responsible for breaches of international treaties outside its territory.¹⁸¹ Extraterritorial jurisdiction is justified by the effective control or authority that a state party exercises outside its borders in relation to territory, institutions or individuals.¹⁸²

Relevantly, extraterritorial jurisdiction may exist, inter alia, when the *victim* of a human rights violation is under the authority and/or effective control of a state or its agents.¹⁸³ The notion of effective control evokes physical control but, in some cases, extraterritorial jurisdiction is not inextricably linked to full physical control over the victim. This is illustrated in the judgments of the European Court of Human Rights, which has the best-developed case law concerning the extraterritorial application of human rights treaties. The Court is often used as a reference point in approaching extraterritorial jurisdiction. In *Jaloud v The Netherlands*, it found that the jurisdiction threshold was met even when control over the victim was limited and transient. The Court decided that the Netherlands had jurisdiction ‘for the purpose of asserting authority and control over persons passing through the checkpoint’.¹⁸⁴ A state may, therefore, have jurisdiction over an individual for certain purposes only, even in the absence of full or effective control over the victim. In *Andreou v Turkey (Admissibility) (‘Andreou’)*,¹⁸⁵ which concerned the shooting by Turkish soldiers operating from the Turkish-controlled part of Cyprus of a Greek-Cypriot civilian who was standing *outside* the Turkish-controlled territory, the Court said that

even though the applicant sustained her injuries in territory over which Turkey exercised no control, the opening of fire on the crowd from close range, which was

13(2) of the *Crimes (Aviation) Act 1991* (Cth) (‘Hijacking an offence’); and division 119 of the *Criminal Code* (‘Foreign incursions and recruitment’). The *TEO Act*, however, is not an exercise of extraterritorial jurisdiction on account of the principle of nationality because the TEOs are not criminal law measures.

180 For example, no other state can issue or withdraw an Australian passport, or grant or withdraw Australian nationality.

181 See the case law of the European Court of Human Rights (see also n 181 below). The Court deals with allegations of infringements by states parties to the *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) (‘*ECHR*’).

182 For a summary of relevant cases, see European Court of Human Rights, ‘Extra-territorial Jurisdiction of States Parties to the European Convention on Human Rights’ (Press Release Factsheet, Press Unit 2018) <https://www.echr.coe.int/Documents/FS_Extra-territorial_jurisdiction_ENG.pdf> (‘Extra-territorial Jurisdiction’). See also *Jaloud v The Netherlands* (European Court of Human Rights, Grand Chamber, Application No 47708/08, 20 November 2014) 59 [139] (‘*Jaloud*’), citing *Al-Skeini v The United Kingdom* (European Court of Human Rights, Grand Chamber, Application No 55721/07, 7 July 2011).

183 *Issa v Turkey (Merits)* (European Court of Human Rights, Grand Chamber, Application No 31821/96, 30 March 2005) 72; *Ócalan v Turkey* (European Court of Human Rights, Grand Chamber, Application No 46221/99, 12 May 2005) 91. See also European Court of Human Rights, Extra-territorial Jurisdiction (n 181).

184 *Jaloud* (n 182) [152].

185 See above n 170.

the direct and immediate cause of those injuries, was such that the applicant must be regarded as ‘within [the] jurisdiction’ of Turkey ...

Arguably, in *Andreou*, the Court dissociates extraterritorial jurisdiction from physical control over individuals or territory. Admittedly, this dissociation is not complete, and the weight given to the physical proximity of the Turkish-controlled territory to the victim is unclear. The reasoning of the Court suggests that this physical proximity, in light of the means used to cause harm (shooting a firearm across the border), gave the state a sufficient level of control to justify jurisdiction. What is implied in *Andreou* is that if the act contrary to the *European Convention on Human Rights* (‘ECHR’)¹⁸⁶ is by itself (through its context and effects) capable of bringing the individual under the control of the offending state, the state has jurisdiction in relation to that incident regardless of the territorial location of the victim.¹⁸⁷ This reasoning can be transferred to TEOs: using Australian nationality as a vehicle means that Australia brings TEO subjects, or those affected by TEOs, under its (non-physical or legal) control and thus under its jurisdiction, at least to a certain extent.

A concern likely to emerge in relation to this reasoning is that it unfairly extends the extraterritorial jurisdiction of states, including Australia for the purposes of this discussion. It creates the risk that states are held responsible for rights violations that can be only vaguely associated with them. While these are legitimate concerns,¹⁸⁸ they do not play out in the context of the argument that TEOs interfere with nationality-related rights. This is because the nationality of the TEO subjects provides a strong basis for the *type* of jurisdiction that Australia would have, which is a jurisdiction limited to those rights (or aspects thereof) with which Australia is capable of interfering extraterritorially (the ‘to the extent’ approach to jurisdiction discussed above).¹⁸⁹ When the citizenship-related action interferes with other rights, those rights are also pulled under the jurisdiction of the state of nationality, at least to a certain extent (that is, *those aspects* of the rights which are affected, or are capable of being affected, by the conduct of the state of

186 See above n 181.

187 In this sense, the exercise of control over the victim is not a (temporal) precondition of jurisdiction; instead, it can be acquired through the conduct of the state that amounts to a breach of the ECHR (n 181).

188 For a discussion of extraterritorial jurisdiction and other implications of transnational human rights violations, see Tilmann Altwicker, ‘Transnationalizing Rights: International Human Rights Law in Cross-Border Contexts’ (2018) 29(2) *European Journal of International Law* 581 <<https://doi.org/10.1093/ejil/chy004>>.

189 This resonates with the ‘divided and tailored’ approach to ECHR (n 180) rights (and implicitly jurisdiction) espoused by the European Court of Human Rights in *Al-Skeini* (n 181) at 59 [137] and *Jaloud* (n 182) at 64 [154] and described by Cedric Ryngaert in the following terms:

[I]t is defensible to limit the extraterritorial application of the ECHR to only some rights, in particular those relating to negative (‘do not’) obligations (eg, the right not [sic] be killed, the right not to be tortured), and not necessarily extend it to positive obligations (eg, the right to housing, social security, etc)

Cedric Ryngaert, ‘*Jaloud v. the Netherlands*: European Court of Human Rights Finds the Netherlands Liable for Failing to Adequately Investigate the Use of Lethal Force by Dutch Troops in Iraq’, *Blog van het Utrecht Centre for Accountability and Liability Law* (Blog Post, 15 December 2014) <<http://blog.ucall.nl/index.php/2014/12/jaloud-v-the-netherlands-european-court-of-human-rights-finds-the-netherlands-liable-for-failing-to-adequately-investigate-the-use-of-lethal-force-by-dutch-troops-in-iraq/>>.

nationality).¹⁹⁰ This ‘to a certain extent’ approach to extraterritorial jurisdiction is consistent with the executive’s own approach in relation to article 3(1) of the *CRC*.

The argument above is complemented by recent comparative and international developments that demonstrate an increasing international acceptance that states of nationality have some responsibility (and thus jurisdiction) in relation to the welfare of children of foreign fighters who are abroad. These developments respond more widely to the plight of these children and they pertain to issues that may not arise directly in a TEO context.¹⁹¹ Nonetheless, they illustrate a growing international acceptance, at least in relation to children, of a link between extraterritorial jurisdiction and the nationality of the victim. These developments suggest that Australia may come under international scrutiny should it persevere in its reluctance to accept responsibility and jurisdiction in relation to some rights of the affected children.

Thus, in 2015, guidance issued by the President of the Family Division of the High Court of England and Wales suggested that the inherent jurisdiction of the High Court enabled it to make British children wards of the court even if they were abroad.¹⁹² This approach was followed in subsequent cases. Children removed from the UK by parents who intended to travel to Syria to join ISIL were declared wards of the court by the Family Division,¹⁹³ which also ordered the return to the UK of orphan children found in a war zone (Syria).¹⁹⁴ In *Re B (A Child)*, Lady Hale and Lord Toulson (in obiter) held that the inherent jurisdiction of the High Court could be exercised extraterritorially on the basis of the nationality of the child.¹⁹⁵ In these cases, the state did not contest its extraterritorial jurisdiction in relation to British children abroad, but this has not always been the case. The Children’s Commissioner

190 An alternative line of inquiry would be the distinction between positive and negative obligations and their potential impact on jurisdiction. This was suggested (in a different context) by Ryngaert (n 189).

191 The legal situation of ISIL-connected children is extremely complex. Not all the issues pertaining to their situation are enlivened by the *TEO Act*. Outside of the issues raised by the *TEO Act* is, for example, the potential responsibility of states of nationality to repatriate the children and/or provide them with basic necessities while they are imprisoned in the Syrian camps. This raises issues about consular and diplomatic protection that are beyond the scope of this article. Connected is the potential contribution of states of nationality to what amounts to an arbitrary detention of children in Al-Hawl and other similar camps, contrary to article 37 of the *CRC* (n 15).

192 James Munby, ‘Radicalisation Cases in the Family Courts: Guidance Issued by Sir James Munby President of the Family Division on 8 October 2015’ (8 October 2015) 1 [2] n 1.

193 *Re M (Children)* [2015] EWHC 1433 (Fam). Munby P said that ‘the Crown’s protective duty, as *parens patriae*, in relation to [British] children extends ... to protect the child wherever he may be, whether in this country or abroad’: at [30]. According to Munby P, when the risk is to life or of degrading or inhuman treatment, the *parens patriae* jurisdiction ‘is surely unproblematic’ and can be exercised when ‘a child has been taken abroad to travel to a dangerous war-zone’: at [32].

194 *Re Orphans from Syria* [2019] EWHC 3202 (Fam). The Court ‘respectfully requested the assistance of the Foreign and Commonwealth Office to secure their return’: at [9] (Keehan J).

195 [2016] UKSC 4 [58]–[62]. The two judges rejected the argument that nationality-based extraterritorial jurisdiction should be used only in exceptional situations: at [59].

for England¹⁹⁶ threatened to take the government to court over its refusal¹⁹⁷ to accept its duty of care (rooted in the *parens patriae* jurisdiction of the Crown)¹⁹⁸ in relation to children abroad who have been caught in the Syrian conflict.

The UK is not the only legal system where extraterritorial jurisdiction has been exercised in relation to the children of foreign fighters who are overseas. Courts in Belgium ordered the repatriation from Syria of two mothers and their children.¹⁹⁹ A court in Austria reportedly granted custody of two orphan children held in Al-Hawl to their Austrian grandmother, paving the way for the children to be brought home by the Austrian authorities.²⁰⁰ In November 2020, the CRC Committee concluded that France has extraterritorial jurisdiction in relation to the protection of several CRC rights of the children of French fighters detained in Syrian camps.²⁰¹

These examples illustrate that the plight of children caught in the Syrian conflict is not beyond the jurisdictional reach of the children's states of nationality. It is difficult to say how widely accepted this position is and what its strongest foundation might be (whether domestic law, as in the UK *parens patriae* reasoning,

196 Letter from Anne Longfield, Children's Commissioner for England to Secretary of State for Foreign and Commonwealth Office', 5 November 2019 <<https://www.childrenscommissioner.gov.uk/2019/11/05/response-to-the-home-and-foreign-secretaries-regarding-british-children-in-syria/>>.

197 Letter from Foreign and Commonwealth Office and Home Office to Children's Commissioner for England, 4 November 2019 <<https://www.childrenscommissioner.gov.uk/2019/11/05/response-to-the-home-and-foreign-secretaries-regarding-british-children-in-syria/>>.

198 The *parens patriae* jurisdiction may be worth exploring as an analytical tool with regard to Australia's responsibilities in relation to the children of foreign fighters caught in the Syrian conflict. It should be noted, however, that the High Court in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* (2004) 225 CLR 1 ('*Re Woolley*') disagreed that the welfare jurisdiction of the Family Court under section 67ZC of the *Family Law Act 1975* (Cth), which is a jurisdiction similar to the common law jurisdiction of *parens patriae*, entitled the Court to make orders against the Minister of Immigration in pursuance of the best interests of the child. However, the reasoning in *Re Woolley* concerns the welfare jurisdiction of the Family Court rather than the *parens patriae* jurisdiction, so the latter remains worthy of exploration.

199 Rik Coolsaet and Thomas Renard, 'Foreign Fighters and the Terrorist Threat in Belgium', *Egmont Royal Institute for International Relations* (Web Page, 10 January 2020) <<http://www.egmontinstitute.be/foreign-fighters-and-the-terrorist-threat-in-belgium/>>.

200 'Syrian Kurds Repatriate Islamic State Orphans to Austria', *The New Arab* (online, 3 October 2019) <<https://english.alaraby.co.uk/english/news/2019/10/3/syrian-kurds-repatriate-islamic-state-orphans-to-austria>>. In 2019, the family of a woman and her children held in Al-Hawl challenged to the European Court of Human Rights the decision of France to refuse their repatriation: Marc Daou, 'France Taken to Court for Refusing to Repatriate the Children of Jihadists', *France24* (online, 7 May 2019) <<https://www.france24.com/en/20190507-france-taken-court-over-repatriating-children-jihadists>>.

201 Committee on the Rights of the Child, *Decision Adopted by the Committee under the Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure, Concerning Communications No 79/2019 and No 109/2019*, UN Doc CRC/C/85/D/109/2019 (2 November 2020, adopted 30 September 2020) paras 9.1–10. See also CRC (n 15) arts 2, 3, 6, 20, 24, 37. In February 2022, the Committee issued its findings on the merits of this application and decided that France violated articles 3, 6(1) and 37(a) of the CRC: *Constatations adoptées par le Comité au titre du Protocole facultatif à la Convention relative aux droits de l'enfant établissant une procédure de présentation de communications, concernant les communications nos 77/2019, 79/2019 et 109/2019* [Views adopted by the Committee under the Protocol Optional to the Convention on the Rights of the Child establishing a procedure for presenting communications, regarding Communications Nos. 77/2019, 79/2019 and 109/2019], CRC/C/89/D/77/2019, CRC/C/89/D/79/2019 and CRC/C/89/D/109/2019 (23 February 2022) <https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=_CRC%2FC%2F89%2FD%2F77-79-109-2019&Lang=en>.

or extraterritorial application of the *CRC*, as in the decision of the *CRC* Committee). Regardless, this accumulation of practice calls into question the position of the Australian government that Australia has no jurisdiction in relation to some of the rights engaged by the *TEO Act*. It also shows that a discussion of the *TEO Act*'s extraterritorial implications would have been appropriate in the scrutiny process.

V THE PROTECTIVE FEATURES OF THE *TEO ACT* AND THEIR IMPACT ON ITS COMPATIBILITY WITH THE *CRC*

The *TEO Act* contains several protective features that could be claimed to make the interference with human rights proportionate with the objective pursued by it, thus making the limitation of human rights justifiable.²⁰² The availability of 'effective safeguards or controls'²⁰³ in relation to the measures that interfere with human rights, such as those discussed below, is one of the factors considered in the proportionality assessment. The relevant question is whether the main protective mechanisms in the *TEO Act* minimise the negative impact of TEOs on the affected children, so as to make the *TEO Act* compatible with the *CRC*. The only explicit, child-focused, protective feature of the *TEO Act* is that the best interests of the child are a primary consideration when making TEOs concerning children aged 14–17 and when attaching conditions to their return permits.²⁰⁴ As discussed in Part III above, this is not an effective mechanism for minimising the negative effects of TEOs on the children concerned.

In addition to the child-focused protections in the *TEO Act*, children also benefit from its general protections, such as the issuing of return permits and the automatic review of TEOs. In this writer's view, these are the most important protective mechanisms. They are discussed below in parallel with an assessment of their effectiveness from a children's rights perspective.²⁰⁵

A return permit must be issued by the Minister when requested under section 15(1).²⁰⁶ The mandatory formulation of the text indicates that the Minister has an obligation to issue a return permit to a TEO subject when an application is made. However, several factors limit the effectiveness of this protective mechanism. Applying for a return permit is practically impossible for nationals in conflict zones, particularly in areas such as Syria, where Australia has no consular or diplomatic presence. Admittedly, the application can be made on behalf of the

202 Federal legislation that interferes with human rights may be deemed human rights-compliant under the *Scrutiny Act* (n 29) provided the limitation of rights is justifiable, meaning that it must be prescribed by law, pursue a legitimate objective, and be rationally connected and proportionate to the objective pursued. See Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015) 7 [1.13]–[1.15] <https://www.aph.gov.au/-/media/Committees/Senate/committee/humanrights_ctte/resources/Guide_to_Human_Rights.pdf?la=en&hash=BAC693389A29CE92A196FEC77252236D78E9ABAC>.

203 *Ibid* 8 [1.21].

204 *TEO Act* (n 8) ss 10(3)–(4), 16(5)–(6).

205 There are other protective mechanisms, such as the revocation of the order at the Minister's own initiative or on application (*ibid* s 11) and the variation of TEOs: *ibid* s 17.

206 A return permit may also be issued at the Minister's own initiative: *ibid* s 15(2).

TEO subject,²⁰⁷ although it is not clear how other individuals would find out about the orders. TEOs in relation to children must be brought to the attention of parents or guardians.²⁰⁸ If the parents are in Australia, it is difficult to imagine that they will not immediately apply for a return permit for their child, which then must be issued by the Minister in a reasonable period of time. TEOs against children in such circumstances become pointless.

A TEO subject who has surrendered his/her passport²⁰⁹ will require a new passport in addition to the return permit. Further, although a return permit must be issued within a ‘reasonable period’ of time,²¹⁰ this term is amenable to an interpretation that could result in severe delays in the return process.²¹¹ A better approach would have been for the permit to be issued in a period of time ‘reasonably necessary to assess the risk posed by the entry of the person to Australia and to make appropriate arrangements for that entry’.²¹² Even when a return permit is issued on demand, pre-entry conditions may prevent the return of the Australian national for a further period of up to 12 months after the permit is issued.²¹³ While the managed return of foreign fighters may be a legitimate means to achieve the purpose of the *TEO Act* (that is, to protect the community from terrorism),²¹⁴ the *TEO Act* seems to aim instead at delaying the return and postponing the problems inherently raised by it. In doing so, the *TEO Act* is less faithful to its purported mission than to the ministerial credo that ‘[t]he Government is determined to deal with these people as far from our shores as possible’.²¹⁵ In other words, making troublesome Australian nationals somebody else’s problem at least for a while.

The duration of a TEO (up to two years), the vagueness of a ‘reasonable period’²¹⁶ for issuing a return permit, and the possibility of further delays create conditions ripe for children to be prevented from returning to Australia for periods

207 Ibid s 15(1)(a).

208 Ibid s 10(8)(b).

209 Ibid s 10(6)(e).

210 Ibid s 15(3)(a).

211 A ‘reasonable period’ is to be determined in the light all the facts and the legislative framework under which the power is exercised: *BMF16 v Minister for Immigration and Border Protection* [2016] FCA 1530 [22]–[23]. Among the factors to be considered are the importance of the exercise of power to both the public and the affected persons, the nature of the interests affected, and the likely prejudicial impact of delays in making the decision, as well as the practical limitations to the particular exercise of the power as a result of the nature of the decision, and the necessary preparation, investigation and considerations: at [25]. With the TEO subjects being overseas, it is anticipated that practical difficulties in obtaining the relevant information will cause delays in the processing of requests for return permits.

212 As in section 16(9)(a)(i) of the *TEO Act* (n 8), which deals with conditions on the return permit. In any case, it is difficult to understand why, once it is known that an Australian overseas poses a security risk upon return, adequate arrangements cannot be made for the time when the person returns.

213 Ibid s 16(9)(a).

214 See the long title of the *TEO Act* and the Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) (n 36) 35 [60].

215 Peter Dutton, ‘Address to the National Press Club of Australia, Canberra’ (Speech, National Press Club of Australia, 21 February 2018) <<https://minister.homeaffairs.gov.au/peterdutton/Pages/Address-to-the-National-Press-Club-of-Australia.aspx>>. At the second reading of the Bill on 4 July 2019, Minister Dutton reiterated that ‘[t]he government has been clear that our policy is to deal with foreign terrorist fighters as far from our shores as possible’: *House of Representatives Debate* (n 113) 299.

216 *TEO Act* (n 8) s 15(3).

that may exceed three years.²¹⁷ This is not conducive to the best interests of the child and disproportionately limits the rights in articles 7–9 and 16 of the *CRC*.

The immediate automatic review of TEOs by a reviewing authority is a positive feature of the *Act*,²¹⁸ as it does not depend on the individual's limited ability to launch a review. However, a review process without the notification or participation of the affected persons,²¹⁹ based exclusively on materials before the Minister at the time the TEO decision was made,²²⁰ and conducted by a reviewing authority that does not exercise judicial powers,²²¹ is not an effective means of limiting the negative effects of the TEOs.²²² Further, the reviewing authority conducts a legality review on the limited grounds specified in section 14(4) and (5). It is empowered to review the decision to make a TEO, but not the conditions attached to the order²²³ or other related decisions.²²⁴ If the reviewing authority sets aside the TEO made by the Minister, the Minister can make a new TEO in relation to that person.²²⁵ The *TEO Act* provides some protection against TEOs being made on abstract policy considerations, as opposed to the risk posed by individuals,²²⁶ which can be set aside by the reviewing authority. However, the quality and accuracy of the information that ultimately informs the Minister's exercise of discretion remains questionable, considering that the Minister has no duty to obtain further information and the affected person has no right to make submissions. The effectiveness of review mechanisms under the *TEO Act* is further diminished by the exclusion of judicial review under the *Administrative Decisions (Judicial Review) Act 1977 (Cth)*²²⁷ and by the statutory exclusion of procedural fairness in relation to decisions made by the Minister.²²⁸ The judicial review option in relation to TEOs are therefore limited to cases where jurisdictional error or error on the face of the record can be pleaded, or where a case can be brought under the original jurisdiction of the High Court according to section 75 of the *Australian Constitution*.

217 The risk of delay is further compounded by the fact that failure to respond, or delays in responding, to requests for return permits are not reviewable by the reviewing authority. Section 14(1) of the *TEO Act* (n 8) only requires that the *making* of a TEO is referred to the reviewing authority, and no other section entitle the authority to review other TEO-related decisions made or omitted to be made by the Minister.

218 *Ibid* s 14.

219 *Ibid* s 14(6).

220 *Ibid* s 14(2). However, the Minister need not refer to the reviewing authority any material that would, in the Minister's opinion, be contrary to the public interest to disclose: at section 14(3). In a charged security context, it is not difficult for the Minister to avoid disclosure, thus placing the reviewing authority in a position of reviewing TEOs based on scant information.

221 See reference to 'personal capacity' in *ibid* section 23.

222 As the Joint Standing Committee for the Scrutiny of Bills remarked, the review process is only a 'modest safeguard compared to the breadth of the discretionary power provided to the minister and may not adequately protect the rights and liberties of persons affected': *Scrutiny Digest 3* (n 37) 13 [1.44].

223 See response to recommendation 7: Australian Government (n 17) 4.

224 Such as a refusal to revoke a TEO (*TEO Act* (n 8) s 11) or to issue a return permit, or refusals of requests for variation or revocation of a return permit: at s 17.

225 *Ibid* s 14(10).

226 *Ibid* s 14(4)(b)(i) read with s 14(5)(f), and s 10(2)(a) read with s 14(4)(b)(iii).

227 *Ibid* s 27.

228 *Ibid* s 26.

The review framework is antithetical to children's rights from several perspectives. The *TEO Act* excludes the involvement of affected children from the review process, which is contrary to article 12(2) of the *CRC*. To be best-interests compliant, decisions concerning children must be based on information pertaining to individual children. The *TEO Act* does not encourage or support the obtaining of such information. Rather, it actively creates obstacles to it by the lack of procedural fairness in the making of TEOs, the exclusion of children and their representatives from the review process, and the absence of a duty for the Minister to inquire (to the extent permitted by the circumstances) into the situation of individual children.²²⁹ Children are treated in the same way as adults in the review process, although accommodating children's vulnerability is of essence under article 3(1) of the *CRC*. A provision requiring the appointment of a guardian *ad litem* might have been an adequate mechanism to ensure that children's interests are represented at least to some extent in the review process. Although the role would necessarily be limited by the children being outside Australia, the guardian's involvement would have provided a perspective additional to that of the Minister in relation to the best interests of the child and would have increased the chance that additional information concerning individual children would be presented to the reviewing authority. This would have diminished the extent to which the *TEO Act* contravenes articles 3(1) and 12(2).

Overall, the protective mechanisms provided by the *TEO Act* do not effectively safeguard against excessive interference with children's rights by the executive. For every *prima facie* protective feature, there is some clawback. The best interests of the child are a primary consideration but are automatically overruled by the paramountcy of community safety. Certain factors must be taken into consideration when deciding what is in the best interests of the child, but the Minister has no duty to ensure that he/she has sufficient relevant information for that assessment. The Minister must issue a return permit on request, but Australians (children and adults) can be kept out of the country for a further 12 months after the return permit has been issued. There is an automatic review of the Minister's decision to make a TEO, but it has a limited scope, is based solely on materials provided by the Minister, and excludes the affected persons and their views. Such protective mechanisms appear tokenistic. From a children's rights perspective, they lack a core element: namely, child-focused features that genuinely aim to safeguard children who are subjects of, or affected by, TEOs.

VI CONCLUSION

This analysis suggests that, contrary to the position taken by the Australian executive during the scrutiny process, the *TEO Act* is inconsistent with the *CRC*. This finding fits into the trend identified by other authors that the parliamentary scrutiny process seldom leads to the Parliament adjusting legislation to ensure

229 Ibid s 10(5)(a).

compliance with human rights,²³⁰ and that in process of passing of terrorism-related legislation (amongst others), human rights concerns routinely get overlooked, sometimes with bi-partisan support.²³¹

The case that the *TEO Act* is inconsistent with the *CRC* is solid in relation to article 3 but more complex in relation to articles 7–9 and 16. The latter rests on accepting some innovations in interpreting the articles and the extraterritorial jurisdiction of Australia. The omission of articles 7–9 and 16 from the compatibility statement, and the scrutiny process more generally, has resulted in these rights being sidelined. Should the rights become relevant in specific cases (as opposed to the abstract assessment under the *Scrutiny Act*), they risk being rendered ineffective due to the *TEO Act's* intransigent language. As discussed in Part II, this language prevents reliance on the *CRC* as an aid in interpreting the *TEO Act*.

There may be some possibilities for the *CRC* to influence the application of the *TEO Act* – although these may be capitalised on only before a court where delays are to be expected. The executive argued in its Explanatory Memorandum that the TEO Bill is consistent with the *CRC*. If this claim is taken to mean that the legislation is not intended to contravene Australia's obligations under the *CRC*, then an interpretation consistent with the *CRC* should, where possible, be followed. It can be further argued that an intention not to contravene the *CRC* suggests that the residual relevant factors that inform the best interests of the child under section 10(4)(f) of the *TEO Act* can include the rights in the *CRC* to the extent that they are relevant in specific cases. Another possibility would be for the omitted *CRC* provisions to retain relevance by linking them to the consideration of the best interests of the child under section 10(4) when a TEO is considered against a child aged 14–17. However, there is little overlap between these considerations and the legal content of the rights in articles 7–9 and 16 of the *CRC*. Therefore, it is likely that these rights, despite their importance for children, would be all but ignored in the TEO context.

Reliance on the best interests factors in section 10(4) does not assist two categories of Australian children largely overlooked by the *TEO Act*: those born overseas to Australian fighters and those taken overseas by their foreign fighter parents. A more thorough engagement with the *CRC* rights discussed in this article during the scrutiny process would have revealed the significant negative consequences of the *TEO Act* on these children and might have prompted some guarantees in the *TEO Act* in relation to the protection of their interests. Instead, because the best interests of the child standard does not have constitutional recognition, or recognition in a statute that would apply to all federal decision-making, it is likely that the best interests of these affected children will continue to be marginalised in the TEO context.

There is no doubt that governments must make difficult decisions when dealing with ISIL-linked children and adults. Some such decisions chart new legal ground,

230 Williams and Reynolds (n 28) 490. It has been argued, for example, that 'enacting laws or regulations that infringe democratic freedoms has become a routine part of the legislative process': see Williams (n 38) 37.

231 Williams (n 38) 37–41.

as does the *TEO Act*, and may result in certain limitations to individual rights. There are grey legal spaces in relation to the compatibility of the *TEO Act* with the *CRC*, and some aspects of the *TEO Act* are not unequivocally contrary to the *CRC* in all circumstances. It is in such grey areas that political leadership matters. Governments have a range of options in responding to the challenges raised by their troublesome nationals. Child rights or humanitarian-informed decision-making may require political courage²³² where legal answers are not clear-cut or are still developing. Taking political risks to support an unpopular cause might not appeal to all governments. At a minimum, however, even a government that is not inclined towards taking such risks but presents itself as a supporter of accountability and transparency should take responsibility for the choices it makes. The executive and the lawmakers who supported the *TEO Act* should have acknowledged contravening the *CRC* standards (which they are entitled to do, in a constitutional system characterised by parliamentary sovereignty), rather than twist the interpretation of the *CRC* to defend a statute that bears no genuine respect for Australia's obligations regarding children's rights.

The arguments made in this article mostly concern the *CRC* implications of the *TEO Act* as they apply to potential TEO subjects detained in Syrian (and other) camps. For children in such camps, the *TEO Act* may lead to potentially disastrous violations of their rights. The situation of other potential subjects of TEOs and members of their families who are not detained may be less perilous. However, the violation of the rights of any child requires close scrutiny.

The Australian government should reconsider its findings regarding the compatibility of the *TEO Act* with the *CRC* and amend the *TEO Act* to ensure Australia's compliance with its children's rights obligations. The provisions of the *TEO Act* that permit the making of TEOs against children should, ideally, be repealed because they are difficult (if not impossible) to align with the *CRC*. Alternatively, the mechanisms to give meaningful consideration to the best interests of the concerned children should be substantially strengthened. Further, the executive and the Parliament should give closer attention to the implications of TEOs for the nationality rights of children, including those born overseas to Australian fighters. The consequences of TEOs on children taken abroad by their fighter parents should also be better safeguarded. Making amendments along the lines suggested here would bring the *TEO Act* closer to respecting Australia's *CRC* obligations, which the executive claimed not to wish to breach.

232 It has been reported that the Norwegian coalition government fell following the repatriation of an ISIL-linked mother and her five-year-old son from Syria: Jack Guy, James Frater and Sarah Dean, 'Norway's Governing Coalition Collapses over ISIS Repatriation', *CNN* (online, 20 January 2020) <<https://edition.cnn.com/2020/01/20/europe/norway-government-collapse-isis-intl/index.html>>.