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21 November 2021

Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

UNSW LAW SOCIETY SUBMISSION REGARDING THE REVIEW OF THE *COUNTER-TERRORISM (TEMPORARY EXCLUSION ORDERS) ACT 2019*

The University of New South Wales Law Society Inc. welcomes the opportunity to provide a submission to the Parliamentary Joint Committee on Intelligence and Security.

The UNSW Law Society Inc. is the representative body for all students in the UNSW Faculty of Law.

Nationally, we are one of the most respected student-run law organisations, attracting sponsorship from prominent national and international firms. Our primary objective is to develop UNSW Law students academically, professionally and personally.

The enclosed submission reflects the opinions of the contributors, with the UNSW Law Society proud to facilitate these submissions. UNSW Law Society Inc. is not affiliated with any political entity.

We thank you for considering our submission. Please do not hesitate to contact us should you require any further assistance.

Yours sincerely,

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Summary of Recommendations

1. Should the *TEO Act* remain in place, this submission recommends the following:
    a. Amend the Act so the decision to impose a Temporary Exclusion Order is made by a Court, and not the Minister for Home Affairs.
    b. Introduce a 'special advocate' provision to advocate on behalf of potential TEO subjects where necessary.
    c. Amend the Act to ensure that there is some level of disclosure as to why the TEO is being imposed.
    d. Require the Minister to observe procedural fairness in making a TEO decision, if the Minister retains the sole authority to make such a decision.
    e. Strengthen the requirement on the Minister to notify the subject of a TEO that they are under a TEO.
    f. Amend the Act to require the Minister to take more steps than just what he or she believes is reasonable.
2. This Submission recommends that 14 to 17-year old's should be wholly excluded from being subject to a Temporary Exclusion Order. If this is not possible:
    a. Better protections to alleviate the harmful impacts of a Temporary Exclusion Order must be facilitated with the consultation of mental health professionals.
    b. Gender specific counselling be provided for any emotional distress that may be caused in the aftermath of imposing a TEO, by trained child helpline staff and psychologists specialising in youth mental health and trauma
    c. Special consideration should be given for children with mental or cognitive disabilities, and as such as the age threshold should be increased for them.
3. Introducing more specific requirements to regulate the broad and speculative nature of "reasonableness" and "substantially assist". [1]
4. Constraining the Minister's discretion by requiring the Minister to consider the recommendations of an independent body (be it ASIO or another specially established body).

[1] Parliamentary Joint Committee on Intelligence and Security, 'Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019' (Advisory Report, April 2019) 2.26.

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BACKGROUND

The UNSW Law Society recognises several issues of signficance in regards to the Review of the Counter-Terrorism (Temporary Exclusion Orders) Act 2019 ('*TEO Act*'). Firstly, the submission is concerned with the Act's potential conflicts with the Australian Constitution, including whether the Act is within the scope of the Commonwealth Parliament's legislative power. Further, this submission identifies that there are dire human rights implications for subjects of the legislation, including children, where both legal and civil-political rights have the potential to be impinged. Lastly, there is concern with regards to the unconstrained discretion bestowed unto the Minister of Home Affairs.

First and foremost, this submission acknowledges that it is limited in providing a concrete review of the Act due to the lack of publicly available information on provision of Temporary Exclusion Orders (TEOs). At the time of writing, there is only one available annual report on the operation of the Act and of this, one page is dedicated to numerical statistics about TEOs.[2] Beyond stating that five TEOs have been issued to date,[3] no demographic data about the subjects of the TEOs have been provided, nor are the reasons for the issuance of any of the five TEOs provided, further noting that the Act criminalises the disclosure of information by reviewing bodies other than to give effect to the Act.[4] Thus, in the absence of any concrete information specifically pertaining to TEOs, this submission is regrettably forced to extrapolate and come to hypothetical conclusions from the general nature of Australia's counter-terrorism regime and the model utilised in the United Kingdom, rather than engage in a meaningful 'review' of the operation of the Act.

A. CONSTITUTIONAL CONCERNS

Previous submissions to this committee, including those of Dr Helen Irving and the Law Council of Australia, have raised concerns about the constitutional validity of the *TEO Act*.

[2] Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences Annual Report 2019-2020* (Report, 2020).
[3] Department of Home Affairs, *Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences Annual Report 2019-2020* (Report, 2020) 8.
[4] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 24(1)(a).

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We share these constitutional concerns, arguing that the *TEO Act* is not supported by a head of legislative power in s 51 of the *Constitution.*

A Commonwealth Legislative Power under s 51

The Department of Home Affairs has advised that defence (s 51(vi)) and external affairs (s 51(xxix)) are the heads of power supporting the *TEO Act*.[5] This submission will therefore examine the extent to which those two heads of power can support this legislation.

1 – External Affairs Power

Neither the 'geographic externality' nor the 'relations with other countries' limbs of the external affairs power can support the *TEO Act.*

Preventing entry into Australia: The geographic externality principle enables the Parliament to make laws with respect to 'a place, person, matter or thing [that] lies outside the geographical limits of [Australia]'.[6] The *TEO Act* regulates the conduct of Australian citizens entering Australia, and places conditions on their entry.[7] For example, s 8, which criminalises entry into Australia when a temporary exclusion order is in place, does not operate extraterritorially, because the offence is only committed once the subject of the order is in Australia.[8] The entry of Australian citizens into Australia is an internal Australian affair.

The High Court has never suggested that the externality principle could be used to make immigration laws against Australian citizens on the basis that, prior to their return, those citizens would be physically located overseas.[9] The externality principle was created to support the exercise of Commonwealth sovereignty outside Australia.[10] It was not created to overturn the decision in *Potter v Minahan*[11] that immigration laws are inapplicable to citizens.

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[5] Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, *Advisory Report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (Report, April 2019) 18.
[6] See, eg, *XYZ v Commonwealth* (2006) 227 CLR 532, 546 [30] (Gummow, Hayne and Crennan JJ).
[7] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) ss 8, 9, 16(9).
[8] See also *Newman v Minister for Health and Aged Care* [2021] FCA 517, [63]–[66] (Thawley J).
[9] Cf *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, 70–1 (Kirby J), 85 (Callinan J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 496–7 (Kirby J).
[10] *New South Wales v Commonwealth* (1975) 135 CLR 337 ('*Seas and Submerged Lands Case*'). See *XYZ v Commonwealth* (2006) 227 CLR 532, 540 (Gleeson CJ), 549 (Gummow, Hayne and Crennan JJ).
[11] *Potter v Minahan* (1908) 7 CLR 277, 288–90 (Griffith CJ), 304–5 (O'Connor J).

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Preventing terrorist attacks overseas: In *Thomas v Mowbray*,[12] three judges suggested that the externality principle could partially support the terrorism control order regime because it was directed at preventing 'intimidation or injury to the government or public of a foreign country'.[13] Their Honours also suggested that the 'relations with other countries' limb could apply because the terrorism control order regime would advance 'comity with foreign governments and the preservation of the integrity of foreign states'.[14]

This reasoning is inapplicable to the *TEO Act*. Unlike the terrorism control orders in *Thomas v Mowbray*, the *TEO Act* does not seek to prevent terrorist attacks against foreign countries. Instead, by excluding Australian citizens from Australia, it places Australia's problems on other countries' doorstep by forcing Australian citizens to find sanctuary in nations outside their own. Therefore, our submission argues that the external affairs power likely cannot support the validity of the *TEO Act*.

2 – Defence Power

As the *TEO Act* falls outside the external affairs power, the *TEO Act*'s validity turns on whether it can be supported as a proportionate use of the defence power. This submission argues that it cannot.

The defence power is a purposive power,[15] meaning that laws enacted under this power must be 'reasonably capable of being seen as appropriate and adapted' to the purpose of defence.[16] Thus, although the prevention of terrorism is a valid defence purpose,[17] our submission is that it does not follow that any law addressing the subject matter of terrorism will automatically be valid.

[12] (2007) 233 CLR 307.
[13] *Thomas v Mowbray* (2007) 233 CLR 307, 365 [153] (Gummow and Crennan JJ, Gleeson CJ agreeing at 324 [6]).
[14] *Thomas v Mowbray* (2007) 233 CLR 307, 365 [151] (Gummow and Crennan JJ, Gleeson CJ agreeing at 324 [6]).
[15] *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).
[16] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 592–593 (Brennan J, Toohey J agreeing at 684), 697 (Gaudron J); *Thomas v Mowbray* (2007) 233 CLR 307, 459 (Hayne J), 504 (Callinan J).
[17] *Thomas v Mowbray* (2007) 233 CLR 307.

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In the absence of total war, the scope of the defence power is limited.[18] To this end, the infringement of fundamental rights is central to determining whether a law is appropriate and adapted to the purpose of defence.[19] We argue that the *TEO Act* is disproportionate because it goes beyond what is reasonably required to protect Australia from terrorism. It infringes the common law (and internationally recognised) right to return home[20] and the rights of the child,[21] and removes ordinary administrative law protections.[22] The practical implications of the latter two issues are discussed in the remainder of this submission.

The *TEO Act* is unnecessary because the terrorism control order regime[23] is an 'obvious and compelling' alternative.[24] Under this regime, restrictions must 'reasonably necessary, and reasonably appropriate and adapted' to terrorism prevention, in the opinion of a court.[25] In *Thomas v Mowbray*, these measures included reporting to police, and refraining from obtaining weapons or communicating with terrorists.[26] By contrast, preventing Australian citizens from returning home is an abrogation of rights so grave that it will almost never be justified unless Australia is in a state of total war. Persons subject to the order could effectively be rendered stateless for the duration of their exclusion.

Thus, given this submission's view that the stated heads of power for the *TEO Act* are not applicable to that Act, this submission expresses doubt as to whether this legislative scheme is constitutional at all.

B The Position of the TEO Act in Australian Terrorism Law

Terrorism poses a genuine threat to security that governments have globally sought to mitigate. Specifically, the *TEO Act* was introduced in 2019 to respond to threats posed by

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[18] *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J); *Stenhouse v Coleman* (1944) 69 CLR 457, 471–472 (Dixon J); Andrew Lynch, 'Thomas v Mowbray: Australia's "War on Terror" Reaches the High Court' (2008) 32(3) *Melbourne University Law Review* 1182, 1195.
[19] *Davis v Commonwealth* (1988) 166 CLR 79, 99–100 (Mason CJ, Deane and Gaudron JJ, Wilson and Dawson JJ agreeing at 101), discussed in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 29–31 (Mason CJ).
[20] *Potter v Minahan* (1908) 7 CLR 277; *International Covenant on Civil and Political Rights* art 12(4).
[21] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.
[22] See eg, *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 26.
[23] *Criminal Code Act 1995* (Cth) div 104.
[24] *Monis v The Queen* 249 CLR 92, 214 [347] (Crennan, Kiefel and Bell JJ).
[25] *Criminal Code Act 1995* (Cth) s 104.4(1)(d).
[26] *Thomas v Mowbray* (2006) 233 CLR 307, 492–495 (Callinan J).

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foreign terrorist fighters returning to Australia from Syria and Iraq.[27] Ultimately, this legislation aims to monitor and control foreign fighters' entry and presence in Australia.[28] However, in practice the *TEO Act*'s contribution to the existing counter-terrorism legislation is questionable, while it severely compromises procedural fairness.

The Act's Contribution to the Existing Counter-Terrorism Scheme

Australia's response to terrorism has stood out among Western democracies and has been labelled "hyper-legislation."[29] This submission stipulates that the particular value of the *TEO Act*, operating alongside approximately 75 other pieces of anti-terrorism legislation in Australia[30] is unclear and further complicates an already challenging legal framework. As noted above, the Federal Government's justification for this regime is to prevent the entry of foreign fighters. However, it subsequently remained silent as to the scale of the issue or level of threat posed by such foreign fighters. Thus, this submission queries what additional need this legislation responds to, this legislation appears to only complicate a scheme that is already "practically unworkable"[31]. To contribute meaningfully to the existing counter-terrorism scheme, the Australian scheme should implement deradicalisation and reintegration programs similar to those implemented as post-entry conditions of TEOs in the UK.[32] In this way, the Act offers more than 'draconian' restrictions, instead offering programs that may effectively mitigate security concerns.[33]

B. Concerns About the Rights of TEO Subjects

Executive Overreach

[27] Commonwealth, *Parliamentary Debates*, House of Representatives, 21 February 2019, 1337 (Peter Dutton, Minister for Home Affairs).
[28] Sangeetha Pillai, 'There's no clear need for Peter Dutton's new bill excluding citizens from Australia' (Web page, 8 July 2019) <https://newsroom.unsw.edu.au/news/business-law/there%E2%80%99s-no-clear-need-peter-dutton%E2%80%99s-new-bill-excluding-citizens-australia>.
[29] Nicola McGarrity and Jessie Blackbourn, 'Australia has enacted 82 anti terror laws since 2001. But tough laws alone can't eliminate terrorism' *The Conversation* (online, September 30 2019).
[30] Greg Barton, 'Preventing foreign fighters from returning home could be dangerous to national security' *The Conversation* (online, 23 July 2019).
[31] Nicola McGarrity and Jessie Blackbourn, 'Australia has enacted 82 anti terror laws since 2001. But tough laws alone can't eliminate terrorism' *The Conversation* (online, 30 September 2019).
[32] Jessie Blackbourn 'Exclusion, prosecution or restricted re-entry?' *Inside Story* (online, 26 February 2019).
[33] Isaac Kfir, 'Why we should allow members of Islamic State to return' *Australian Strategic Policy Institute* (online, 19 March 2019).

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This submission argued that the *TEO Act* gives the Minister for Home Affairs too wide a discretion to create and revoke both TEOs and return permits. This submission expresses deep concern that the discretion provided to the Home Affairs Minister, without the need for approval or authorisation by the judiciary, would result in significant executive overreach.

It is uncontroversial that under Australian law, there is a separation of powers between the judiciary and other branches of government. As the Federal Court reiterated in *Djalic v Minister for Immigration and Multicultural and Indigenous Affairs*,[34] the 'adjudication and punishment of criminal guilt for offences against a law of the Commonwealth is exclusively within the province of courts exercising the judicial power of the Commonwealth'.[35] The High Court in *Thomas v Mowbray* went further to say that:

> [i]n a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.[36]

Unlike the control orders that exist in the *Criminal Code* (Cth),[37] there is no judicial authorisation for TEOs; the decision is made only by the Minister.

The decision in *Thomas v Mowbray*, validating the use of the control order regime, was, among other reasons, reached partly because a court, when answering the Executive's application for a control order, must ascertain there are reasonable grounds for the order before it takes effect. As Gleeson CJ observes, having powers exercised by the judiciary 'independently, impartially and judicially', as courts do, tends to be a good thing, especially in qualifying powers that limit human rights,[38] and that not having the judiciary being capable of exercising those powers would 'not constitute an advance in human rights'.[39] This submission agrees with the Gleeson CJ's view, and is critical of the Minister alone being capable of exercising such a significant power.

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[34] [2004] FCAFC 151 ('*Djalic v MIMIA*').
[35] *Djalic v MIMIA* [2004] FCAFC 151, [58].
[36] *Boilermakers Case* (1956) 94 CLR 254, 456 cited in *Thomas v Mowbray* (2007) 233 CLR 307, 413 [302].
[37] *Criminal Code Act 1995* (Cth) s 104.1.
[38] *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17].
[39] *Thomas v Mowbray* (2007) 233 CLR 307, 329 [17].

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Provisions for a 'reviewing authority' are unlikely to resolve the issue of there being no judicial authorisation as the reviewing authority is not an active member of the judiciary in a professional capacity, thus failing to constitute judicial authorisation.[40]

The comparable UK legislation, requires the Secretary of State to seek court authorisation to make a TEO, unless there is significant urgency.[41] Given the wide scope of *TEO Act* section 10(2), together with the speculative nature of the grounds for the TEO, which is 'reasonable suspicion', the lowest standard of reasonable grounds for criminal offences, and the lack of merits review amounts to, in this submission's view, an overly broad power to grant TEOs.[42] This submission recommends that the initial making of a TEO Act should be made by the courts on the application of a Minister.

The 'Closed' Nature of Judicial Review

This scheme has been labelled as draconian primarily due to limited opportunities for review, especially as the Australian system entails 'far greater obligations, prohibitions and restrictions'[43] than the UK scheme that it is based upon. While the *TEO Act* does make provision for the 'immediate automatic review of TEOs by reviewing authorities',[44] a positive concern arises from the closed nature of judicial review.[45] Ultimately, a review process without the notification and participation of the affected persons[46] does not provide a meaningful way for affected individuals to challenge the harsh effects of a TEO. Furthermore, the making of an order under this scheme is not subject to ordinary judicial review (separate from the automatic review done by retired judicial officers) as the *TEO Act* explicitly prohibits such review.[47] This aspect of review is also reflected in the equivalent UK legislation[48] although the UK scheme offers increased protection for the affected individual.

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[40] *Helen Irving,* 'Can we come home now? Temporary Exclusion Orders Act raises serious constitutional concerns' (2019) (59) *LSJ: Law Society Journal of NSW* 68, 69.
[41] *Counter-Terrorism and Security Act 2015* (UK) s 7 (a).
[42] *Law Council Submission on 2019 Bill* (n 2) [24].
[43] Jessie Blackbourn 'Exclusion, prosecution or restricted re-entry?' *Inside Story* (online, 26 February 2019).
[44] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14.
[45] Notably, in the definition of 'reviewing authority' in *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 23, does require an ex judicial officer of a superior court or a current senior Administrative Appeals Tribunal Member.
[46] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14(6) expressly prohibits the participation of the potential subject of a temporary exclusion order.
[47] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 27.
[48] *Counter-Terrorism and Security Act 2015* (UK) s 3(3).

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Contrastingly to the Australian system, the UK model offers an opportunity for the rights of the TEO subject to be somewhat represented through the provision of a 'special advocate'[49] whereby the court process, though still generally remaining closed to the affected individual, still has their advocate present to support their interests and provide important checks and balances on governmental discretion. This submission recommends the implementation of a 'special advocate' system in the TEO Act to ensure that potential subjects of such orders are not completely defenceless.

The UK Scheme has further safeguards. For example, with respect to information asymmetry that exists between the Minister (who has all the information) and the potential TEO subject (who has none), under the control orders scheme in the UK,[50] the 'gist of the case' against the controlee must at least be disclosed in proceedings.[51] We would recommend a similar method be adopted, as the lack of any information on the grounds of the order significantly limits the applicant's ability to challenge it.

Quality of Judicial Review Decisions

Additionally, the fact that reviews by reviewing authorities are based exclusively on materials provided by the Minister. Importantly, the Minister has the sole discretion to disclose material on which a decision may be made.[52] This may be contrasted with the UK Scheme where only a court can rule on whether certain material ought not be provided where there is a public interest against disclosure (and even then, the Secretary of State must provide summaries of that material).[53] In Australia, given the Minister's sole discretion to control what materials are provided, and that the Minister has no duty to obtain further information,[54] this submission questions whether review by the reviewing authority can offer genuine challenges to ministerial decisions. This submission believes that the legislation should impose a

[49] *Counter-Terrorism and Security Act 2015* (UK) sch 3 para 10.
[50] *Prevention of Terrorism Act 2005* (UK).
[51] Helen M Fenwick, 'Reconciling International Human Rights Law with Executive Non-trial-Based Counter-Terror Measures: The Case of UK Temporary Exclusion Orders' in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer Press) 121, 125*; A v United Kingdom* (2009) (European Court of Human Rights, Grand Chamber, Application No. 3455/05, 19 February 2009); *Secretary of State for the Home Department v AF (No 3)* [2007] 3 WLR 681.
[52] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14(3).
[53] *Counter-Terrorism and Security Act 2015* (UK) sch 3 para 4.
[54] Meda Couzens, 'A Critique of the Counter-terrorism (Temporary Exclusion Orders) Act 2019 In Light of Australia's Obligations under the Convention on the Rights of the Child' (2022) 45(2) *University of New South Wales Law Journal* (advance), 35.

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positive duty on ministers to attain this information so that reviewing authorities have all relevant information before them to make quality, and not tokenistic, decisions. Additionally, the UK scheme provides that during the period that a TEO is in force, the Secretary of State 'must keep under review' whether the order continues to be necessary to protect members from the risk of terrorism.[55] The UK legislation thus offers more safeguards for accountability that this submission recommends should be implemented in Australia, so that the orders are not excessively intruding on personal rights.

This submission argues that if the Act is to remain, vital safeguards as implemented by the UK scheme, need to be implemented to ensure that individuals have recourse to the harsh effects of this scheme.

Procedural Fairness

This submission is especially concerned about the *TEO Act* because it has explicitly excluded the Minister from needing to observe procedural fairness under that Act, including but not limited to the actual making of a TEO.[56] Our concern stems from the fact that such exclusion only further limits the protections available to subjects of TEOs. Given the fact that the process is already so opaque, and the potential subject of a TEO is almost totally subject to the unreviewable whim of the Minister for Home Affairs (in any meaningful fashion), it is especially important that any original order is made fairly. A requirement for procedural fairness is a vital protection in that respect, and this submission believes it should be in the legislation.

We would also note that the Australian legislation at present only requires the Minister take such steps to notify the subject of a TEO order that the Minister thinks are 'reasonable and practicable'. This submission recommends that the wording of s 10(8) of the *TEO Act* be amended to reflect that the Executive must take whatever steps necessary to bring the order to the attention of the applicant.[57]

Recommendations

[55] *Counter-Terrorism and Security Act 2015* (UK), s 4(9)-(10).
[56] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 26.
[57] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 10(8).

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While reconciliation of counterterrorism legislation with international human rights law can be difficult, departure from adherence to constitutional and democratic values undermines the moral legitimacy of state power in this arena.[58] Addressing concerns regarding constitutionality by requiring court authorisation of a TEO, together with the aforementioned changes, would ensure the legislation is consistent with democratic and constitutional principles.

Should the *TEO Act* remain in place, this submission recommends the following:

1. Amend the Act so the decision to impose a Temporary Exclusion Order is made by a Court, and not the Minister for Home Affairs.

2. Introduce a 'special advocate' provision to advocate on behalf of potential TEO subjects where necessary.

3. Amend the Act to ensure that there is some level of disclosure as to why the TEO is being imposed.

4. Require the Minister to observe procedural fairness in making a TEO decision, if the Minister retains the sole authority to make such a decision.

5. Strengthen the requirement on the Minister to notify the subject of a TEO that they are under a TEO.

6. Amend the Act to require the Minister to take more steps than just what he or she believes is reasonable.

C. CONCERNS ABOUT THE RIGHTS OF CHILDREN

This Submission identifies the TEO Act to be inconsistent with Australia's international human rights obligations with respect to children aged 14 to 17 who are included within the scope of the Act. The capacity of the Australian government to issue temporary exclusion orders against this age group is highly concerning due to the inherent vulnerability of this

[58] Helen M Fenwick, 'Reconciling International Human Rights Law with Executive Non-trial-Based Counter-Terror Measures: The Case of UK Temporary Exclusion Orders' in Pierre Auriel, Olivier Beaud and Carl Wellman (eds), *The Rule of Crisis: Terrorism, Emergency Legislation and the Rule of Law* (Springer Press) 121, 122.

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demographic. Such concerns are elevated due to the inability to challenge a TEO.[59] Thus, this Submission observes that the Act unjustifiably abrogates fundamental human rights, especially contradicting Australia's international human rights obligations. Further, the psychological harm that will likely result from the enforcement of this legislation does not outweigh any purported benefit, particularly given that relevant contingency measures and protocols are notably absent from the Act.

TEO's Inconsistency with International Human Rights Obligations

The Australian government found that the *Counter-Terrorism (Temporary Exclusion Orders) Bill 2019* (Cth) was compatible with the human rights recognised by international agreements under section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), as is required by Part 3 of that Act.[60] However, this finding, as outlined in the Bill's Explanatory Memorandum, is highly concerning. As previously mentioned, the Act clearly violates Article 14 of the *International Covenant on Civil and Political Rights*,[61] whereby all accused peoples are entitled to a fair and public hearing. More specifically, the finding is in direct friction with the relevant articles of the *Convention on the Rights of the Child* ('CRC'),[62] including Article 9, 12 and 40(iii), which are noticeably undermined by the Act's extension of TEOs to children. It is alarming that Parliament found Article 3 of CRC, which requires that 'the best interests of the child shall be a primary consideration', to be upheld by the Act.[63] Contrary to the findings in the Explanatory Memorandum, the interests of the child are *not* balanced with the protection of the Australian community.

The Explanatory Memorandum fails to address Article 9 of CRC, which stipulates that children should not be separated from their parents unless it is in their best interests.[64] It can

[59] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14(6); 27.
[60] Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) 27.
[61] Opened for signature 16 December 1966 999 UNTS 171 (entered into force 23 March 1976).
[62] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[63] Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) 27; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[64] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

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hardly be argued that separation for a crime that one has not committed is in the best interest of both parties. Under the TEO scheme, children as young as 14 years old can face expulsion, displacement and separation from their families and communities.[65] They may also be required to undergo strenuous legal proceedings and criminalisation without adequate representation and support.[66] This being so, imposing a TEO on youth included within the scope of this Act can have a tremendous bearing on their mental health and emotional wellbeing. Displaced and criminalised youth exhibit elevated rates of phobia, anxiety, depression, suicidal ideation, and low optimism about their futures.[67] They are also more likely to suffer malnutrition, physical injury, brain damage, and sexual abuse.[68] The CRC recognises the need for additional safeguards and special protection in actions concerning youth.[69] It also acknowledges the rights of mentally and physically disabled children and the right to proper health care; rights which the TEO Act do not value or even consider.[70]

The Likely Eventuation of Psychological Harm for Children Affected

Whilst the TEO Act makes some mention of valuing a child's mental health,[71] there is an absence of any distinct protocols or practices to supplant the psychological well-being of a child subject to the Act.[72] The demographic which this Act includes is of distinct vulnerability. There are age-related neurological considerations pertinent to this Act as adolescence is a period of great biological, psychological, and social change.[73] It is an important formative period in which developmental trajectories become established and the patterns of behaviour formed permeate into adulthood, particularly in the domains of mental

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[65] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 8.
[66] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 26.
[67] Trand Thomas and Winnie Lau, 'Psychological Well Being of Child and Adolescent Refugee and Asylum Seekers: Overview of Major Research Findings of Past Ten Years' (2002) *Australian Human Rights Commission*, 11, 6.
[68] Trand Thomas and Winnie Lau, 'Psychological Well Being of Child and Adolescent Refugee and Asylum Seekers: Overview of Major Research Findings of Past Ten Years' (2002) *Australian Human Rights Commission*, 11, 6.
[69] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 3 and 37.
[70] *United Nations Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 23-25.
[71] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) ss 10(3); 10(4) .
[72] Michael Rutter, 'Parent-child separation: psychological effects on children' (1974) 12 *La Psychiatrie de l'Enfant* 233, 233.
[73] NSW Auditor-General's Report, *Addressing the Needs of Young Offender*s (Audit Office, 2007) 14.

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health, family formation and interpersonal relationships.[74] A young person's brain is often 'still developing in ways that affect their impulse control and their ability to choose between anti-social behaviour and socially acceptable courses of action.'[75] This is particularly heightened if a child has a cognitive or mental health impairment as 'if the developmental context creates a specific vulnerability in its own right then the impacts of even moderate mental illness may be magnified'.[76] Mental disorders may also lead to 'delays in normal cognitive and psychosocial development, especially if the illness is chronic'.[77] Children with intellectual deficits, learning disabilities, emotional disturbances and or less educational and social opportunities generally have slower cognitive and psychosocial development and might not develop skills related to competency in legal settings until they are much older.[78] On this basis, this Submission recommends raising the age threshold for imposing a TEO on children with disabilities or recognized mental illnesses.

Research has also found that there are vast gender disparities with which adverse consequences stemming from interaction with the justice system are reported, with young males being particularly more susceptible to emotional and behavioural issues.[79] However, evidence suggests that there is also a greater capacity for rehabilitation because a child's character is still developing, and this is a 'fundamental tenet of the juvenile justice system'.[80] The earlier the intervention in relation to mental illness, the more effective it is and the better the outcome.[81] As such, it is imperative that children on which TEOs are imposed or those who are adversely impacted by TEOs (children with parents subject to TEOs) are provided with adequate mental health services. This Submission recommends that gender specific counselling be provided for any emotional distress that may be caused in the aftermath of

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[74] Andrew Day, Kevin Howells and Debra Rickwood, *Current Trends in the Rehabilitation of Juvenile Offenders*, Trends and Issues in Crime and Criminal Justice 284 (Australian Institute of Criminology, 2004) 4.
[75] New South Wales, *Government Response to Juvenile Justice Review* (2010) 3.
[76] Thomas Grisso, 'Juvenile Offenders and Mental Illness' (1999) 6(2) *Psychiatry, Psychology and Law* 143, 146.
[77] Maryann Zavez, 'Kids and the Criminal Justice System: Questions of Capacity and Competence' (2000) 20(1) *Children's Legal Rights Journal* 2, 9.
[78] Maryann Zavez, 'Kids and the Criminal Justice System: Questions of Capacity and Competence' (2000) 20(1) *Children's Legal Rights Journal* 2, 9.
[79] Deborah Macourt, 'Youth and the law: the impact of legal problems on young people.' (2014) *Law and Justice Foundation of New South Wales*, 1 (38) 7
[80] Chris Lennings, 'Assessment of Mental Health Issues with Young Offenders' *Juvenile Justice: From Lessons of the Past to a Road for the Future* (2003) 4.
[81] Robert Hayes et al, 'Evidence-Based Mental Health Law: The Case for Legislative Change to Allow Earlier Intervention in Psychotic Illness' (2007) 14(1) *Psychiatry, Psychology and Law* 35, 40.

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imposing a TEO, by trained child helpline staff and psychologists specialising in youth mental health and trauma.

Infringements on Legal Rights

A plethora of legal issues compose the Act. As discussed in relation to the Act's 'closed' judicial review and removal of the right to procedural fairness,[82] it unjustly infringes upon Article 12 of CRC, which provides that children should be heard in judicial and administrative proceedings directly affecting them.[83] The Explanatory Memorandum attempts to justify this as a 'necessary and proportionate response' to the 'complexity and fluidity' of the threat of terrorism.[84] This Submission argues that such a response is not proportionate, particularly given that there is a potential capacity for a TEO to be incorrectly and unnecessarily issued, as with any administrative decision.

Also, the inability to challenge a TEO,[85] highlights the absence of executive accountability mechanisms including judicial review, merits review and avenues of redress for a potentially unfair decision. This is compounded by the fact that the Act is predominantly preventative in nature and does not require an offence to have been committed for an individual to come under the purview of the Act. Such legislation is akin to other rights-harmful counter-terrorism legislation such as the *Terrorism (Police Powers) Amendment (Investigative Detention) Act 2016 (Cth)* allowing police to arrest, detain and question a person of 14 years without charge or presentation before a court on reasonable grounds of involvement in a recent or an imminent terrorist act. The impact of preventative detention, similar to temporary exclusion orders, erodes assumed fundamental common law rights[86] and represents a coercive use of state power.[87] Thus, this submission recommends that 14 to 17-year old's be wholly excluded from being subject to a Temporary Exclusion Order. Alternatively, better

[82] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 26.
[83] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[84] Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019 (Cth) 37.
[85] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 14(6); s 27.
[86] Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31(3) *Melbourne University Law Review* 1072.
[87] Pauline Wright, Submission to Department of Justice, *Statutory Review of the Terrorism (Police Powers) Act 2002 (NSW)* (9 November 2017) 1.

UNSW Law Society

UNSW Law Society Inc.
ABN: 84 087 397 820
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protections to alleviate the harmful impacts of a Temporary Exclusion Order must be established with the consultation of mental health professionals.

Recommendations

1. This Submission recommends that 14 to 17-year old's should be wholly excluded from being subject to a Temporary Exclusion Order

    a. If this is not possible: better protections to alleviate the harmful impacts of a Temporary Exclusion Order must be facilitated with the consultation of mental health professionals.

    b. Gender specific counselling be provided for any emotional distress that may be caused in the aftermath of imposing a TEO, by trained child helpline staff and psychologists specialising in youth mental health and trauma

    c. Special consideration should be given for children with mental or cognitive disabilities, and as such as the age threshold should be increased for them.

D. CONCERNS ABOUT THE MINISTER'S DISCRETION

The *TEO Act* confers discretion upon the Minister to issue a 'temporary exclusion order' (TEO), preventing a person from entering Australia for up to two years. The significant contention with this discretion is the ability to issue the TEO on 'reasonable grounds',[88] which is essentially based on a state of satisfaction. Moreover, this submission is concerned with the racialised undertones of the Act and the human rights implications of this on young people who are particularly vulnerable to injustice. As the criteria specified in the Act does not require a TEO candidate to have engaged in any wrongdoing, as well as the mechanisms in place for procedural fairness and the right of review being substantially limited,[89] this submission argues that the Act is extraneous given the efficacy of existing terrorism legislation[90] and its potential for exploitation.

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[88] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 10(2)(a).
[89] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 26
[90] John Coyne, 'Why is the Morrison government pushing for new terrorism legislation?', *ABC News* (online at 4 July 2019) <https://www.abc.net.au/news/2019-07-04/dutton-counter-terror-laws-could-backfire/11275524>.

UNSW Law Society Inc.
ABN: 84 087 397 820
E: policy.submissions@lawsoc.org.au

The discretion handed to the Minister has made the rights of a citizen to enter Australia increasingly strained due to the broadness and lack of specificity within the criterion of s 10(2)(a).[91] While these limitations are justified as "reasonable, necessary and proportionate",[92] the fairness in the process is completely undermined due to reasons of 'timeframes'[93] and 'limited information'[94] that justify the absence of a comprehensive assessment. Despite independent oversight over the Minister's decision,[95] this becomes futile considering the Department of Home Affairs explained that the use of 'limited information' is justified because of the challenge of obtaining evidence from conflict zones and translating intelligence information.[96] It is this 'challenge' that is exploited to normalize that the current approach is rather a "proportional response to the threats we face…ensuring appropriate safeguards".[97] However, this becomes extremely problematic when these safeguards and justifications of 'limited information' are applied to child citizens. It is arguable that children who may not present "a clear security risk"[98] but are present in a terrorist-related zone, would likely justify the Minister's satisfaction[99] of issuing a TEO.[100] To a great extent, it raises the same concerns expressed by Professor Helen Irving, particularly whether the Minister has the constitutional power to exclude citizens on the basis that they "may commit or support an act of terrorism".[101]

Moreover, crucial to understanding the ramifications of the discretion conferred under s 10(2)(a) is the social attitudes behind these policies. Australia has a long and controversial

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[91] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth).
[92] Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 35.
[93] Commonwealth, *Hansard,* Committee, 15 March 2019, 13 (Michael Rendina, Deputy Counter-Terrorism Coordinator).
[94] Commonwealth, *Hansard,* Committee, 15 March 2019, 13 (Michael Rendina, Deputy Counter-Terrorism Coordinator).
[95] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 23.
[96] Parliamentary Joint Committee on Intelligence and Security, 'Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019' (Advisory Report, April 2019) 2.29.
[97] Commonwealth, *Hansard*, House of Representatives, 4 July 2019, 299 (Peter Dutton, Minister for Home Affairs).
[98] Meda Couzens, 'A Critique of the Counter-terrorism (Temporary Exclusion Orders) Act 2019 In Light of Australia's Obligations under the Convention on the Rights of the Child' (2022) 45(2) *University of New South Wales Law Journal* (advance), 14.
[99] *Counter-Terrorism (Temporary Exclusion Orders) Act 2019* (Cth) s 10(2)(a).
[100] Meda Couzens, 'A Critique of the Counter-terrorism (Temporary Exclusion Orders) Act 2019 In Light of Australia's Obligations under the Convention on the Rights of the Child' (2022) 45(2) *University of New South Wales Law Journal* (advance), 18.
[101] Helen Irving, 'Can we come home now? Temporary Exclusion Orders Act raises serious constitutional concerns' (2019) 59 *Law Society of NSW Journal* 68.

UNSW Law Society Inc.
ABN: 84 087 397 820
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history of discriminatory practice towards racial minorities in the name of law enforcement and enacting counter-terrorism measures.[102] Although the Act itself has only recently been passed and thus does not have a wealth of case studies to reference, with only 5 TEOs made from 2019-20 and 0 in relation to those under 18,[103] the extant literature surrounding previous counter-terrorism measures clearly does not bode well for its future.

This submission wishes to bring to attention the critical academic analysis of executive action response to terrorist threats, which have generally been targeted towards Muslim/Middle Eastern minorities given their stereotyping as a 'terrorising' monolith and subsequently a threat to Australian security and values.[104] We highlight such analysis to raise concern as to whether the exercise of executive power here - with the powerful consequence of excluding certain Australian citizens from returning home - would be used in a racially discriminatory manner.

Sentas in her analysis goes as far as to say that this stereotyping appears to form the basis of agencies' surveillance matrices, such as ASIO, the AFP, state police and DIMA, worked to form a matrix of heightened surveillance that 'criminalised cultural and religious practices', backed by the new investment in and expansion of security policing powers, jurisdiction and personnel.[105] So-called 'public fear campaigns' such as *Let's Look Out for Australia* led to hypersurveillance and arbitrary state harassment, and still more extreme measures such as ASIO raids on Muslim families have undoubtedly led to enduring trauma.[106] As a result of problematic conceptions of associative guilt and a conception of Arab Australians as inherently other and therefore dangerous, these measures all led to the following outcome: 'Arab and/or Muslim Australians are legislatively precluded from inhabiting the civic spaces of the nation'.[107] Nurrahimi notes that following 9/11 and the Lindt cafe siege, sensationalist

[102] Vicki Sentas, 'Counter Terrorism Policing - Investing in the Racial State' (2006) 2(1) *ACRAWSA E-Journal* 1, 12.
[103] Australian Government Department of Home Affairs, '*Control Orders, Preventative Detention Orders, Continuing Detention Orders, Temporary Exclusion Orders, and Powers in Relation to Terrorist Acts and Terrorism Offences: Annual Report 2019-20'* (2020) 10.
[104] Vicki Sentas, 'Counter Terrorism Policing - Investing in the Racial State' (2006) 2(1) *ACRAWSA E-Journal* 1, 5.
[105] Vicki Sentas, 'Counter Terrorism Policing - Investing in the Racial State' (2006) 2(1) *ACRAWSA E-Journal* 1, 5.
[106] Vicki Sentas, 'Counter Terrorism Policing - Investing in the Racial State' (2006) 2(1) *ACRAWSA E-Journal* 1, 5; 11.
[107] Vicki Sentas, 'Counter Terrorism Policing - Investing in the Racial State' (2006) 2(1) *ACRAWSA E-Journal* 1, 6.

UNSW Law Society Inc.
ABN: 84 087 397 820
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media hysteria led to an intensification of extreme policing procedures as reactionary interventions in response to a perceived 'war on terror' that needed to be fought.[108] As Harley Williamson elucidates, there is a strong relationship between perceived threat from racial/ethnic minority groups and their perceived involvement,[109] leading to the stereotyping of Middle Eastern Muslims in a negative light.[110]

Thus, given the extensive history of an Executive Government that has "[perceived] Muslims as a threat, and [endorsed] attitudes supportive of punitive counter-terrorism measures",[111] this submission is concerned that the lack of discretionary constraint upon the Minister's "opinion"[112] will continue to perpetuate discriminatory racialised attitudes towards Arab and/or Muslim Australians.

Recommendations

Therefore, despite the Explanatory Memorandum of the Act describing criterion of accountability as "not arbitrary",[113] this submission is strongly opposed to the very low threshold required to impose a disproportionately onerous exclusion order. As such, this submission recommends:

1. Introducing more specific requirements to regulate broad and speculative nature of "reasonableness" and "substantially assist"; [114]

[108] Febri Nurrahmi, 'Ethnic and Religious Crime in Australian Media: Sensationalism versus Public Interest' (2019) 292 *Advances in Social Science, Education and Humanities Research* 254, 255.
[109] Harley Williamson, 'Pride and prejudice: Exploring how identity processes shape public attitudes towards Australian counter-terrorism measures' (2019) 52(4) *Australian & New Zealand Journal of Criminology* 558, 561.
[110] Febri Nurrahmi, 'Ethnic and Religious Crime in Australian Media: Sensationalism versus Public Interest' (2019) 292 *Advances in Social Science, Education and Humanities Research* 254, 257.
[111] Harley Williamson, 'Pride and prejudice: Exploring how identity processes shape public attitudes towards Australian counter-terrorism measures' *Australian & New Zealand Journal of Criminology* 52(4) 558, 572.
[112] Matthew Doran, 'Peter Dutton wants to stop Australian citizens with suspected terror links from coming home', *ABC News* (online at 23 July 2019) <https://www.abc.net.au/news/2019-07-23/temporary-exclusion-order-explainer/11330566>
[113] Explanatory Memorandum, Counter-Terrorism (Temporary Exclusion Orders) Bill 2019, 34.
[114] Parliamentary Joint Committee on Intelligence and Security, 'Advisory report on the Counter-Terrorism (Temporary Exclusion Orders) Bill 2019' (Advisory Report, April 2019) 2.26.

UNSW Law Society Inc.
ABN: 84 087 397 820
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2. Constraining the Minister's discretion by requiring the Minister to consider the recommendations of an independent body (be it ASIO or another specially established body).

E. CONCLUSION

In sum, this submission asserts that the very foundation of the Act raises questions of threatening constitutional validity and the rule of law as raised by numerous commentators.[115] It raises the possibility of human rights abuses due to its incompatibility with widely held human rights standards as outlined in international law.[116] When considering the position of children, the onerousness of these measures must be weighted according to the disproportionate effect they would have on marginalised youths, who are already disenfranchised from greater Australian society owing to racial discrimination backed by unjust law enforcement and policing measures.

[115] Sangeetha Pillai, *There's no clear need for Peter Dutton's new bill excluding citizens from Australia* (7 July 2019) UNSW Sydney Newsroom <https://newsroom.unsw.edu.au/news/business-law/there%E2%80%99s-no-clear-need-peter-dutton%E2%80%99s-new-bill-excluding-citizens-australia>

[116] Helen Irving, *'Can We Come Home Now? Temporary Exclusion Orders Act Raises Serious Constitutional Concerns'* (1 September 2019) Law Society Journal <https://lsj.com.au/articles/can-we-come-home-now-temporary-exclusion-orders-act-raises-serious-constitutional-concerns/>