Question on Notice from Senator Thorpe: *Minister for Immigration v Teoh* confirmed the existence of procedural rights that government bodies would take treaty obligations into account in making decisions. Why has this not been used to invalidate government decisions in subsequent cases, and why might it not survive a direct challenge, and would federal human rights legislation change this?

Summary

Unfavourable case law after *Minister for Immigration v Teoh*[1] has called into question the principle that treaty obligations should be considered in government decision-making. This factor in combination with executive and parliamentary responses have limited the scope of *Teoh*'s application. A federal human rights charter would improve human rights protections by establishing a clear set of rights, which is not contingent on judicial interpretation, placing the onus on government decision-makers to uphold these rights, and alleviating the burden on applicants to seek protection of their rights through litigation.

High Court's findings in *Minister for Immigration v Teoh*

Teoh concerned the refusal of a residency application on character grounds and deportation order. The High Court held that a treaty ratified by Australia (in this instance the Convention on the Rights of the Child (CROC)), although not incorporated into Australian domestic law, could create a legitimate expectation that administrative decision makers would act in accordance with it.[2] If a decision maker intended to make a decision inconsistent with that expectation, procedural fairness required that the person affected be given notice and an adequate opportunity to respond.[3] However, the Court held that "statutory and executive indications to the contrary" could remove that legitimate expectation.[4]

Why has *Teoh* not been used to invalidate government decisions in subsequent cases? Why might it not survive a direct challenge?

There are two key principles arising from *Teoh* - the use of the term 'legitimate expectations' to describe certain procedural rights, and whether consideration of treaties not incorporated into domestic law is required in administrative decision making. Our submission will focus on the latter aspect.

Judicial considerations

Although *Teoh* has not been directly overruled, subsequent *obiter dicta* in case law challenges the extent of its applicability. The High Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[5] was critical of the reasoning in *Teoh*, stating:

> "If *Teoh* is to have continued significance at a general level for the principles which inform the relationship between international obligations and the domestic constitutional structure, then further attention will be required to the basis upon which *Teoh* rests…
>
> However, in the case law a line has been drawn which limits the normative effect of what are unenacted international obligations upon discretionary decision-making under powers conferred by statute and without specification of those obligations. **The judgments in *Teoh* accepted the established doctrine that such obligations are not mandatory relevant considerations attracting judicial review for jurisdictional error**. The curiosity is that,

[1] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
[2] Ibid [291].
[3] Ibid [291]-[292].
[4] Ibid [291].
[5] *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1.

> nevertheless, such matters are to be treated, if *Teoh* be taken as establishing any general proposition in this area, as mandatory relevant considerations for that species of judicial review concerned with procedural fairness.
>
> The reasoning which as a matter of principle would sustain such an erratic application of "invocation" doctrine remains for analysis and decision. Basic questions of the interaction between the three branches of government are involved (emphasis added, citation removed)."[6]

Whilst the *ratio decidendi* of the High Court's judgment did not disturb the findings in *Teoh*, it raised serious concerns about their accuracy.

Recent case law has grappled with the relevance of *Teoh*. In 2017, the Federal Court considered whether the Minister's decision not to revoke a visa cancellation under section 501CA of the Migration Act[7] was invalid due to a denial of procedural fairness regarding the applicant's legitimate expectations arising from Article 23 of the International Covenant on Civil and Political Rights (ICCPR).[8] The Court applied *Teoh*, accepting that Australia's ratification of the ICCPR gave rise to a legitimate expectation that the right to found a family would be considered.[9] However, the Court dismissed the application because the Minister had taken account of this matter.[10]

In 2020, two single bench Federal Court judgments applied *Teoh* and held that the Administrative Appeals Tribunal's failure to consider the best interests of the child as a primary consideration regarding section 109 visa cancellation decisions had resulted in a denial of procedural fairness.[11]

By contrast, in 2021 a Full Federal Court judgment concerning a section 501 visa cancellation held that *Teoh* was not applicable due to the different statutory context, which required the decision-maker to take into account the best interests of the child as a primary consideration.[12] Another 2021 Full Federal Court judgment made similar findings that the section 501 cancellation regime was inconsistent with any procedural fairness obligation regarding Article 12 of the ICCPR, and that the regime was "quite different" from the broad discretion that supported the ministerial power in *Teoh*.[13] The Court also stated that:

> "to the extent that *Teoh* suggests as a general principle that the ratification of an international treaty gives rise to a presumption or expectation that the executive government will act consistently with the treaty, even in the absence of legislation adopting the treaty as part of domestic law, that reasoning was strongly doubted by a majority of the High Court in *Lam.*"[14]

The Court also noted that "there is some difficulty in identifying the ratio of *Teoh*", in particular whether *Teoh* is limited to the CROC or extends to other treaties.[15]

---

[6] Ibid [98], [101]-[102] (McHugh and Gummow JJ).
[7] *Migration Act 1958* (Cth).
[8] *Poroa v Minister for Immigration and Border Protection* (2017) 252 FCR 505.
[9] Ibid [51].
[10] Ibid [52].
[11] *DXQ16 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1184 [37], [53]; *Promsopa v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA1480.
[12] *Tohi v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 125 [178]-[179].
[13] *Ratu v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2021] FCAFC 141 [54].
[14] Ibid [43].
[15] Ibid [45].

In light of the unfavourable interpretations of *Teoh* and the different statutory contexts in which administrative decisions are now made, *Teoh* has provided limited recourse to invalidate government decisions, and we consider that *Teoh* is unlikely to survive a direct litigation challenge.

Executive and parliamentary considerations

The Executive has also taken steps to limit the reach of *Teoh*. In 1995, the then Minister for Foreign Affairs and the Attorney-General issued a 'Joint Executive Statement' to attempt to nullify the effect of *Teoh* in relation to unincorporated treaties.[16] This statement was replaced by a statement in 1997 by the Minister for Foreign Affairs and the Attorney-General, which stated:

> "we indicate on behalf of the Government that the act of entering into a treaty does not give rise to legitimate expectations in administrative law which could form the basis for challenging any administrative decision made from today. This is a clear expression by the Executive Government of the Commonwealth of a contrary indication referred to by the majority of the High Court in the Teoh Case."[17]

While there is some debate regarding whether the Joint Executive Statements would have the effect of negating the impact of *Teoh* in relation to the ratifications of *all* treaties,[18] it is evident that the Executive has the power to curtail the scope of *Teoh* and any favourable case law regarding the consideration of ratified international treaties in administrative decision-making.

In addition, there have been legislative attempts to confine *Teoh*. In 1995, 1997 and 1999 the federal government introduced legislation to clarify the effect of international instruments, however all three Bills lapsed.[19] Also, the South Australian Parliament passed the *Administrative Decisions (Effect of International Instruments) Act 1996* (SA), which is still in effect and provides that an international instrument cannot give rise to legitimate expectations in relation to State administrative decision-making where the instrument has not been enacted under domestic law.[20] Courts have held that this Act removes any legitimate expectation arising under international instruments.[21]

These considerations render it even more unlikely that a direct challenge regarding *Teoh* would result in government decision-making taking into account international treaty obligations. Unfortunately in circumstances where the judiciary makes a finding that is unpalatable to the government of the day, the government often resorts to introducing retrospective legislation to override the judgment's impact.

Other positions with respect to treaty obligations

This response is largely confined to the current approach to *Teoh*. More broadly, however, litigators have tested the boundaries of how treaty obligations inform administrative decision-making. For example, jurisprudence regarding the exercise of discretion under section 501 obliges government decision-makers to "engage in an active intellectual process with significant and clearly expressed relevant

[16] Joint Statement by the Minister for Foreign Affairs, Senator Gareth Evans, and the AttorneyGeneral, Michael Lavarch, International Treaties and the High Court Decision in Teoh, 10 May 1995.
[17] Joint Statement by the Minister for Foreign Affairs, Alexander Downer, and the Attorney-General, Daryl Williams, The Effect of Treaties in Administrative Decision Making, 25 February 1997.
[18] Glen Cranwell, 'Treaties and Australian Law - Administrative Discretions, Statutes and the Common Law' [2001] QUTLawJJl 5, 67-68.
[19] Ibid.
[20] *Administrative Decisions (Effect of International Instruments) Act 1995* (SA), s 3.
[21] *Collins v State of South Australia* (Unreported, Supreme Court of South Australia, Millhouse J, 25 June 1999).

representations",[22] but allows deferral of consideration of such representations in certain circumstances.[23] In the context of visa character refusals/cancellations, this means a person must not only raise the existence of a treaty obligation, but it must also be considered significant, clearly expressed, and relevant, and the decision-maker may have authority to defer consideration. This causes inequity as people seeking asylum and refugees are likely to be disadvantaged in their ability to make such representations. It also produces inconsistency and delay in decision-making.

Would federal human rights legislation change this?

Yes. Federal human rights legislation would establish a clear set of human rights for everyone, which is enshrined in domestic law. These rights would be drawn from international treaties as recommended by the Australian Human Rights Commission's position paper. Government decision-makers would be required to uphold these rights, and the onus would no longer be on applicants to seek protection of their rights through costly and burdensome litigation (as was the case in *Teoh*). This would result in fairer outcomes for everyone, especially people facing barriers to access justice (such as people in immigration detention and victim-survivors of family violence), and better government decision-making. This in turn would reduce the cost and resource demand on review bodies and courts. In addition, the existence of human rights protections would not be dependent on judicial interpretation, which could be overridden by future case law or legislation.

[22] *Minister for Home Affairs v Omar* [2019] FCAFC 188.
[23] *Plaintiff M1-2021 v Minister for Home Affairs* [2022] HCA 17.