



18 December 2015

Mr Dan Tehan MP
Chair
Parliamentary Joint Committee on Intelligence and Security
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email: pjcis@aph.gov.au

Dear Mr Tehan

Supplementary Submission Counter-Terrorism Bill (No. 1) 2015

1. The Law Council of Australia attended a hearing of the Parliamentary Joint Committee's (the Committee) inquiry into the Counter-Terrorism Bill (No. 1) 2015 (the Bill) on 14 December 2015.
2. In response to a question from the Shadow Attorney-General, the Hon. Mark Dreyfus MP, at the hearing, the Law Council has prepared this supplementary submission to further inform the Committee's consideration of the Bill.
3. The supplementary submission addresses the matter raised by paragraphs 25,31 and 34 of the Law Council's written submission.

Best interests of the child as a primary consideration

4. Paragraph 25 of the Law Council's initial written submission to the Committee provided:

For this reason, the concept of the 'best interests of the child' should be a primary consideration and the content of the expression (suited or modified to this context) should be adequately provided. Where a control order may not be in the best interests of the child, the issuing authority should be required to be satisfied that the order is necessary for one of the limited purposes, such as, preventing a terrorist attack from occurring.

5. In addition, the Law Council recommended that consideration should be given to including the additional factors set out in the United Nations *Convention on the Rights of the Child* (CRC) in the court's determination of what is in a child's best interests.
6. The notion of primary considerations and other considerations as separate categories of matters is not unknown in Commonwealth legislation. Directions issued under the *Migration Act 1958* (Cth) from time to time have referred to "primary considerations" and "other considerations"¹.

¹ *Direction No. 65 – Visa refusal and cancellation under s501*, given under section 499 of the *Migration Act 1958* (Cth), in effect on and from 23/12/2014.

7. The concept of the best interests of a child being “a primary consideration” derives from the text of the CRC itself, which provides, at Article 3(1):

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.

8. The requirement of “a primary consideration” does not equate to “sole consideration” but does require that it at least rank as being of first importance along with other considerations which require equal, but not paramount, consideration².
9. In *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh*,³ McHugh J (dissenting) described the content of the obligation in these terms:

*Article 3(1) insists that "(i)n 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". ... The use of the word "a" indicates that the best interests of the children need not be the primary consideration. And, as Carr J recognised, a primary consideration may have to accommodate itself to other overriding interests.*⁴

10. Suggested amendments to the Bill that accord with these positions are provided below.

Schedule 2 – Control orders for young people

4 Paragraph 104.4(2)(b) of the Criminal Code Act 1995

Omit all the words after “adapted,”, substitute:

the court must take into account:

- (a) the impact of the obligation, prohibition or restriction on the person’s circumstances (including the person’s financial and personal circumstances); and
- (b) If the person is 14 to 17 years of age – the best interests of the child as a primary (but not the sole) consideration.

5 After subsection 104.4(2) of the Criminal Code

Insert:

(2A) In determining what is in the best interests of a child for the purposes of paragraph (2)(b), the court must take into account the following:

- (a) the child’s views;
- (b) the age, maturity, sex and background (including lifestyle culture and traditions) of the child;
- (c) the need to protect the child from physical or psychological harm;
- (d) the physical and psychological health of the child;
- (e) the benefit to the child of having a meaningful relationship with his or her family and friends;

² *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273, per Mason CJ and Deane J at [39]; per Gaudron J at [4].

³ *Minister for Immigration and Ethnic Affairs v Ah Hin Teoh* (1995) 183 CLR 273.

⁴ *Ibid*, per McHugh J at [47].

- (f) the right of the child to receive an education;
- (g) the right of the child to practise his or her religion;
- (h) the sexual orientation of the child (where relevant);
- (i) any situation of vulnerability of the child (for example, disability, belonging to a minority, being a refugee or asylum seeker, being a victim of abuse); and
- (j) any other matter the court considers relevant.

37 Subsection 104.24(2) of the Criminal Code

Omit all the words after “adapted,”, substitute:

the court must take into account:

- (a) the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances); and
- (b) if the person is 14 to 17 years of age – the best interests of the child as a primary (but not the sole) consideration.

11. Other provisions proposed in the Bill relating specifically to children should also be amended to refer to ‘the child’ rather than ‘the person’.

Disclosure of information

12. Paragraph 31 of the Law Council's initial written submission to the Committee provided:

It is also unclear as to how subsections 104.28AA(2)(e), (3) and (4) sit together. It appears that the court appointed advocate must ensure that ‘any views’ expressed by the child are fully put before the court, but there is then a discretion left with the advocate to disclose ‘any information’ that the person communicates to the advocate. This appears to be an inconsistency, which ought to be clarified to ensure that confidentiality can be maintained.

13. In addition, the Law Council recommended that the court appointed advocate should not be permitted to disclose information against the wishes of the child.
14. Suggested amendments to the Bill that accord with this position are provided below.

Regarding proposed paragraph 104.28AA(2)(e) amend as follows:

(e) ensure that any views the child wishes to express in relation to the control order matters are fully put before an issuing court; and

Insert subsection 104.28AA(2A) or a new subsection 104.28AA(3) after subsection 104.28AA(2) as follows:

The child's legal representative (other than the court appointed advocate) must authorise any views expressed to the issuing authority in accordance with paragraph 104.28AA(2)(e).

Regarding proposed subsection 104.28(3) amend as follows:

(3) The court appointed advocate of a child is not the child's legal representative.

15. Proposed subsection 104.28(4) could be maintained and proposed subsection 104.28(5) removed to secure the child's confidentiality.

Legal representative

16. Paragraph 25 of the Law Council's initial written submission to the Committee provided:

Where paramount consideration is given to the safety of the community and it is alleged that the child is a danger to the community, it is submitted that a child must have access to their own independent legal representative that is properly funded by the Government given the extraordinary nature of the power sought to be invoked against the child.

17. Consideration could be given to allowing the funds to be drawn from the Expensive Commonwealth Criminal Cases Fund, or similar, given the extraordinary nature of the power sought to be invoked against the child.
18. An entitlement to legal representation provision could be provided for in the legislation itself as follows.
- (1) If an application is made to an issuing authority for the making, confirmation, revocation or variation of a control order, the Commonwealth must (subject to the qualifications that appear below) grant reasonable legal assistance by way of legal representation to the proposed or actual subject of a control order for the control order proceedings.
 - (2) The Commonwealth must not terminate legal assistance granted unless the assisted person:
 - (a) obtains privately funded legal representation for the proceedings; or
 - (b) notifies the Commonwealth of an intention to do without legal representation at the proceedings.
 - (3) If legal assistance has been terminated on these grounds and a further application for legal assistance is made, the Commonwealth should have an obligation to provide reasonable legal assistance.
19. The child and/or parent/guardian should be able to choose the legal practitioner by whom legal assistance is to be provided.
20. Thank you for the opportunity to provide these observations.

Yours sincerely,

Mr Duncan McConnell
President

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia exists to represent the legal profession at the national level, to speak on behalf of its Constituent Bodies on national issues, and to promote the administration of justice, access to justice and general improvement of the law.

The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

Through this representation, the Law Council effectively acts on behalf of more than 60,000 lawyers across Australia.

The Law Council is governed by a board of 23 Directors – one from each of the constituent bodies and six elected Executive members. The Directors meet quarterly to set objectives, policy and priorities for the Law Council. Between the meetings of Directors, policies and governance responsibility for the Law Council is exercised by the elected Executive members, led by the President who normally serves a 12 month term. The Council's six Executive members are nominated and elected by the board of Directors.

Members of the 2015 Executive as at 1 July 2015 are:

- Mr Duncan McConnel, President
- Mr Stuart Clark AM, President-Elect
- Ms Fiona McLeod SC, Treasurer
- Mr Morry Bailes, Executive Member

The Secretariat serves the Law Council nationally and is based in Canberra.