

# THE NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

## **SUBMISSION TO THE SENATE LEGAL & CONSTITUTIONAL COMMITTEE Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005**

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## **The National Children's and Youth Law Centre**

The National Children's and Youth Law Centre is a Community Legal Centre working for and with Australia's children and young people to promote and protect their rights and interests. It was established in 1993 with the support of the University of New South Wales, the University of Sydney, the Public Interest Advocacy Centre and the (then) Australian Youth Foundation.

The touchstone of the Centre is the United Nations Convention on the Rights of the Child and we aim to promote understanding and adherence to children's rights as fundamental human rights. Since its inception in 1993 the Centre has made over 160 public submissions on a range of issues affecting children and young people and has responded to more than 150,000 enquiries by or on behalf of children and young people throughout Australia.

### **Inquiry into the provisions of the Anti-Terrorism Bill (No. 2) 2005**

The Centre is vitally concerned with the content and impact of the provisions of this Bill. In its role in coordinating the Non-Government Report to the United Nations Committee on the Rights of the Child during 2004 and 2005, the Centre consulted broadly with children and young people and those who work with them and advocate on their behalf. Considerable concern was raised during that process as to the potential impact of previous anti-terrorism legislative measures.

It is acknowledged that on this and previous occasions, efforts have been made to ameliorate the impact of legislative provisions upon children, young people and their families and carers. However the Centre and its networks retain major concerns as to the impact on the rights and interests of children and young people under this latest Bill.

To some extent, these concerns have been amplified by the haste with which the legislative process has been undertaken. It has not been possible to give this legislation the detailed public policy examination that it deserves.

We are able to identify four areas of major ongoing concern.

In general, the Centre endorses the detailed approach and issues raised in the document "Laws for Insecurity? A Report on the Federal Government's Proposed Counter-Terrorism Measures" (September 2005) – authored by Chong, Emerton, Kadous, Pettitt, Sempill, Sentas, Stratton and Tham.

These areas are summarised as:

- inconsistency with basic human rights
- inconsistency with international youth justice standards and the requirements of a youth justice system
- the workability of the measures in the context of family and caring relationships
- the potential discriminatory impact of the exercise of policing powers.

## **Inconsistency with basic human rights**

It is our understanding that the provisions of the legislation (like that of previous legislative measures) do not seek to include children under the age of sixteen years within their ambit.

This is to be commended although a detailed scrutiny of the Bill should still be undertaken to ensure that there is no unintended application to children under this age.

Children between the ages of sixteen and eighteen years are covered by special provisions but with largely the same effect in terms of infringements of rights as that for adults.

No special provision is made for young adults (those over the age of eighteen years).

Each of these two groups deserves the full protection of the criminal justice system and of the rights guaranteed under the International Covenant of Civil and Political Rights.

Suspected involvement in terrorists acts (no matter how objectionable and unacceptable to Australian society) should not forfeit the protection of basic human rights.

Given the susceptibility of these two groups to the influence of older adults and their relative inexperience in adult decision-making, we should retain the guarantee of those basic protections. Then the vigorous operation of the administration of ordinary criminal justice can allow for differing degrees of culpability, the discretion to determine that and the opportunity for reintegration and rehabilitation in all but the most extreme cases.

There is a strong argument that the impact of the legislation – particularly of the regime of control orders and preventative detention – is to remove those guarantees and inhibit that operation.

## **Inconsistency with international youth justice standards and the requirements of a youth justice system**

Over the last 25 years, a comprehensive set of principles has been developed and adopted by the international community to reflect best practice in the administration of youth justice.

It comprises the United Nations Guidelines for the Prevention of Juvenile Delinquency 1990 (known as the Riyadh Guidelines), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 (known as the Beijing Rules), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 and the United Nations Convention on the Rights of the Child.

The Convention itself has a broader application than just the administration of juvenile justice but it does set out fundamental principles that should be reflected in the sentencing of young offenders. It also places juvenile justice in the context of a comprehensive statement of the place that children should have in all human society - as valued autonomous human beings that require special protections but are also deserving of the same basic human rights and dignities that adults deserve.

The Convention also has particular significance as it has been adopted and ratified by Australia (in 1990) and now represents the most widely ratified international instrument. There exists a strong argument that the terms of the Convention have been incorporated into customary international law.

The provisions of the current Bill as they apply to 16 to 18 year old children have not been developed in light of these principles. The special framework for children of this (and previous) anti-terrorism measures creates a slightly less harsh regime – with little indication of the application of the principles that are reflected (to a greater or lesser degree) in state and territory youth justice systems.

Consideration should at least be given to the applications of principles such as:

- Detention as a measure of last resort and for the shortest period of time;
- Diversion from criminal proceedings likely to stigmatise;
- Community involvement in all stages of the administration of justice;
- Separation of children from adult processes and environments;
- Special measures for care and protection;
- Special measures to ensure understanding of rights and processes;
- Maintenance of existing supportive family and caring relationships.

### **The workability of measures in the context of family relationships**

There has been insufficient opportunity for a careful examination of the impact of the legislation on relationships that are likely to provide support to children.

The measures have largely been developed from a policing perspective.

Removal of children from their family or community environment will dramatically increase the risk of emotional and possibly physical harm to these children. Their possible involvement in activities related to terrorism does not mean that they are not deserving of the care and support of that family and wider community.

It is arguable that the best prospects of securing their cooperation and that of their families is by providing for their ongoing care and support – respecting the rights of their families and carers to dignity, privacy and respect.

## **The potential discriminatory impact of the exercise of policing powers.**

Much of the emphasis of the anti-terrorism legislation is on facilitating police investigative and interrogative powers. This significantly increases the risk of the discriminatory impact of those powers.

Experience tells us that young people and particularly young people of ethnic background or appearance will be targeted. A degree of racial profiling is inevitable.

With that emphasis, the exercise of those policing powers requires special protection and review. Mechanisms for individual and systemic complaint, review and redress are required. Such mechanisms must be public, independent and externally accountable.

On this issue and in conclusion, we draw attention to the following paragraphs (24 and 25) taken from the recently published Concluding Observations of the United Nations Committee on the Rights of the Child on Australia's compliance with the Convention on the Rights of the Child (30 September 2005).

*While the Committee notes the initiatives taken against racial, ethnic and religious discrimination ... the Committee is concerned that discriminatory attitudes and stigmatization continue to exist, especially towards certain groups of children such as asylum-seeking children and children belonging to ethnic and/or national minorities, including Arabs and Muslims. In this respect, the Committee is also concerned at the possible side effects that the enforcement of the Anti-Terrorism legislation may have on certain groups of children.*

***In accordance with article 2 of the Convention, the Committee recommends that the State party regularly evaluate existing disparities in the enjoyment by children of their rights and undertake on the basis of that evaluation the necessary steps to prevent and combat discriminatory disparities. It also recommends that the State party strengthen its administrative and judicial measures in a time-bound manner to prevent and eliminate de facto discrimination and discriminatory attitudes towards especially vulnerable groups of children and ensure, while enforcing its Anti-Terrorism legislation, a full respect of the rights enshrined in Convention.***

The National Children's & Youth Law Centre thanks the Senate Legal and Constitutional Legislation Committee for the opportunity to make this submission.