# THE NATIONAL CHILDREN'S AND YOUTH LAW CENTRE

## SUBMISSION TO THE PARLIMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

### Review of Security and Counter Terrorism Legislation 2006

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# 1 Introduction

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

The National Children's and Youth Law Centre thanks the Committee for providing us with the opportunity to make a submission.

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.

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.

The Centre is vitally concerned with the content and impact of the provisions of the security and counter terrorism legislation on children and young people. The legislation that is the subject of this review potentially affects children as young as 10 years old[1]. 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.

The Centre and its networks retain major concerns as to the impact on the rights and interests of children and young people under the legislation which is the subject of this inquiry. 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.

## 1.2 Human rights

The touchstone of the Centre is the United Nations Convention on the Rights of the Child ("**CROC**") and we aim to promote understanding and adherence to children's rights as fundamental human rights. CROC 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.

[1] Crimes Act 1914 (Cth) s 4M

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.

Children and young people deserve the full protection of the criminal justice system and of the rights guaranteed under CROC, the International Covenant of Civil and Political Rights, and other international instruments. Consideration should at least be given to the applications of principles such as special measures to ensure understanding of rights and processes, and maintenance of existing supportive family and caring relationships.

Suspected involvement in terrorists acts or association with suspected terrorist groups (no matter how objectionable and unacceptable to Australian society) should not utterly forfeit the protection of basic human rights.

To the extent the legislation restricts rights given to children in the CROC and other international instruments, such restrictions must be proportional means of achieving those ends. As stated by the United Nations Secretary General, it is crucial that those measures used in an attempt to safeguard our society are consistent with international human rights law to ensure that we do not give away the very rights that are essential to the maintenance of the rule of law, one of the fundamental principles of a functioning democracy[2].

Given the susceptibility of children and youth to the influence of others including 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.

### 1.3 Fairness and Clarity

The Centre acknowledges the need for legislation to protect the Australian community from terrorism. However, the legislation must be clearly framed, fair, and effective in terms of targeting 'terrorist' behaviour and enforcing the law. Lack of certainty in law leads to confusion and distrust amongst the community, especially amongst young people. In turn, this makes the process of educating and integrating youths more difficult. The legislation that is the subject of this review creates a range of offences that are extremely far-reaching and in some cases unclear, and lend themselves to discretionary application in policing. Laws of this nature may lead to discrimination against minority and vulnerable groups in society – in the present case young people and in particular young people from Muslim and Arab Communities. . Experience tells us that young people and particularly young people of ethnic or indigenous appearance will be targeted. A degree of racial profiling is inevitable.

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[2] See UN Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005.

The marginalisation of these groups is contrary to the development of a cohesive and integrated society, and ultimately undermines the objectives of the legislation. Misunderstanding and fearfulness will assist the propensity for terrorism, rather than hinder it. In the words of the Sheller [Committee] [at 10.97]:
"The negative effects upon minority communities, and in particular the escalating radicalisation of young members of such communities, have the potential to cause long term damage to the Australian community. It is vital to remember that lessening the prospects of 'homegrown' terrorism is an essential part of an anti-terrorism strategy" [Sheller Report at 10.97]

On this issue, 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."***

### 1.4 The Preventative Approach

The legislation that is the subject of this review is very much focused on a policing – rather than a preventative - strategy. The Centre offers its support and encouragement for all efforts that focus not so much on generating more criminal offences and policing powers, but more effective intelligence gathering, building community support for existing and future integrative strategies. Such efforts will also address the possible causes of criminal (and terrorist) behaviour – such as alienation, distrust of authority, and the frustration of marginalised groups in society.

We support seeking to learn lessons from experience overseas particularly the British experience of a year ago. We note that the London bombings took police and intelligence agencies by surprise. There were no obvious links between the offenders and any recognised terrorist organisations.

Legislation which targets various associations to ‘terrorist organisations’ would be ineffective at preventing this type of destructive activity.

If young intelligent men from targeted communities in Australia are suspected of planning to commit terrorist acts, or associating with terrorist organisations, we should have confidence in the underlying fabric of Australian society. We should be empowering their families and the communities to which they belong, to reinforce the broader community’s abhorrence of terrorism and to redirect their energies to acceptable behaviour.

Policing authorities utilising new offences to investigate and arrest suspects run the risk of further alienating those suspects from their peers, family members, and their community. It may even further incite them to commit those terrorist acts in the future.

The prevention of terrorism should be a partnership between intelligence authorities, policing authorities and the community itself.

### 1.5 Detailed Comments

As requested, Part 2 of this submission shall focus on the Security Legislation Review Committee (the Sheller Inquiry) recommendations on pages 8 to 14 of its recent report. Part 3 of this submission will address issues that the centre feels were not adequately covered by the Sheller Inquiry. Also, consistent with the role of the National Children’s and Youth Law Centre, this submission shall focus on those issues which are child specific.

# 2 NCYLC’s response to the Sheller Inquiry Recommendations

## 2.1 Sheller Inquiry recommendation 1: Further review

*The SLRC recommends that the government establish a legislative-based timetable for continuing review of the security legislation by an independent body, such as the SLRC, to take place within the next three years.*

*If an independent reviewer, as discussed in this report, has been appointed, the review to be commissioned by the Council of Australian Governments (COAG) in late 2010, could be expanded in its scope to include all of Part 5.3 of the Criminal Code. The SLRC also draws attention to other models of review and urges the government to consider the models discussed in the report.*

**NCYLC Comments:**

NCYLC agrees with the substance of this recommendation.

Since the legislation was introduced in 2002 and 2003, the Australian Federal Police have conducted 479 counter-terrorism investigations and charged 24 people with terrorism related offences. As canvassed in 18.5-18.7 of the Sheller Report, the implementation of the legislation should be subject to ***ongoing monitoring***.

We suggest that this monitoring be in the form of constant oversight, and an annual report which should be tabled in all relevant Parliament bodies.

The role of the independent monitor could be performed by the Office of the Inspector-General of Intelligence & Security or the Commonwealth Ombudsman as suggested by the Sheller Report. However the Human Rights and Equal Opportunity Commision (**HREOC**) should also have a role in any such process (and have appropriate resources provided to them to perform this role).

The position of a **Special Advocate** should be established (similar to the equivalent position in the United Kingdom), as canvassed in 18.9-18.17 of the Sheller Report; and the review must be ***widely publicised*** to all individuals and groups who may be interested in providing submissions, including human rights interest groups, public interest legal centres, and Muslim or Arabic community groups.

The review must provide ***sufficient time*** and support for any interested groups or individuals to prepare their submissions; and for the purposes of preparing submissions, the review must provide to all interested groups and individuals ***statistical and other relevant information*** relating to any arrests, prosecutions, or other exercise of power pursuant to the offences provided for in the legislation.

### 2.2 Recommendation 2: Community education

*The SLRC recommends that greater efforts be made by representatives of all Australian governments to explain the security legislation and communicate with the public, in particular the Muslim and Arab communities, and to understand and address the concerns and fears of members of those communities so that practical and immediate programs can be developed to allay them.*

**NCYLC Comments:**

NCYLC agrees with the substance of this recommendation.

Particular care should be given to efforts to educate children and young people. The comments of the UN Committee on the Rights of the Child (reported above) assume appropriate community education strategies to enable effective monitoring and complaint mechanisms.

It should be noted that children and young people (particularly from Muslim and Arab communities) are more likely to distrust or misunderstand the

authority figures who implement the legislation. They are less likely to understand the legal process and offences.

However they also offer a good  opportunity to inform communities as often adults learn from their children's greater capacity for processing new information.

The primary method educating the community should be through *community based* and *peer based strategies*. Although programs such as the national Muslim Youth Summit (held in December 2005) are commendable, they are not the ideal method for educating the community at large because they have a relatively small participation rate. Young people are more likely to respond to suggestions from peers and members of their community.

These strategies must be implemented by agencies that are independent of government.

In educating the 'Muslim' community it must be ensured that this process does not exclude those persons of Arabic or Middle Eastern descent sectors who do not identify themselves as 'Muslim' (as they do not considers themselves particularly religious). Persons of Arabic and Middle Eastern descent may regard the legislation (and its enforcement) with distrust regardless of religious persuasion, due to their susceptibility to discriminatory application of the legislation.

### 2.3 Recommendation 3: Reform of the process of proscription

This recommendation is not the subject of this review.

### 2.4 Recommendation 4: Process of proscription

This recommendation is not the subject of this review.

### 2.5 Recommendation 6: Definition of terrorist act – 'harm that is physical'

*The SLRC recommends that the words 'harm that is physical' be deleted from paragraphs 2(a) and 3(b)(i) in the definition of 'terrorist act' so that the definition of harm in the Dictionary to the Criminal Code applies, and the paragraphs extend to cover serious harm to a person's mental health.*

**NCYLC Comments:**

NCYLC does not support this recommendation.

The proposed change broadens the definition of a 'terrorist act' in such a way that increases the risk of the inclusion of aspects of legitimate public debate or the actions of advocates within the definition.

### 2.6 Recommendation 7: Definition of a terrorist act – 'threat of action'

*The SLRC recommends that the reference to 'threat of action' and other references to 'threat' be removed from the definition of 'terrorist act' in section 100.1(1).*

**NCYLC Comments:**
NCYLC supports this recommendation.

As noted in the Sheller Report, the inclusion of a threat of action as a terrorist act does not sit well with the requirement that the threat causes serious harm to a person or property under s101.1(2); and creates uncertainty in its application – for example, preparatory acts (which are considered an offence under 101.6) to a mere 'threat' of action are potentially limitless.

### 2.7 Recommendation 8: Offence of 'threat of action' or 'threat to commit a terrorist act'

*The SLRC recommends that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101. The description should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur.*

**NCYLC Comments:**
NCYLC does not agree with this recommendation. See our comments in part 2.19 of this submission.

### 2.8 Recommendation 9: Definition of 'advocates'

This recommendation is not the subject of this review

### 2.9 Recommendation 10: Definition of 'terrorist organisation'

This recommendation is not the subject of this review

### 2.10 Recommendation 11: Section 102.3(2) – burden of proof

*The SLRC recommends that the burden of proof on the defendant under section 102.3(2) be reduced from a legal burden to an evidential burden. Section 102.3(2) requires the defendant to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.*

**NCYLC Comments:**

NCYLC supports this recommendation.

Article 40(2)(b)(i) of CROC states that "every child alleged or accused of having infringed the penal law has at least the following guarantees…to be presumed innocent until proven guilty according to law".

### 2.11 Recommendation 12: Section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation

*The SLRC recommends that section 102.5, 'Training a terrorist organisation or receiving training …', be redrafted as a matter of urgency.*
*The redraft should make it an element of the offence either that the training is connected with a terrorist act or that the training is such as could reasonably prepare the organisation, or the person receiving the training, to engage in, or assist with, a terrorist act.*

*The SLRC recommends that the scope of the offence should be extended to cover participation in training.*

*The SLRC recommends that neither the offence nor any element of it should be of strict liability.*

**NCYLC Comments:**

NCYLC supports this recommendation.

Strict liability is not appropriate for offences that can carry terms of imprisonment.

Article 40(2)(b)(i) of CROC states that "every child … accused of having infringed the penal law has at least the following guarantees…to be presumed innocent until proven guilty according the to law"; and Article 15 of CROC states that a child has the right to freedom of association.

By merely specifying the link between training and an organisation the legislation disproportionately inhibits that right; and the offence does not require a connection between any training received or given and a terrorist act. As a result the act potentially captures many harmless activities.

For example, if a religious group is prescribed to be a terrorist organisation, and the religious group trains a group of unwary children in a particular religious practice – for example, lighting candles, those children will have committed an offence carrying an imprisonment term of 25 years.

### 2.12 Recommendation 13: Section 102.6 – getting funds to, from or for a terrorist organisation

*The SLRC recommends that, at most, a defendant legal representative should bear an evidentiary burden, and that subsections (1) and (2) should not apply to the person's receipt of funds from the organisation if the person received the funds solely for the purpose of the provision of:*
*(a) legal representation in proceedings under Part 5.3, or*
*(b) assistance to the organisation for it to comply with a law of the Commonwealth or a State or Territory.*

**NCYLC Comments:**

NCYLC supports this recommendation.

Article 40(2)(b)(i) of CROC states that "every child … accused of having infringed the penal law has at least the following guarantees…to be presumed innocent until proven guilty according to law"; and Article 40(2)(b)(ii) of CROC states that every child has the right "to have legal or other appropriate assistance in the preparation and presentation of his or her defence".

### 2.13 Recommendation 14: Section 102.7 – providing support to a terrorist organisation

*The SLRC recommends that section 102.7, 'Providing support to a terrorist organisation', be amended to ensure that the word 'support' cannot be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objective.*

*One means of achieving this could be to insert defences of the type contained in section 80.3 of the Criminal Code in relation to treason and sedition.*

**NCYLC Comments:**

NCYLC does not agree with this recommendation.

Every child has the right to:

- freedom of expression (CROC article 13); and
- freedom of association and peaceful assembly (CROC article 15).

These rights are qualified in CROC in that they may be restricted in conformity with laws which are necessary in a democratic society in the interests of national security or public safety, public order (*ordre public*), the protection of public health or morals or the protection of the rights and freedoms of others.

However the term 'support' is broad and ambiguous in its potential to restrict all of the above freedoms. As correctly noted by the Sheller Inquiry, the publication of views which appear to be favourable to a terrorist organisation would arguably fall within in the scope of 'support' – thus disproportionately restricting the right to freedom of expression. As a result of this concern, the Sheller Report recommended that an exemption be created from this offence for the 'publication of views' which could be considered favourable to a terrorist organisation.

However, this failed to address other forms of expression which could also fall within the bracket of 'support'. Effectively, the Sheller Report's recommendation only protects media type organisations and public interest groups. Other forms of expression, either political such as the right to peaceful assembly or otherwise, are more likely to affect children and young people.

For example, a child who attends a march with family members or friends protesting the continued occupation of Iraq by the United States is arguably providing ‘support’ to terrorist organisations which hold the same view.

Similarly to the ‘publication of views’ argument noted by the Sheller Committee, the ‘support’ provided arguably helps the terrorist organisation to commit a terrorist act in terms of recruiting more followers and increasing anti-United States sentiment. As result a child attending a protest could be charged and faces a 25 year term of imprisonment.

The offence should either:

- Be repealed altogether; or
- Be redrafted to ensure that it does not disproportionately restrict the right to freedom of expression, freedom of association, and freedom of peaceful assembly. For example, the offence could require *a **direct connection*** between the support provided and a terrorist act (as opposed to supporting a terrorist organisation in way which may help the organisation to commit a terrorist act).

### 2.14 Recommendation 15: Section 102.8 – associating with terrorist Organisations

*The SLRC recommends that …section 102.8 … ‘Associating with terrorist organisations’, be repealed. The SLRC recommends that, if section 102.8 is retained, section 102.8(5) be repealed.*

**NCYLC Comments:**

NCYLC agrees that section 102.8 of the Criminal Code be ***repealed.***

There is no connection to any terrorist act, and so the offence attracts heavy punishment without any perceivable ‘wrong’ or danger from society’s perspective. As a result the offence is a disproportionate restriction on freedom of association contained in CROC article 15.

Although there are exemptions for associating with ‘close family members’, the definition of a ‘close family member’ does not include extended family members, or informal members of a family group. The support of an extended family group is especially important for children and young people.

The exemptions for associations that occur in a ‘place of public religious worship’ do not include associations that would take place in private or outdoor religious festivals as these are not in places of ‘public religious worship’.

### 2.15 Recommendation 16: Section 103.1 – financing terrorism

*The SLRC recommends that section 103.1… should be amended by inserting ‘intentionally’ after ‘the person’ in paragraph(a) and removing the note.*

NCYLC does not comment on this recommendation.

### 2.16 Recommendation 17: Section 103.2 – financing a terrorist

*The SLRC recommends that consideration be given to re-drafting paragraph (b) of section 103.2(1) to make it clear that it is required that the intended recipient of the funds is a terrorist.*

NCYLC does not comment on this recommendation.

### 2.17 Recommendation 18: Section 80.1(1)(f) – conduct assisting another country or an organisation engaged in armed hostilities against the Australian Defence Force

*The SLRC recommends that section 80.1(1)(f)… be amended to require, as an ingredient of the offence, that the person knows that the other country or the organisation is engaged in armed hostilities against the ADF.*

NCYLC does not comment on this recommendation.

### 2.18 Recommendation 19: Customs' recommendations

*The SLRC recommends that the government give consideration to implementation of Customs' eight recommendations on border security.*

NCYLC does not comment on this recommendation.

### 2.19 Recommendation 20: Hoax offence

*The SLRC recommends that a hoax offence be added to Part 5.3 in the terms of Article 2(2) of the UN Draft Comprehensive Convention on International Terrorism to apply to a credible and serious threat to commit a terrorist act, where the evidence does not support a finding that there was such intention as described in the definition of 'terrorist act'.*

**NCYLC Comments:**

NCYLC does not support this recommendation.

The 'hoax offence' suggested by the Sheller Report potentially captures idle threats of violence, that, although unacceptable, do not fit comfortably under what should be considered to be a terrorist act. Even if the offence is drafted to include only "serious and credible" threats, as suggested by the Sheller Report, the offence may label troublesome or mischievous young people as terrorists. It is not clear if the threat is to be considered "serious and credible" from an objective perspective or from the perspective of the offender. .

Current federal and state law adequately covers threats and violence in these categories. For example, threats of violence are adequately covered by the relevant state based assault provisions. Classifying a naïve or mischievous act that creates a hoax effect as a 'terrorist act' is not appropriate.

*Example:*
In an internet chat room people a group of young people are discussing the conflict between Israel and Hezbollah/Lebanon. A young person of Lebanese descent, inflamed by the violence he has seen on television, threatens to bomb a local synagogue.

His actions are unacceptable and probably should invoke the criminal law. However the characterisation of such actions as terrorist needs to be reconsidered.

There is no actual intention to bomb the mosque. However as a hoax offence under this section, his comment could be considered to be a 'terrorist act', as the threat:

- Is to cause serious damage to property;
- Is arguably done with the intention of advancing a political, ideological or religious cause;
- Could have been made with the intention of intimidating a section of the public; and
- The threat could be considered to be serious and credible.

# 3 Other Key Recommendations of NCYLC

### 3.1 Definition of 'terrorist act'

The definition of a 'terrorist act' in 100.1 is excessively broad, and captures activities which should not be classified as 'terrorist acts'.

*Political, religious, or ideological cause*

The qualification that a terrorist act must be done with the intention of advancing a "political, religious, or ideological cause" in part (b) of the definition potentially captures all sorts of motivations for violence. For example, the term "ideological" could arguably include purely racist objectives – for example, White Supremacy, or Neo-Nazism. Racism is a serious problem, but is not adequately addressed through specifying such offences as "terrorist acts". A more community focused approach is necessary – see our comments in part 1.3 of this submission.

*Example: The Cronulla Riots*

During the Cronulla riots of December 2005, approximately 5000 people, mostly young people, attended Cronulla beach in an effort to "re-claim the beach" from persons of Middle Eastern descent. The conflict generated a response from young people of Middle Eastern descent.

Arguably, the acts of violence that took place were 'terrorist acts' for the purposes of this legislation, as the acts:

- Caused serious harm to a person (100.1(a));
- Were arguably done with the intention of advancing a "political, religious, or ideological cause" (100.1(b));

- Were done with the intention of intimidating a section of the public (100.1(c)).

After the event, many of the offenders were caught and prosecuted under the existing criminal law.

The question is whether this terrorism legislation is an effective tool for dealing with such a situation.

NCYLC recommends that consideration is given to ensuring that the use of offences under this legislation by policing authorities is not expanded in ways that confuses community understanding of terrorism as distinct from social unrest.

Both issues require a coordinated and integrated community response. However the criminal law can be a blunt tool to achieve that result – especially when used by authorities under pressure to be seen to act decisively. In those circumstance disadvantaged groups such as children and young people often become scape goats. Community cohesion is reduced as a result.

### 3.2 Sections 101.2, 101.4, 101.5, and 101.6

These sections create specified offences for providing or receiving training connected with terrorist acts, possessing things connected with terrorist acts, collecting or making documents connected with a terrorist or any other act done in preparation for, or planning for, terrorist act. The offences are not dependant a terrorist act actually occurring, or any specifically planned terrorist act – the act seems to contemplate a potential terrorist act.

It is understandable that the legislation does not specify that a terrorist act must actually occur, as presumably the aim is to support the prevention of such acts. However the result in legislative terms is a lack of clarity.

*Degree of connection*

The degree of connection between the acts referred to above and any potential terrorist act is unclear. There is no requirement that the acts make a terrorist act more likely to occur - despite the heading to section 101.5 (collecting or making documents likely to facilitate terrorist acts).

The concept of a ‘connection with’ a terrorist act is broad and vague – it potentially captures all sorts of conduct and information. This lack of clarity lends itself to discriminatory application and has the potential to generate mistrust and fear within the community. It is submitted that the connection should be redrafted to include only a ***“direct connection”*** with a terrorist act.

The vagueness of a ‘connection’ with a terrorist act also makes the potential application of the offences far reaching. For example, a person may collect plans of famous buildings and posts them on a personal website. It is conceivable that the plans could be used by a terrorist in making an attack –

so arguably the plans are ‘connected with’ a potential terrorist act. Provided the person is aware (or reckless) to the connection they can be convicted of up to 10 years imprisonment under section 101.5(2).

*Level of knowledge*

Also, the level of intent or knowledge required in all of the above acts is ‘recklessness’. In other areas of criminal law, reckless is occasionally considered sufficient to establish mens rea – for example when a person displays reckless indifference to human life they may be charged with murder. However, where the reckless indifference in question is to an unidentified ‘connection’ with a potential terrorist act, it is submitted that recklessness is also too remote. The outcome could be 10 years imprisonment.

Knowledge of the connection with a potential terrorist act should be required.

*Burden of Proof*

Under sections 101.4 (possessing a thing) and 101.5 (collecting or making documents) there is an effective defence if a defendant proves that the document or thing was not intended to facilitate a terrorist attack. However the defendant bears an evidential onus of proof in relation to this. It is submitted that it is not acceptable to rest the burden of proof on defendants for a ‘lesser offence’ which carries 10 years imprisonment.

The reversal of the burden of proof in sections 101.4 and 101.5 is arguably in contravention of article 40(2)(b)(i) of CROC states that “every child alleged or accused of having infringed the penal law has at least the following guarantees…to be presumed innocent until proven guilty according to law”.

*Example*

These problems can be illustrated by the following example. A child views a document on the internet which details the making of a bomb. Out of personal curiosity or mischievousness, the child prints it and takes it to school to show his friends. A teacher sees the document and confiscates it, and notifies the police. The child may be charged with an offence under section 101.4(2) or 101.5(2) as he or she collected a document and was ‘reckless’ as to the existence of a connection between the document and a potential terrorist act.

The child may also be charged with possessing a ‘thing’ connected with a potential terrorist threat. The child may have had no knowledge or intention that the document actually be used in a terrorist act. However the child must satisfy the evidentiary burden of proof to rebut this presumption. An evidentiary burden of proof for a federal offence means ‘the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist”[3].

[3] Criminal Code 1914 (Cth) s13.3(6)

Similarly, if a child posted similar information on a webpage they would be liable for the same punishment.

Children often find themselves under suspicion of anti-social behaviour. Adolescents in particular, as they test boundaries, engage in activities through a lack of judgement, an act of teenage rebellion, or at the incitement of others.

These acts rarely have the considered intent to cause harm. It is not appropriate to deal with these instances through this legislation.

NCYLC recommends that actual knowledge (not mere recklessness) be required of the connection with a terrorist act in the offences in s101.2, 101.4, 101.5, and 101.6; the burden of proof in sections 101.4(5) and section 101.5(5) should be on the prosecution; and the connection between the offences in s101.2, 101.4, 101.5, and 101.6 be redrafted so that a "direct connection" is required between the relevant act and the terrorist act.

### 3.3 Sentencing of juvenile federal offenders

The legislation creates a wide range of federal offences that are applicable to children and young people.

From January 2000 to June 2005, the Commonwealth Department of Public Prosecutions prosecuted 107 cases involving young people aged under 18 at the time of sentencing. It is foreseeable that the anti-terrorism offences could substantially increase the number of federal offences under which children and young people may be prosecuted.

This makes it essential that federal sentencing procedures follow the internationally recognised juvenile sentencing principles. Young people constitute a category of offenders that merit special consideration. It is an internationally recognised principle that children, by reason of their physical or mental immaturity, are entitled to special care, safeguards, and assistance, including appropriate legal protection[4].

It is equally important that children and young people have access to effective and appropriate diversionary programs to prevent them becoming institutionalised and being drawn into a cycle of crime.

The issue of the sentencing of juveniles under federal crimes has recently been examined by the Australian Law Reform Commission (ALRC). In its report released on 22 June 2006 - Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders*[5], the Commission found a number of problems with the current federal sentencing principles for young offenders.

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[4] United Nations Universal Declaration of Human Rights, GA Res 217A(III), UN Doc A/Res/810 (1948) art 25(2); United Nations Declaration of the Rights of the Child, GA Res 44/25, UN GAOR, UN Doc A/Res/44/49 (1989), preamble.

[5] ALRC Report 103: *Same Crime, Same Time: Sentencing of Federal Offenders*. Tabled in Federal Parliament on 22 June 2006. Available at http://www.alrc.gov.au/inquiries/title/alrc103/index.html

Currently, section 20C(1) of the Crimes Act 1914 (Cth) s 20C(1) of the Crimes Act 1914 (Cth) provides that: "[a] child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

However, the ALRC noted:

- the absence of a definition of 'child or young person' in Part IB of the Crimes Act;
- the absence of a clear statement about whether s 20C precludes the use of Part IB in the sentencing of young federal offenders;
- the absence of a statement that the penalty imposed on a young offender should be no greater than that imposed on an adult who commits an offence of the same kind;
- difficulties accessing diversionary options provided by the states and territories;
- doubts about the power to apply state or territory enforcement provisions if a young federal offender breaches a sentence; and
- disparity between the states and territories in legislative principles, procedures and sentencing options applicable to young federal offenders and in their patterns of sentencing[6].

As a result the ALRC Report recommended:

- introducing federal minimum standards that will apply to all young federal offenders;
- requiring certain provisions that are applicable to adult federal offenders to apply also to young federal offenders;
- developing best practice guidelines for juvenile justice, to promote consistency across states and territories in relation to the sentencing, administration and release of young offenders; and
- increasing federal oversight of young federal offenders[7].

NCYLC submits that to ensure that the sentencing of juveniles under the anti-terrorism legislation complies with Australia's international law obligations, federal sentencing procedures should be addressed - by implementing the recommendations set out in Chapter 27 (Young Federal Offenders) of the ALRC Report 103: Same Crime, Same Time: Sentencing of Federal Offenders.

The Centre acknowledges and thanks the Committee for the opportunity to make this belated submission.

We are willing to participate in any oral hearings to give evidence.

National Children's and Youth Law Centre

[6] Note 5 at 27.16
[7] Note 5 at 27.22. See Proposals 27-1, 27-2, 27-3, 27-4