

ICCPR

In answer to the question on notice on incorporation of the international protocols into the bill I would submit that the way of incorporating these provisions is that:

1. The bill should include an amendment to the Crimes Act, Criminal Code Act and the ASIO Act that incorporates into the Acts the following most relevant sections of the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC) as an additional section of the legislation.
2. The relevant sections are Article 9 of the ICCPR and Articles 3 & 37 of the CRC.
3. The Acts would also need to be amended to include a section instructing that each other provision of the Act is subject to this section and that should there be any inconsistency then these provisions prevail.
4. In addition, the Acts should also be amended to allow judicial review of any decision (under the ADJR Act) on the basis that it is inconsistent with these provisions and that reasons for any decision must be provided to the person subject of such a decision.

The most important relevant sections of the ICCPR and the CRC are reproduced as follows:

International Covenant on Civil and Political Rights Article 9

1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.
2. Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgement.
4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have

an enforceable right to compensation.

Convention on the Rights of the Child

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.
2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, in the number and suitability of their staff, as well as competent supervision.

Convention on the Rights of the Child

Article 37

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;
- (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;
- (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;
- (d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action

Monitoring contact with lawyers

Provisions similar to section 105.38 Anti-Terrorism Bill (No. 2) 2005 exist in the United States and the United Kingdom (see below). However, the US and UK legislation contain a threshold test that must be met before communications between a solicitor and client can be monitored. In the US the Attorney General must certify that "reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism". In the UK a senior police officer must have "reasonable grounds to believe that such consultation would lead to interference with the investigation". There is no such requirement in the Commonwealth legislation.

United States

Regulation permitting Federal Agents to monitor attorney-client conversations
On October 30, 2001, the Justice Department unilaterally imposed a requirement on federal correctional facilities that the correspondence and private conversations of prisoners with their counsel are subject to monitoring in most cases. The rule was put into effect immediately by Attorney General Ashcroft, without the usual protections of notice and public comment afforded by the federal Administrative Procedures Act. It was posted in the Federal Register on October 31, 2001, the day after it went into effect. The rule provides:

28 CFR Parts 500 and 501: National Security; Prevention of Acts of Violence and Terrorism; Final Rule [excerpt]:

[I]n those cases where the Attorney General has certified that reasonable suspicion exists to believe that an inmate may use communications with attorneys or their agents to further or facilitate acts of violence or terrorism, this rule amends the existing regulations to provide that the Bureau is authorized to monitor mail or communications with attorneys in order to deter such acts, subject to specific procedural safeguards, to the extent permitted under the Constitution and laws of the United States.

(The full regulation (also cited as 66 Fed. Reg. 55,061, 55,063 [October 31, 2001]) can be viewed at: http://www.epic.org/privacy/terrorism/bop_rule.pdf).

United Kingdom

Terrorism Act 2000

The Act allows for a consultation between lawyer and detainee to be held "in the sight and hearing" of a police officer, if a senior police officer has reasonable grounds to believe that such consultation would lead to interference with the investigation. Separate provisions, in relation to Scotland, similarly allow for an officer "to be present during a consultation".

(Schedule 8, Part I, section 9: <http://www.opsi.gov.uk/acts/acts2000/00011--u.htm#sch8ptI>).

Repeal of Sedition laws

This is from Ben Saul's article re repeal of sedition laws:

The Gibbs review observed that the UK Law Commission found that a crime of sedition was unnecessary, since seditious conduct is already captured by the ordinary offence of incitement to crime. Reviews of criminal law in Canada and New Zealand omitted sedition offences altogether.[1]

[1] Gibbs Review, n18, 304-305.