Submission to the Senate Legal and Constitutional Legislation Committee

Anti-Terrorism Bill (No. 2) 2005

The authors of this submission are:

The Hon. Alastair Nicholson, AO RFD QC, Honorary Professorial Fellow, The Department of Criminology, The University of Melbourne

Mr. John Tobin, Senior Lecturer, Law School, The University of Melbourne

Mr Danny Sandor, Past-President, Defence for Children International – Australia, Sydney.

Ms. Paula Grogan, Director, Young People's Legal Rights Centre (Youthlaw), Melbourne.

Ms Carmel Guerra, Director, Centre for Multicultural Youth Issues, Melbourne.

The authors consent to the publication and dissemination of this submission.

Contact Person:

Danny Sandor

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About This Submission

The principal focus of this submission is on whether the Bill breaches Australia's international human rights treaty obligations. We appreciate that human rights law does not prevent States from undertaking decisive measures to deal with terrorism. Indeed we recognise that States are required to take necessary and proportionate measures to protect the rights of persons within their jurisdictions where they are threatened by terrorist activities. At the same time we are guided by the comments of the Secretary General of the United Nations that:

> *It would be a mistake to treat human rights as though there were a trade off to be made between human rights and such goals as security… We only weaken our hand in fighting the horrors of … terrorism, if, in our efforts to do so we deny the very human rights that these scourges take away from citizens. Strategies based on the protection of human rights are vital for both our moral understanding and the practical effectiveness of our actions.* [1]

This is the context in which the measures proposed in the Anti Terrorism Bill No 2 (2005) ('the Bill') must be examined – the justification for pursuing these measures in the name of our human rights must also extend to an assessment of their impact on the human rights of those who may fall within their purview.[2] After undertaking such an assessment it is our submission that an appropriate balance has not been struck and that the Bill violates Australia's obligations under international human rights in several respects both with respect to its treatment of adults and of even greater concern, children to whom additional human rights obligations are owed.

In keeping with the United Nations Convention on the Rights of the Child, ('CROC') the term "children" is defined as people under the age of 18 years. There are provisions of the Bill which directly affect 16 and 17 year olds, for example control orders and preventative

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[1] Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights For All* A/59/2005, par 140.

[2] In a public emergency threatening the life of a nation (which must be reported to the UN) rights may be limited or suspended : Article 4 International Covenant on Civil and Political Rights. However, no-one could argue that this is our present situation and the Government's own assessment is that the threat is 'medium', as it has been since 9/11. In the absence of such a threat, which must be immediate, there is no excuse for the Government over-riding human rights obligations. It is our view that this Bill does so in a number of respects.

detention orders. They have been subject to comparably little examination and our submission includes particular attention to them.

We note that the Bill contains some provision for its measures to be applied in a different way to these older children as compared with adults. We take this as Government recognition that international law requires under 18 year olds to be treated differently to adults. We agree.

Our submission explains a number of ways in which consider the Bill has failed to capture and reflect international obligations not just to adults but also for children who are the subject of applications for control orders or preventative detention order. However, in order to meet the deadline for submission we have not set out all arguments concerning control orders and preventative detention orders.

We have also had to reserve for later explanation, other direct human rights breaches we see for adults and children in the the Bill and also the ways in which we consider that the application to adults of the measure contained in the Bill would breach the rights of those adults' under 18 year old children.

The authors bring varied experience bases to the submission.

- The Honourable Alastair Nicholson, AO RFD QC, Honorary Professorial Fellow, The Department of Criminology, The University of Melbourne was a Justice of the Supreme Court (1982-1988) during which time he was Deputy Chair and Chair of the Adult Parole Board and Deputy Chair of the Victorian Sentencing Committee chaired by Sir John Starke. He was then appointed Chief Justice of the Family Court of Australia with a concurrent commission as a Justice of the Federal Court of Australia (1988 – 2004). During these periods of judicial service, he was Deputy Judge Advocate General of the R.A.A.F (1982 -1984), Judge Marshal of the R.A.A.F (1985-1987) and Judge Advocate General of the Australian Defence Force with the rank of Air Vice Marshal (1987-1992). In 2004 he chaired a Review of the performance of the Asia Pacific Centre for Military

Law for the University of Melbourne and the Department of Defence. He is the founding patron of Children's Rights International [www.childjustice.org].

- Mr. John Tobin, Senior Lecturer, Law School, The University of Melbourne teaches a wide range of undergraduate and post-graduate subject in the field of international and human rights law. He previously worked as a senior solicitor with the Youth Legal Service at Victoria Legal Aid and as a Legal Officer with the Department of Justice, Victoria. He has also worked for UNICEF in Florence as a member of a team which examined the impact of the Convention on the Rights of the Child after its first 10 years in force. He is currently working on a Commentary to the Convention on the Rights of the Child with Professor Philip Alston from the European University Institute in Florence which will published by Oxford University Press upon its completion.

- Mr Danny Sandor, Past-President, Defence for Children International – Australia, Sydney [www.dci-au.org] most recently held the position of a Senior Program Manager for the Open Society Institute funded by philanthropist George Soros. His area of responsibility was grant-making for policy and practice in the field of human rights for people with intellectual and psychiatric disabilities in central and eastern Europe and the former Soviet Union. He was the Senior Legal Associate to the Chief Justice of the Family Court (1993 – 2004) and previously held direct service and program management roles, including detention facility management, in the Victorian child protection and juvenile justice field.

- Ms. Paula Grogan, Director, Young People's Legal Rights Centre (Youthlaw), Melbourne [www.youthlaw.asn.au] worked as the policy officer for the Youth Affairs Council of Victoria, the State's peak youth sector body. She now directs the operation of a specialist and statewide community legal centre for young people, which was established in Victoria in 2001.Youthlaw is funded by Commonwealth and State government grants and receives financial and in-kind support from Blake Dawson Waldron, a commercial law firm. Youthlaw works to achieve systemic responses to the legal issues facing young people, through casework, policy development, advocacy and preventative education programs, within a human rights and social justice framework.

- Ms Carmel Guerra, Director, Centre for Multicultural Youth Issues, Melbourne [www.cmyi.net.au] has over 15 years of specialised experience in shaping Victoria's approach to culturally and linguistically diverse young people, first as the director of the Ethnic Youth Issues Network and now as the leader of a statewide community-based organisation auspiced by the Australian Multicultural Foundation that aims to strengthen and build innovative partnerships between young people, support services and the community.. The Centre has a priority focus on CLD young people from refugee and newly-arrived communities. It represents a range of individuals and organisations from CLD communities, government and non-government organisations with a commitment to improving the social and personal status of young people from CLD backgrounds

We are conscious that the Committee addressed comparable issues in its report *Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999* ("the 1999 Inquiry").[3] In framing our submission, we have sought to identify where our approach is consistent with the 1999 Inquiry.

There is a clear duty to ensure that no aspect of the terms of legislation or its practical effects results in a breach continues in the context of terrorism. In a resolution adopted on 20 January 2003, the United Nations Security Council specifically called for the following:

> *States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee and humanitarian law*.[4]

Pursuant to Article 25 of the United Nations Charter:

[3] http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/mandatory/report/index.htm, date completed 13 March 2000. A significant difference between the 1999 Inquiry and the present one is that the impugned laws had been in operation by the time of the Inquiry and thus there was empirical evidence as to how the statutes operated in practice. As this Inquiry precedes any commencement of the Bill, it is not possible to provide such direct impact data.
[4] Security Council Resolution 1456 (2003) adopted 20 January 2003, par 6.

The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter.

We note the following exchange on this topic between reporters and the Attorney-General on ABC radio's *The World Today*:

REPORTER: … Do they breach some of the treaties that Australia is signatory to?

PHILIP RUDDOCK: Let me just make it very clear. We have examined each and every one of these measures against our international obligations. And they do not breach our international obligations.

There are some people who have a wish list in relation to international obligations as to what they'd like them to include, and the point I make in relation to international obligations that we're a party to, is that they have to be seen as a whole package.

One of the first and primary international obligations that we're party to is to the protection of the right to life - safety and security. Other rights in international instruments are not absolute.

And I make the point, and I've made it time and time again, in relation to freedom of movement, that freedom of movement is restricted in order to preserve people's right to life.

You have no right to choose on which side of the road you will drive on. And you know and you understand that, you accept it, but it constrains your freedom of movement. And equally, in relation to the sedition laws, freedom of speech - people say, you know, we can say anything.

Well, you're journalists, you know that what you can say is constrained by defamation laws. Nobody's arguing out there that they're in breach of our fundamental human rights obligations.

You have to in relation to each of these matters recognise that in the international instruments that we have signed, that there is provision for issues relating to safety and security to be taken into account in getting that balance right. These measures do. And they do not breach our international obligations.[5]

For reasons we elaborate later in this submission **we submit** that:

a) the Attorney-General is wrong in his assertion that none of the measures in the Bill breach Australia's international obligations;

[5] http://www.abc.net.au/worldtoday/content/2005/s1497863.htm, 4 November 2005.

b) the Attorney-General misstates the principles by which one evaluates whether the measures in the Bill breach Australia's international obligations;
c) the issue of whether the Bill breaches Australia's international obligations cannot be assessed solely by reference to the "measures" within the Bill;
d) the issue of whether the Bill breaches Australia's international obligations must also include an assessment of the criteria applied by decision-makers in determining whether a measure will applied

It is not sufficient that the determination of whether Australia is in compliance with its international obligations can rest solely with an unsubstantiated assertion by the Attorney General. Indeed such an approach, which allows the Government to be the sole arbiter as to the legality of its actions, is likely to breed deep cynicism in the minds of not only the Australian public but also the international community. It does nothing to foster transparency, accountability and respect for Government processes. Thus, in the absence of any judicial process to test the Attorney's assertions, it is critical that the Senate Committee engage in a thorough and detailed examination of the nature of the Bill's provisions and their impact on the international treaties to which Australia is a party.

We appreciate that we are criticising views expressed by the Attorney-General in a media interview. Unfortunately, the technical advice upon which the Government relies for the assertion that the Bill does not breach international obligations is not publicly available. On 10 November, a request for this material was was refused. The officer of the Attorney-General's Department who responded to the request stated: [6]

> *It is not the Government's practice to disclose whether it has received legal advice, nor to disclose the content of any such advice.*

We ask the Committee to consider our submission bearing this disadvantage, and the short timeline for submissions in mind. Therefore, in addition, **we ask** the Committee to receive a

[6] Email to Mr. Danny Sandor 10 November 2005.

further submission from the authors once we have had the opportunity to examine any submission or evidence on behalf of the Government.

The authors wish to appear before the Committee at its hearings on the Bill. **We ask** that any appearance that is granted be scheduled after publication of the transcript of evidence on behalf of the Government concerning compliance with international obligations. This is so that we have the opportunity to familiarise ourself with the bases of the Government's position and be in a position to effectively address them and questions from the Committee.

We would further request that such hearing be in Melbourne in particular because two of the co-authors represent non-government organisations (CMYI and Youthlaw) with limited funds and staff that can cover for the full day absence that a hearing in Sydney would require. In addition, we would be inviting the Committee to hear from and ask questions of young people themselves about their experiences under current legal and social conditions and how they anticipate the Bill would further impact on their lives. Such young people are associated with the two non-government organisations.

If Melbourne hearings are not possible, **we would ask** the Committee to consider hearing us by video-link.

Introduction

It is the primary contention of those making this submission that much of the present Bill is fatally flawed and should largely be abandoned. Particularly objectionable aspects of it are the probably unconstitutional provisions for preventative detention and control orders and the secrecy provisions that surround them. The secrecy provisions are of particular concern in that they are a grave interference with the right of freedom of speech and cloak the activities of Government in such a way that they are not open to proper scrutiny. Further the secrecy that surrounds the process is the antithesis of justice as we know it in our community, an essential aspect being that it is public and accountable.

There are however other problem areas, including the breadth of the definition of terrorist organisations and particularly the 'advocacy' clause, the nature of the proposed sedition laws and the hitherto unprecedented right of police to stop and request details from citizens.

We also have grave concerns about the provisions for judicial review and as to whether they can be properly characterised as judicial review at all.

Justice and Law

What then of justice and its relationship to the law? It is our contention that in introducing this legislation the Government has abandoned justice as an object of its laws and has thus rendered them intrinsically bad.

Justice is a concept that we instinctively understand but sometimes find difficult to identify in words. It is not capable of a fixed definition because what is regarded as justice will vary from time to time and from community to community. It has been defined as the quality of being just or fair[7] and thus as being synonymous with fairness. However we think that this is to gravely understate the power of the concept of justice. We note in this regard, a view expressed not by a lawyer but by a philosopher, Professor Raymond Gaita, who wrote:

> *Acknowledgment of someone as fully human is an act of justice of a different kind from those acts of justice which are rightly described as forms of fairness. Fairness is at issue only when the fully human status of those who are protesting their unfair treatment is not disputed. When they centre on the distribution of goods or access to opportunities and such things, concerns about equity presuppose a more fundamental level of equality of respect. If you are taken as fully 'one of us', then your protestation that equity demands that you receive higher wages or be granted better promotion prospects, for example, is probably an appeal to justice as fairness. If, however, you are regarded as sub-human, then it would be ludicrous for you to even consider pressing such claims, unless as a device to dramatise the radically different kind of equality that is really at issue.*[8]

[7] die.net http://dict.die.net/justice.
[8] Raymond Gaita, *A Common Humanity, Thinking about Love and Truth and Justice* Text Publishing, Melbourne (1999).

Gaita was there speaking about Indigenous people in the context of the High Court of Australia's decision in *Mabo v Queensland*,[9] which recognised that there was a law prior to white settlement and discarded the odious doctrine of terra nullius.

We think that similarly with these laws, they proceed upon a basis that those suspected of terrorism are regarded as sub-human and therefore having little or no entitlement to justice. Quite obviously, as government and media thinking goes, no-one has much sympathy for terrorists, particularly if they are probably Islamic and therefore alien to popular culture. However we tread a very dangerous path when we take this approach, as the real test of a free society is how it treats its minorities.

It is of course clear that justice and law are not synonymous. Law can be extremely unfair and unjust, either intrinsically because it is a bad law, or because it has unexpected ill effects in certain circumstances and/or in its application by the Executive and/or by the courts. What we are discussing is a very good example of very bad law and one of the reasons why this is so is because these laws have no relationship with justice but rather with a perceived fear of the unknown that has been used to frighten the populace into thinking that they are necessary.

In such circumstances, the fact that the laws are unnecessary, or that it has not been demonstrated that they are necessary, seems to have been completely ignored by their proponents. Hugh White in a recent article in the Melbourne newspaper *The Age* put this into perspective very well when he argued that no convincing material has been advanced as to the necessity for these laws.[10] We are expected to trust undisclosed security briefings delivered to a select few. Trust becomes extremely difficult following the Tampa, the Siev X, the 'children overboard', and the 'weapons of mass destruction'.

[9] *Mabo v Queensland No 2* [1992] HCA 23;(1992) 175 CLR 1 (High Court of Australia).
[10] Hugh White, 'Without answers, terror laws should be rejected', The Age 31 October 2005, accessed at http://www.theage.com.au/news/hugh-white/without-answers-terror-laws-should-be-rejected/2005/10/30/1130607148563.html.

The achievement of justice and fairness once occupied a primary position in our society. We liked to believe that they were part of the Australian ethos and that they applied universally. Unfortunately that is no longer the case.

The Absence of a Bill of Rights in Australia

In considering this proposed legislation, it is important to remember that in Australia there is no effective human rights framework surrounding the new anti-terrorism legislation. Unlike other western democracies, we have no Bill of Rights and therefore no check upon extreme legislation of this type other than what can be found in the Constitution.

Similarly, unlike European countries including the UK, we are not party to any binding international instruments such as the European Convention on Human Rights and its five protocols, which enable European citizens to appeal to the European Court of Human Rights if domestic legislation or law is thought to be in breach of that Convention.

Additionally, the UK has passed human rights legislation of its own as have Canada, in the form of a constitutional Charter and New Zealand. The US has its own 18th century Bill of Rights, which nevertheless continues to provide real protection against governmental excesses.

In Australia it is very difficult for a citizen or other person detrimentally affected by this legislation to effectively access the courts

There are differing models to be found of Bills of Rights and like legislation but the better models enable the court to read down legislation so as to be compatible with human rights requirements, or if this cannot be done, strike down the legislation.

This is a vitally important distinction that must be borne in mind in considering the new legislation, particularly when its proponents seek to draw parallels with legislation elsewhere. In the UK in particular, the avenue of the courts is much more open than it is here.

It is important to emphasise the lack of a human rights context in this regard. Without laws to protect human rights the role of the courts is a very difficult one and our traditional belief in the role of the courts as guardians of our rights is greatly hampered by this fact.

That view is strengthened by Justice Michael McHugh, a judge who formed one of the majority in the case of *Al-Kateb v Godwin*[11], a case in which the High Court by a majority of 4 to 3 held that the Migration Act permitted the indefinite detention of asylum seekers until they could be removed, to which he referred in the following extract from a speech delivered recently at Sydney University:

> *There is one area of law that provides fertile ground for the legal agitator to sow the seeds of legal discontent. It is the continuing failure of this country to have a Bill of Rights. Without a Bill of Rights or a constitutional Convention on Human Rights, the High Court of Australia is not empowered to be as active as the Supreme Court of the United States or the House of Lords in the defence of the fundamental process of human rights. That a judge may be called upon to reach legal conclusions that are applied with 'tragic' consequences was brought home by the High Court's decision of Al-Kateb v Goodwin. There a majority of Justices – who included myself – held that the investing of judicial power in courts exercising federal jurisdiction did not prohibit the Parliament from legislating to require that "unlawful non-citizens" be detained until they can be deported. Al-Khateb highlights that, without a Bill of Rights, the need for the informed and impassioned to agitate the Parliament for legislative reform is heightened.* [12]

The Australian Constitution and the Separation of Powers

In comparison to other countries, the Australian Constitution contains no significant human rights clauses and the few that are there have been so read down by the High Court as to be

[11] (2004) 208 ALR 124.

almost meaningless. Overall, we consider it is a somewhat weak and slender reed upon which we can rely in seeking to protect our freedoms. [13]

One relevant safeguard that it does contain for present purposes relates to the separation of powers as between the legislature, executive and the judiciary. The purpose of this doctrine is to ensure that no one of the three institutional pillars of government has absolute power and that each branch will provide a check and balance on the other. One way of ensuring this is to provide for a non-elected judiciary, who will not be swayed by the need to pander to popular opinion as the legislative branch may well do. It is interesting to note that the fact that the judiciary is non-elected is now used in a pejorative sense, but it is really fundamental to the working of our system and makes it much more difficult for the Executive and the Legislature to manipulate it than would otherwise be the case.

A former long serving Solicitor General, Dr Gavan Griffith QC, said recently in an ABC interview:

> *I regard it as very questionable for judges and courts to be involved at all in any aspect with respect to these warrants and detention orders. They're essentially just providing an administrative practice for administrative detention. And there's no obvious role for the judiciary to come to give a, as it were, a cloak of legitimacy to matter which essentially are not judicial.*[14]

A final feature of the doctrine of the separation of powers that we would highlight is that the use of a corresponding State, Territory and Commonwealth legislative framework for the anti-terrorism laws introduces a particular uncertainty. Even if the Commonwealth legislation proves to be unconstitutional, that may not apply to the State legislation. Complex issues

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[12] The Hon Justice Michael McHugh, *The Need for Agitators – the Risk of Stagnation*; Sydney University Law Society Public Forum, Sydney 12 October 2005, accessed at http://www.hcourt.gov.au/speeches/mchughj/mchughj_12oct05.pdf.

[13] Alastair Nicholson, *Reflections on Social Justice – Australian Democracy, Law and Justice. What has happened to the checks and balances?* (Anglicare Tasmania Inc 2005) accessed at www.anglicare-tas.org.au. See particularly Hilary Charlesworth, 'The High Court and Human Rights', The Centenary Conference of the High Court of Australia Canberra 2003 (to be published).

[14] 31 October 2005, accessed at http://www.abc.net.au/pm/content/2005/s1494744.htm.

would arise involving consideration of what courts have been asked to do, and fundamental concepts such as *"integrity"*.[15]

The Role of the Executive

The record of the Executive in administering similar legislation to the anti-terrorism legislation is not a good one. The problem about this sort of legislation is that it is likely to lead to a situation where Government and its agencies will use it for other and improper purposes, including its own political ends. Alternatively, those responsible for its administration will bungle its use in such a way that it will have the effect of blighting people's lives in the same way as the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA) has done in respect of many of the asylum seekers under its charge.

The Role of the Legislature

[15] Kirk McKenzie, (*Abolishing)Law and Liberty* (New Matilda .com) 26 October 2005.
"The problem is that the Constitution's Chapter III may only prevent the Federal Parliament, not the State Parliaments from passing such legislation.
The State Parliaments' only relevant limit has been expressed as follows:
If a State legislates to give a State Court powers not allowed to Federal Courts and the State Court is, under Federal legislation, vested with jurisdiction in some Federal matters (for example State Courts are commonly given power to try Federal crimes) the State Parliament could not confer those powers if they would have the effect of compromising the integrity of the Court and thereby infecting the Federal judicial system with the same disease.
In other words, as McHugh said in Kable v DPP in 1996, the powers conferred cannot be of a nature that might lead an ordinary, reasonable member of the public to conclude that the State Court was not independent of the executive government of the State. An example is the Kable decision itself. In that case the NSW Parliament passed an Act applying to just one person, Mr Kable said to be a very dangerous prisoner likely to kill if released at the end of his sentence. The Act's provisions were directed towards detaining him in custody at the end of that sentence.
The High Court said that because it applied to one person only and its provisions required the NSW Supreme Court to rubber stamp his continued preventative detention, the Court was being used as a tool to achieve a political objective. It declared the legislation invalid.
This principle was narrowed in Fardon's case [(2004) 210 ALR 50] where the facts were similar to Kable except the Act there was of general application to convicted offenders and the Supreme Court was given a wide discretion to make an order or not. The High Court (only Kirby dissenting) said the Act was valid."

What then of the Legislature? The seeds of the present problem lie in the Government's newly won control of the two houses of Parliament. In a speech that he gave recently,[16] Professor Alastair Nicholson said:

> *We have since experienced a complete failure of political leadership on both sides of politics that has led to a lemming-like rush by the two major political parties to outdo each other in proposing more and more extreme legislation directed at combating a threat of terrorism in this country.*
>
> *We have also experienced a further tragic bombing incident in Indonesia which has cost Australian lives and which has already been relied upon as providing further evidence of the need for the sort of draconian legislation that is contemplated.*
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> *It should be remembered that we already have security legislation which many people, me included, regard as objectionable. However the attacks in London or Bali will be more than sufficient to justify the desire of governments to introduce additional powers in the name of security. And again in the name of security, in circumstances which are reminiscent of the works of Joseph Heller and George Orwell, the public is prevented from knowing the evidentiary basis which justifies such powers. This is the case with new legislation and also, as U.S. activist Scott Parkin discovered, where the powers are applied to an individual.*[17]

He later continued:

> *It would appear that our "leaders" have thus managed to undo liberties that have stood the test of time in our community for hundreds of years, all in the name of combating this threat of terrorism. Of course, entwined with concern for the public interest was political self-interest in avoiding the accusation that any of them are seen as "soft on terror", particularly if there is a future tragedy within our borders which enables conservatives to begin a blame-game directed at leaders who wouldn't adopt the full precautionary package due to qualms about civil liberties.*[18]

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[16] Alastair Nicholson *Contemplating Justice -The Law as a Tool of Justice and Human Rights*, accessed at http://www.reprieve.org.au/Prof_Alastair_Nicholson_2005_AGM_Speech-Contemplating_Justice.pdf.

[17] *"The authorities may indeed have sound reasons for deeming Mr Parkin a security risk, but we can't know for sure because they won't tell us. Mr Parkin is appealing to the Migration Review Tribunal over his proposed deportation - but Mr Ruddock could apply for a certificate to prevent the hearing. There is a distinctly Orwellian logic at work here: the Government justifies a decision to curtail an individual's liberty by invoking national security and then refuses to provide evidence because national security allegedly is at stake. There's nothing new about governments hiding behind the cloak of national security, but this Government is now proposing that it be allowed to do so more often."*: 'Arrest sets off alarm bells on security powers' *The Age*, editorial, 14 September 2005."

[18] *"No government wants to appear soft on terrorism and any such perception would be punished severely by voters if there were a terrorist attack in Australia. This also explains why Labor - a party traditionally defensive of such civil liberties - has been reluctant to challenge the Government's proposed anti-terror laws. So the*

The secret status of the intelligence material that secured unanimity with the Federal Government has conveniently ensured that leaders of State and Territory Governments and the Leader of the Opposition can acquiesce with impunity since there can be no informed public debate and thus criticism of them concerning the proportionality or rationality of the security response as measured against threat evidence that is kept under wraps.

It's a win-win situation all round politically. If Australia escapes a domestic attack, it can be said that ipso facto the civil liberties sacrifices were warranted. If an attack does occur, and no doubt it was this possibility that was of greatest political concern, the stage has been set for there being no weak link in the leadership chain to attract recriminations.

We can expect to see more of this tidy secrecy-based formula in the future and further instances of leaders failing or refusing to heed the warning which issued from within the Federal Government's ranks by Petro Georgiou; that:

> *in the course of defending the democratic values which terrorism attacks, we do not inadvertently betray them.* [19]

We regard the role of the Opposition as even more worrying than the role of the Government. It would appear that a more critical role is being played by the Government's own backbench and the Fairfax press than by the Opposition.

It is against the sort of populism demonstrated by the Government and supported by the Opposition and the Premiers that the other checks and balances were designed to operate. We think that they have failed and that we are definitely entering what senior journalist Geoffrey Barker has described as *"the twilight of democracy in Australia"*.[20]

The Role of the Judiciary

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political path is set and it is highly unlikely that state and territory leaders will derail the Prime Minister's plans when they meet to discuss them in Canberra on September 27." Cameron Stewart, 'Terror fact and fiction' *The Australian*, 17 September 2005.

[19] Quoted in *The Age* editorial of 24 September 2005 'Finding a balance between security and freedom'.

[20] *The Media Report* 6 October 2005 ABC radio, accessed at http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s1475927.htm.

Turning to the role of the judges and federal magistrates who are expected to participate in this legislation, we consider that they are put in an invidious position.

In our view such participation would be the antithesis of a proper judicial role. The apparent intention is to provide some check upon the Executive, but we regard it as an illusory check. The judges of the Federal and Family Courts largely formed the view that they would have no further part in the issue of warrants under listening device legislation for the same reason, that the role was not a judicial one. What occurred was that representatives of the police and usually a policeman would attend upon the judge in private and place an affidavit before him/her setting out why such an order should be made. The judge would peruse the affidavit, but would have no way of testing the accuracy of its content and would usually proceed to make an order.

A judicial proceeding involves a fair trial before an impartial and skilled judge at which both parties have an opportunity to be represented by competent counsel and be heard. In a criminal case the issues before the court are formulated by the laying of specific charges against the defendant by the prosecution, access by both parties to all relevant material and the opportunity to test evidence by cross examination and to give evidence in rebuttal. The charges against the accused person must be proved by the prosecution beyond reasonable doubt. There is an automatic right of appeal to a higher court and further rights of appeal.

None of these rights would appear to be contemplated by this legislation and of course there is no offence alleged. The standard of proof is not the criminal standard but only upon the balance of probabilities and access to a lawyer is limited and the communications between lawyer and client are likely to be monitored. Yet at the same time, the consequences to the person concerned may be equivalent to or worse than to a criminal defendant.

If judges are to be involved in the administration of this legislation, it faces real constitutional difficulties and if they are not, it will be revealed for what it is, namely the greatest attack upon individual liberties and freedom ever perpetrated by an Australian Government.

As Justice Michael Kirby has graphically pointed out:

> *The real test comes when judges are led by their understanding of the law, the findings on the facts and the pull of conscience to a decision which is contrary to what the other branches of government or other powerful interests in society want. Something different from what "the home crowd" wants. That is when judicial independence is put to the test.*[21]

The Bill appears to us to raise a real prospect that a judge or other judicial officer will refuse to sit to hear applications under it. The drafters must have had something like this in mind in relation to the original draft when they provided that applications for a control order could be made to a judge in his/her personal capacity.

The problem about this is that if a judge is not sitting in a judicial capacity then he/she is not sitting as a judge at all and the proposal for so-called judicial review is illusory. Also, it may well be that the performance of such a role is incompatible with his/her role as a judge.[22] Further, there is the risk that the judges who would volunteer to carry out this work will not be or will not be perceived by the community to be representative of the judiciary as a whole. This invites concerns about bias and the erosion of public confidence.

Another concept that has been introduced is the use of retired judges. Again this is an illusion of judicial involvement. Retired judges are just that and since they would have to be volunteers, it is likely that they would be unrepresentative of even the retired judiciary and attract the same concerns we have raised in respect of serving judges. We expect that few will wish to have any part of such a process.

In relation to detention orders the Bill now provides for a list of people including sitting Federal judges, State and Territory judges and retired judges and others whom the Attorney-General may appoint with their consent. In our view this does nothing to cure the problem and may if anything exacerbate it. . It is true that an appeal now lies to the Administrative Appeals Tribunal but this is not judicial review in any event. The right of review under the ADJR act

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[21] The Hon Justice Michael Kirby, *Independence of the Judiciary – Basic Principles, New Challenges*; International Bar Association, Human Rights Institute, Hong Kong, 12 – 14 June 1998, accessed at http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_abahk.htm.

has been eliminated, thus eliminating the only real judicial review. Further there is no obligation on the issuing authority to give reasons but merely to state grounds. This is the antithesis of a judicial proceeding

On the other hand, in relation to control orders jurisdiction is given to a court, including the Federal and Family Courts and the Federal Magistrates Court. It is thus not a matter of judges acting as volunteers and cases are presumably simply assigned to judges or judicial officers in the usual fashion. What would then be the situation if a judge or magistrate refused to hear such a matter on the basis that the legislation under which the application was made was unlawful? Presumably the Attorney-General would seek a prerogative writ such as mandamus requiring the judge to hear the application. That then would eventually go to the High Court of Australia but in the meantime, what would be the position of this so called urgent legislation? What also would be the implications for the independence of the judiciary?

We very much doubt that the proponents of the legislation have properly thought this through and the haste that has accompanied it makes this very likely.

What are the Relevant International Instruments?

We submit that the International Covenant on Civil and Political Rights ('ICCPR') and CROC are the principally relevant international treaties to this Inquiry.

The ICCPR was adopted by the United Nations in 1966 and entered into force for Australia on 13 August 1980. Pursuant to s.3(1) of the HREOC Act. it is a *"relevant international instrument"* for the purposes of defining *"human rights"*[23]. It is Schedule 2 of that Act.

Australia signed the CROC on 22 August 1990 and ratified it on 17 December 1990. The CROC came into force on 16 January 1991. Ratification was preceded by a detailed process of consultation with State and Territory governments.

[22] *Grollo v Palmer* (1995) 184 CLR 348 (High Court of Australia).

> *Negotiations conducted by the [Standing Committee if Attorneys-General] resulted in unanimous agreement by Australian Governments to ratification of the Convention.*[24]

Subsequent to ratification, on 13 January 1993, the then Attorney-General made a declaration pursuant to s.47(1) of the HREOC Act ("s.47(1) declaration") that the CROC is "an international instrument relating to human rights and freedoms for the purposes of [the HREOC Act]". The effect of the s.47(1) declaration was that the CROC became a *"relevant international instrument"* for the purposes of defining *"human rights"*, pursuant to s.3(1) of the HREOC Act, relevantly equal to the ICCPR which does appear as a Schedule to that Act.[25]

Importantly as the High Court of Australia in *Teoh's case* has noted:[26]

> *ratification of an international treaty is not be dismissed as a merely platitudinous or ineffectual act particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative bodies dealing with basic human rights affecting the family and children.*

Moreover under international law, the Vienna Convention on the Law of Treaties demands that:

> *Every treaty in force is binding upon the parties to it and must be performed by them in good faith* (Article 26)

and that:

> *A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty* (Article 27)

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[23] Section 3(1) states *""relevant international instrument" means an international instrument in respect of which a declaration under section 47 is in force."*

[24] Human Rights and Equal Opportunity Commission, *Submission to the Inquiry by the Joint Standing Committee on Treaties Into the Status of the United Nations Convention on the Rights of the Child*, July 1997 p.9.

[25] The 1975 Declaration of the Rights of the Child appears as Schedule 3 to the HREOC Act. It is not a ratified treaty like the CROC.

[26] *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 at par 34.

The fact that the CROC does not appear as a Schedule to the HREOC Act is of no importance. Like the CROC, there is no schedule to the HREOC Act containing Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief. That is because the Declaration, like the CROC was given recognition by the s.47(1) declaration process.

The s.47(1) declaration as to the CROC had effect from 13 January, 1993. Importantly, attempts were subsequently made in each House of Parliament pursuant to s.47(3) of the HREOC Act to disallow the Minister's declaration.[27] Those attempts were defeated. Thus, although ratification of the CROC was an act of the Executive, its incorporation as a declared instrument was the subject of a democratic vote by the Commonwealth Parliament.

We submit that regard should also be had to the three sets of Rules set out in par. 5.48 of the following quote from the majority report of the1999 Inquiry:[28]

> *Other instruments*
>
> *5.47 The basic principles set out in the ICCPR and CROC have been significantly elaborated upon through international consultation. Standards have been developed and adopted by the General Assembly. These standards have been adopted by the Committee on the Rights of the Child[29] as elaborating upon the provisions in the CROC. Although not having the force of international law:*
>
> > *… they are highly authoritative and persuasive, especially in this country which has been a leading participant in their drafting and a sponsor at the General Assembly stage.[30]*
>
> *5.48 The three most relevant standards developed to date are:*
>
> - *the Beijing Rules, the UN Standard Minimum Rules for the Administration of Juvenile Justice adopted by the UN General Assembly in 1985;*

[27] See *House of Representatives Hansard* 1 September, 1993, pp.691-701*; Senate Hansard* 30 September, 1993 pp.1473-98 and 1595-8; 5 October pp.1682-85.
[28] Footnotes in the original. They were numbered 53 to 56 in the original.
[29] *"The Committee was established under article 43 of the CROC."*
[30] *"Anne Bonney, Background to Mandatory Sentencing of Juvenile Offenders: A Northern Territory Perspective, Darwin, October 1996, p. 109."*

- *the Riyadh Guidelines, the UN Guidelines for the Prevention of Juvenile Delinquency adopted by the UN General Assembly in 1990;*[31] *and*
- *the Tokyo Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty, adopted by the UN General Assembly in 1990.*[32]

5.49 The level of Australia's commitment to these standards is evidenced in a statement made on behalf of the Australian delegation to the Fifty-Second Session of the Commission on Human Rights in Geneva on 4 April 1996. Referring to the Secretary-General's report entitled Human Rights in the Administration of Justice, in particular of Children and Juveniles in Detention, it was stated:

> *The report urges states to take into account in their national legislation and practice, and to disseminate widely, the United Nations standard minimum rules for the administration of juvenile justice (the Beijing rules), the United Nations guidelines for the prevention of juvenile delinquency (the Riyadh guidelines) and the United Nations guidelines for the protection of juveniles deprived of their liberty. The report also urged states to take appropriate steps to ensure that compliance with the principle that depriving children and juveniles of their liberty should only be used as a measure of last resort.*
>
> *Australia welcomes these recommendations and encourages states to adhere to these fundamental rules in dealing with children and juveniles in detention within their jurisdiction. We acknowledge that there are issues that Australia itself must address in this context - and we are committed to doing so.*

At par 5.50, the Committee recorded that it adopted the approach of *"not[ing] the evidence it had received in relation to both the CROC and these other instruments [listed in par 5.48]"*. The Government Senators' report of the 1999 Inquiry did not comment on this issue.[33] **We submit** that the Committee in its current Inquiry should apply the same approach. Our submissions identify what we consider to be breaches of those Rules.

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[31] *"The Riyadh Guidelines seek to prevent juvenile delinquency by reinforcing the integrity of young people by reference to the family first and to the social net second, by the cooperation of society economic, social and cultural levels, and by policies to divert young people away from the justice system."*

[32] *The Rules for the Protection of Juveniles for their Liberty enunciate the fundamental principle that the juvenile justice system should uphold the rights and safety and promote the physical and mental wellbeing of juveniles. In particular, the rules require that imprisonment should be imposed upon juveniles (under the age of 18 years) as a last resort and only for the minimum necessary period. Further, the length of the sanctioned should be determined by judicial authority, without precluding the possibility of early release (Rule 2)."*

[33] In this regard we note the Government Senators' comment at par 1.3 of their report:

What are the Relevant Articles and Rules?

In Appendix A to this submission, we set what we consider to be the relevant international obligations stipulated by the relevant international instrument. We do not claim that the Bill breaches each of these. They are intended to provide a glossary of relevant Article and Riles to which the Committee Members can refer when the Article or Rule is mentioned in the text of this submission which explains our reasons for alleging particular breaches.

How Should the Committee Assess Whether a Provision is in Breach of International Obligations?

The majority report of the 1999 Inquiry report did not explain its approach to this question. The Government Senators' report stated:

> *6.6 In determining whether any of these provisions have been breached, the following general principles of treaty interpretation are appropriate:*
>
> *a) a treaty is to be interpreted in good faith, in accordance with the ordinary meaning of the words in their context and in the context of the treaty as a whole and in light of the object and purpose of the treaty;*
>
> *b) States are accorded a 'measure of appreciation' in their implementation of international obligations. This is the degree of latitude in how treaty obligations are interpreted and applied.*
>
> *6.7 The matters that are taken into account in assessing the breadth of the measure of appreciation will depend on a number of factors such as:*
>
> - *the specificity of the treaty language;*
> - *State practice;*
> - *the significance of the rights involved;*
> - *the object or purpose of the treaty;*

"Government senators on the Committee find themselves in agreement with certain aspects of the majority report. These comments will address the terms of reference of the inquiry and present further conclusions and recommendations.".

- *whether the treaty points to balancing considerations.*

We accept that this approach is largely consistent with the principles for the interpretation of international human rights instruments. However we stress that the exercise of the margin of appreciation is not to be used to undermine the objective of the right in question or destroy its effective enjoyment. States cannot become the sole arbiters as to the nature and scope of their obligations under international law and, as the European Court of Human Rights explained in the *Handyside Case*,[34] the doctrine does not give *"states an unlimited power of appreciation"*. Thus it remains for the bodies responsible for monitoring Australia's obligations under the ICCPR and CRC, namely the Human Rights Committee and Committee on the Rights of the Child, to give the final ruling on whether the alleged margin of appreciation is reconcilable with Australia's obligations under these treaties.

Which Features of the Bill Breach Which Specific Articles and Rules?

In the first part of this section we identify overarching concerns about the Bill's failure to accord with international human rights obligations.

The second part of this section of this submission we summarise our understanding of the relevant portion of the bill drawing attention to problematic drafting features that we ask the Committee to consider. We then identify the some specific aspects of the Bill which give rise to breach of international obligations for people (including children) upon whom the Bill directly impacts. We identify the specific Article or Rule that we submit is breached and refer the reader to Appendix A which quotes the content of that Article or Breach.

Given the limited time available for compiling this submission to meet the deadline it has only been possible to highlight only some of the main arguments concerning the Bill. We hope to have the opportunity to elaborate these arguments in a supplementary submission and an appearance before the Committee.

[34] *Handyside v UK* (1976) 1 EHRR 737 at pars 48-49.

Overarching Concerns

We would ask the Committee to bear in mind four broad criticisms of the Bill as it considers our specific submissions:

A general complaint is that the Bill contains no reference to the principle that restrictions on rights should be read in accordance with Australia's treaty obligations. In order to conform with those obligations, must include express reference to the ICCPR and the CRC at a minimum.

A second structural failure is that none of the Bill's proposed factors to guide the exercise of power or decision-making are specific to children. For these purposes they are treated the same as adults when international obligations found in both the ICCPR and CROC require a different approach that should be spelt out in the Bill.

The third overall characteristic of the Bill is its attempt to impose orders in the absence of proving a criminal offence and seeking to use satisfaction to the civil standard of proof as the sufficient to found the making of orders. Examination of the nature of the orders and how they restrict personal liberty indicates an international law obligation to have the international safeguards applicable to criminal matters.

A fourth deficiency in the Bill is that where there is provision for a person to challenge an order the Bill, while referring to legal representation, does not specifically provide that he/she will have legal aid for legal representation. Without such aid, most will have no capacity to exercise this right.

Finally, we refer to the observations made in the Introduction to this submission concerning the expected role of the judiciary. In our submission it is incompatible with local as well as international standards.

Preventative Detention and Prohibited Contact Orders:

The relevant provisions of the Bill

Division 105 of the Bill introduces a preventative detention regime that applies to adults and older children aged 16 and 17 years old. Under the Commonwealth Bill, preventative detention may last no longer than 48 hours in total but may extend to 14 days through orders made under State and Territory laws. The time maximums are the same for adults and 16 and 17 year olds.

An initial preventative detention order may last no more than 24 hours, including by extensions of the initial order. The "*issuing authority"* is a senior AFP member – s.100.1(1); s.105.8).

A continued detention order can result in the person having been detained up to 48 hours, including the time spent under initial preventative detention orders.(s.105.12(3) in combination with s.105(12)(5)). An issuing authority is as set out in s.105.2 which states:

> ***105.2 Issuing authorities for continued preventative detention orders***
> *(1) The Minister may, by writing, appoint as an issuing authority for continued preventative detention orders:*
> *(a) a person who is a judge of a State or Territory Supreme Court; or*
> *(b) a person who is a Judge; or*
> *(c) a person who is a Federal Magistrate; or*
> *(d) a person who:*
> *(i) has served as a judge in one or more superior courts for a period of 5 years; and*
> *(ii) no longer holds a commission as a judge of a superior court; or*
> *(e) a person who:*
> *(i) holds an appointment to the Administrative AppealsTribunal as President or Deputy President; and*
> *(ii) is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory; and*
> *(iii) has been enrolled for at least 5 years.*
> *(2) The Minister must not appoint a person unless:*
> *(a) the person has, by writing, consented to being appointed; and*

(b) the consent is in force.

Section 105.5(1) prohibits an application or order for preventative detention to be made in relation to a person under the age of 16 years. The application for an initial preventative detention order (s.105.7(2)(d)) requires the applicant AFP Officer to set out any information about the person's age in the material submitted to the issuing authority.

The information known as to age must also be included in any application to a for a continued preventative detention order made to an issuing authority (s.105.11(2)(d)) of the type provided for in s.105.2.

The requirement to provide known information as to age is, however, absent from s.105.7(10) which concerns an application to the issuing authority for an extension of the initial preventative detention order. Although it is not expressly stated, we understand "*issuing authority"* means a senior AFP officer.

The basis for applying for and making initial and continued preventative detention orders is contained in s.105.4(4)-(6) which state:

(4) A person meets the requirements of this subsection if the person is satisfied that:
(a) there are reasonable grounds to suspect that the subject:
(i) will engage in a terrorist act; or
(ii) possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; or
(iii) has done an act in preparation for, or planning, a terrorist act; and
(b) making the order would substantially assist in preventing a terrorist act occurring; and
(c) detaining the subject for the period for which the person is to be detained under the order is reasonably necessary for the
purpose referred to in paragraph (b).
(5) A terrorist act referred to in subsection (4):
(a) must be one that is imminent; and
(b) must be one that is expected to occur, in any event, at some time in the next 14 days.
(6) A person meets the requirements of this subsection if the person is satisfied that:
(a) a terrorist act has occurred within the last 28 days; and
(b) it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act; and

(c) detaining the subject for the period for which the person is tobe detained under the order is reasonably necessary for the purpose referred to in paragraph (b).

A person subject to a preventative detention order may be frisk searched (s.105.23), and an ordrinary search (s.105.24). **We ask the Committee to note** that there is no requirement as to the sex of the person conducting these searches. Having regard to cultural considerations, the Bill should provide that searches are to be conducted by a person of the same sex as the person.

Section 105.32 requires that the person be given a copy of the order and a summary of the grounds on which the order is made and for the police to arrange for these documents to be provided to the person's lawyer. The *"summary of grounds"* may be edited to exclude information that *"is likely to prejudice national security"* (s.105.32(2)).

The Bill does not refer to reasons for the decision to issue the order and accordingly there is no provision requiring such reasons to be provided to the person.

As to the treatment of persons under preventative detention, the Bill provides:

> **105.33 Humane treatment of person being detained**
> A person being taken into custody, or being detained, under a preventative detention order:
> (a) must be treated with humanity and with respect for human dignity; and
> (b) must not be subjected to cruel, inhuman or degrading treatment;
> by anyone exercising authority under the order or implementing or enforcing the order.

We ask the Committee to note that the Bill gives no defintional guidance to the quality of the standards of treatment in paragraphs a) and b). The quality of *"age-appropriate"* treatment is missing from the section

While preventatve detention is being imposed under the order, an adult person has no entitlement to contact any person and may be prevented from contacting another person (s.105.34). Section 105.35 sets out who the person is entitled to contact "*solely for the*

purposes of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being." The person is entitled to contact the Ombudsman (s.105.36) and his/her lawyer for specified purposes (s.105.37). All contact must be monitored (s.105.38) and save for contact with the Ombdsman, the entitlement to contact is subject to whether the person is prohibited by an order from contacting those people.

There are a few special provisions concerning 16 and 17 year olds and persons who are *"incapable of managing their own affairs"*.

If subject to a preventative detention order, they can be fingerprinted just like adults in general but other *"identification material"* can only be taken if ordered by a Federal Magistrate, or with both parental/guardian consent and their own consent (s. 105.43).

Section 105.39 grants additional entitlements to monitored contact with parents or guardians. The Bill specifies that the contact can occur for 2 hours each day but **we ask the Committee to note** that it is not specified (see s.105.39(3)(a) and (5)(a)) whether the Bill envisages 2 hours with each or overall. Longer contact can be a specific part of the detention order.

Unlike others under preventative detention, it is not be an offence for those covered by s.105.39 to disclose they are under preventative detention to their parent(s) guardian(s) (s.105.39(3)). However, s.105.41, which deals with disclosure offences states in relevant part:

> *(3) A person (the **parent/guardian**) commits an offence if:*
> *(a) a person being detained under a preventative detention order (the **detainee**) has contact with the parent/guardian under section 105.39; and*
> *(b) the parent/guardian discloses to another person:*
> *(i) the fact that a preventative detention order has been made in relation to the detainee; or*
> *(ii) the fact that the detainee is being detained; or*
> *(iii) the period for which the detainee is being detained; or*
> *(iv) any information that the detainee gives the parent/guardian in the course of the contact; and*
> *(c) the other person is not a person with whom the detainee has also had contact under section 105.39 while being detained under the order; and*
> *(d) the disclosure occurs while the detainee is being detained under the order; …*

The wording of par (c) indicates to us that it would be an offence for a parent who has had contact with a detained child to tell a parent who has not yet had contact with that detained child. The applicable penalty is imprisonment of up to 5 years (s. 105.41(3)). We were of the understanding that such communication between parents/guardians was to be exempt from the sanctions and **we ask the Committee to note** the current drafting does not achieve this end.

Section 105.15 permits an application for a prohibited contact order to made in conjunction with an application for a preventative detention order. Section 105.16 permits such an application and order to be made in respect of a person already the subject of a preventative detention order.

The Explanatory Memorandum to the Bill states:

> *If an application is made at the time of applying for an initial preventative detention order, the application must be made to the Commissioner or a Deputy Commissioner of the AFP, or an AFP member of, or above, the rank of Superintendent. If an application is made at the time of applying for a continued preventative detention order, the application must be made to an issuing authority (see s.105.2).*
>
> *New subsection 105.15(4)* [and 105.16(4)] *authorises the relevant issuing authority to make the prohibited contact order if the preventative detention order is to be made and the issuing authority is satisfied that making the prohibited contact order will assist in achieving the objectives of the preventative detention order. The prohibited contact order prohibits the subject, while being detained under the preventative detention order, from contacting a person specified in the prohibited contact order. The note to new subsection (2) indicates that new subsections 105.4(4) and (6) set out the objectives of preventative detention orders.*

We ask the Committee to note that section 105.17 provides for the revocation of a prohibited contact order but does not include a mechanism for application by the subject of the order.

Our Submission as to Breaches

- *The criteria used in determining whether to make a preventative detention order (both initial and continuing) and a prohibited contact order*

Completely absent from this framework is any requirement that the issuing authority have any regard to the international obligations assumed by and binding on Australia with respect to the treatment of adults or young people between aged 16 or 17 under international law. **We submit** that this constitutes a failure to fulfil international obligations.

Importantly the Human Rights Committee in its *General Comment No 8* has explained in respect of ICCPR Article 9 that:

> *...if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5). And if, in addition, criminal charges are brought in such cases, the full protection of article 9 (2) and (3), as well as article 14, must also be granted*[35]

Thus **we submit** the Committee should proceed on the argument that for the purposes of international law it does not matter whether the detention is punitive or preventative – the same obligations apply to the Bill – and so do all of the ICCPR obligations concerning criminal charges. One particular consequence of this approach is that the matters in s.105.4(4)-(6) must be proven to the criminal standard of beyond reasonable doubt.

With respect to 16 and 17 year olds, there is in any event and particularly given the General Comment, the requirement to meet the guarantee in ICCPR Article 14(4) that the procedure under the Bill takes account of the child's age. **We submit** the Bill does not fulfil this requirement as the same criteria for making an order apply as for adults (s.105.4(4)-(6)) . The fact that young people under preventative detention orders have additional contact rights under the Bill is not a matter of *"procedure"*.

[35] Human Rights Committee, *General Comment 8*, Article 9 (Sixteenth session, 1982), *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI\GEN\1\Rev.1 at 8 (1994) at par 4.

We submit that the different procedure for children must contain an express requirement in the Bill that the preventative detention order must be a measure of last resort for a child (CROC Article 37(b) and that the issuing authority must give consideration to the best interests of a young person subject to an application for such an order (CROC Article 3; Beijing Rules 17.1, 19.1; Tokyo Rules).

The current omissions reveal a failure to first identify and then demand that the issuing authority undertake a careful consideration of the competing interests when an application for a preventative detention order is made. As such the very criteria for the issue of a preventative detention order fail to strike an appropriate balance between the competing interests at play. Indeed far from recognising that Australia as a party to the CROC carries a heavy onus if it wishes to displace the presumption in favour of liberty for children created under Article 37 (b), the present criteria are completely silent with respect to the obligation to protect the rights of children.

The Article 37(b) stipulation imposes an extraordinarily high standard on a State if it seeks to justify the detention of a child in any circumstances including preventative detention. Indeed the obligation that detention must only be a measure of last resort creates an overwhelming presumption against deprivation of liberty which places a heavy onus on States if it is to be displaced. This matter of onus reinforces our submission that the criminal standard of proof rather than balance of probabilities would be more appropriate in determining whether an order should be issued.

Also relevant and missing from the bill is any requirement that an application for a preventative detention order consider the background, circumstances and impact of such an order on the child who is the subject of the application. Such an omisision fails to allow the issuing authority to strike an appropriate balance between the particular circumstances of the child and the alleged need to protect national security. It is therefore reveals a patent lack of awareness of Australia's obligation under CROC Article 3(1) that the best interests of a child must be a primary consideration in any matter concerning the child and the requirement under

Beijing Rule 16.1 which requires that a decision-maker receive a report on the child's background and the circumstances in which he/she has been living before a final disposition is made. **We submit** that a continued preventative detention order is effectively a final disposition in the scheme of the Bill.

- *The personal capacity in which a judge or federal magistrate makes a continuing preventative detention order.*

ICCPR Article 14(3) creates the obligation for a person to *"be brought promptly before a judge or other officer authorized by law to exercise judicial power"* and Article 14(4) additionally requires that *"[a]nyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court"* (our emphasis).

We submit that for both adults and older children, the issuing authority arrangements for preventative detention do not comply with these entitlements and that the Explanatory Memorandum in its comment on s.105.18(2) admits that the application is not before a *"court"* or a person exercising *"judicial power"*:

> *New subsection 105.18(2) provides that making, revoking, extending or further extending a continued preventative detention order, or making or revoking a prohibited contact order, are powers conferred in a personal capacity and not as a court or a member of a court. This new subsection has been included to ensure that it is clear that the function of issuing authority is conferred on judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal in their personal capacity. It is clear that a former judge who is an issuing authority is exercising powers conferred by the Division in a personal capacity and not as a court or a member of a court, and it is therefore unnecessary to specifically refer to former judges in subsection 105.18(2).*

If a judge is not sitting in a judicial capacity then he/she is not sitting as a judge at all and the proposal for so-called judicial review is illusory. Also, it may well be that the performance of such a role is incompatible with his/her role as a judge.[36] Further, there is the risk that the judges who would volunteer to carry out this work will not be or will not be perceived by the community to be representative of the judiciary as a whole. This invites concerns about bias

and the erosion of public confidence and would seem to breach two key principles of the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (As Amended at Manila, 28 August 1997): Firstly, Principle 7: "*Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities*"; secondly, Principle 35: *'The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court".*

If some judges would not volunteer for the appointment under s.105(2), **we submit** the role of the judiciary as a whole, and those who have volunteered in particular is impugned.

Section 105.2 introduces the use of retired judges. Again this is an illusion of judicial involvement and they do not constitute a court nor can they exercise judicial power. Retired judges are just that and since they would have to be volunteers, it is likely that they would be unrepresentative of even the retired judiciary and attract the same concerns raised in respect of serving judges.

- *Determining who is a child*

We submit that s.105.7(10) should contain the same requirement of stated information as to the person's age. If the requirement to provide such information is intended as a safeguard, it should be present in all applications.

Section 105.5(2) puts the onus on a detained child to establish on reasonable grounds to the satisfaction of a police officer detaining him/her, that he/she is under 16 years of age. **We submit** that the onus should be the opposite – that before an initial preventative order may be applied for, the police officer should be obliged to establish that the child has attained the age of 16 years and is thus liable to preventative detention. We contend that framing the requirement in the way we suggest is consistent with the Bill's intention to avoid the preventative detention of under 16 year olds. We further contend that the current imposition

[36] *Grollo v Palmer* (1995) 184 CLR 348 (High Court of Australia).

of an onus upon the child is inconsistent with Article 16, 37(b) and 40(1) Rules 10.3, 17.1 (b)and (c) Beijing Rules, Rule 3.3 Tokyo Rules, and Paragraph 12 of the Economic and Social Council Resolution 1997/30 on Adminstration of Juvenile Justice.

- *Where will the child be detained?*

We submit that the Bill requires a provision that specifies that 16 and 17 year olds must be detained separately from adults unless it would be contrary to their best interests. This is required by ICCPR Article 10 and CROC Article 37(c). We are aware that Australia has a reservation on CROC Article 37(c) however we draw attention to the following comment by the Committee on the Rights of the Child in its September 2005 Concluding Observations in respect of Australia:[37]

> *Reservations*
> *7. The Committee is of the opinion that the State party's reservation to article 37(c) is unnecessary since there appears to be no contradiction between the logicbehind it and the provisions of Article 37 (c) of the Convention. In fact, theconcerns expressed by the State party in its reservation are well taken care ofby article 37 (c) which provides that every child deprived of liberty shall beseparated from adults "unless it is considered in the best interests of the childnot to do so" and that the child "shall have the right to maintain contact withhis or her family".*

Thus, a presumption of separate detention should be specified in the Bill.

Control Orders

The relevant provisions of the Bill

A control order cannot be requested in respect of a person under the age of 16 years (s.104.28). Any request to the Attorney-General for consent to apply for a control order requires the inclusion of the known information about a person's age (s.104.2(3)(e). The application may then be made to an "*issuing court*".

[37] CRC/C/15/Add.268 available at www.dci-au.org/news.

Section 104.5(1)(e) indicates that the hearing of the application is *ex parte* – without the subject of the application or any representative involved. Section 104.12(1)(a) and (b) requires service of the order on the subject of the application and order together with a summary of the grounds upon which the order has been made. The person's lawyer may receive no more than these documents (s.104.13).

Section 104.4(1) sets out the conditions that must be met before an issuing court may make an interim control order with par (c) specifyiing

> *The court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.*

Section 104.4(2) sets out the matters the decision-maker must take into account.

> *In determining whether each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, the court must take into account the impact of the obligation, prohibition or restriction on the person's circumstances (including the person's financial and personal circumstances).*

Section 104.5(3) lists the types of obligations, prohibitions and restrictions that may be imposed. These are:

> *"(a) a prohibition or restriction on the person being at specified areas or places;*
> *(b) a prohibition or restriction on the person leaving Australia;*
> *(c) a requirement that the person remain at specified premises between specified times each day, or on specified days;*
> *(d) a requirement that the person wear a tracking device;*
> *(e) a prohibition or restriction on the person communicating or associating with specified individuals;*
> *(f) a prohibition or restriction on the person accessing or using specified forms of telecommunications or other technology (including the Internet);*
> *(g) a prohibition or restriction on the person possessing or using specified articles or substances;*
> *(h) prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);*

(i) a requirement that the person report to specified persons at specified times and places;
(j) a requirement that the person allow himself or herself to be photographed;
(k) a requirement that the person allow impressions of his or her fingerprints to be taken; and
(l) a requirement that the person participate in specified counselling or education."

It is not possible under the legislation to impose an obligation, prohibition or restriction that is not of a type listed.

Section 104.22(1) prohibits the use of a photograph or an impression of fingerprints, taken as a requirement of a control order for any purpose other than ensuring compliance with that control order. Under subsection 104.22(2), if 12 months have elapsed after the control order ceases to be in force and proceedings in respect of the control order or the treatment of the person have not been brought or have been brought and discontinued or completed, the photograph or impression must be destroyed as soon as practicable after the end of this period.

The only explicit difference between the order that may be made for 16 and 17 year olds as compared with those aged 18 and over is that the order must not total more than 3 months (s. 104.5(1)) whereas for adults it may run for 12 months. Successive control orders may be made for both adults and older children (s. 104.5(2)). **We ask the Committee to note** that there is no limit to the number of successive orders that may be made or upper limit of the total time while subject to such orders in the Bill, either for children or for adults.

There is then a hearing to confirm the interim control order before the issuing court as set out in s. 104.14. **We ask the Committee to note** that s.104.4(e) requires the interim order to specify a date on which a confirmation hearing is held but thaty the Bill does not specify any maximum period in which this must happen.

That section does not set out the factors to which the issuing court must have regard. Section 104.14(1) permits evidence and submissions to be given to the issuing court and s.104.14(3) requires the court to consider the original request for the interim control order and any evidence or submissions presented at the confirmation hearing.

Section 104.18 specifies the right of a person subject to a confirmed control order to seek revocation or variation of the order. However there is no provision refering to the availability of legal aid to persons who are the subject of the order. This would usualy be particularly relevant to young people. In its absence, many of these rights to challenge the basis for making the order would be largely illusory.

Section 104.23 enables the AFP Commissioner to cause an application to add restrictions, obligations or prohibitions to a control order. Such an application is with notice to the participation of the subject of the order (s.104.23(3)and (4)). The issuing court may make such variations if the court is satisfied of the same matters required by s.104.4(1).

Our Submission as to Breaches

- *The criteria used in determining whether to make a control order (both interim and confirmed)*

We submit that the Bill breaches international obligations to all who may be subject to control orders by its failure to require the issuing court to have regard to their human rights. The prohibitions, obligations and restrictions listed in 104.5(3) directly concern an individual's rights under ICCPR Articles 9, 12, 14, 17, 18, 19. Others may be breached depending on the circumstances of the case and the order made.

An issuing court should therefore be expressly required to have regard to the ICCPR and also be expressly required to apply the requirement that any infringement of these rights be not just *"reasonably necessary, and reasonably appropriate and adapted"* (s.104(1) and (2)) but also *"proportionate"*.

In respect of 16 and 17 year olds there are additional rights guarantees that an issuing court must be obliged to consider in order to fulfil the international obligation to treat children differently to adults in the criminal justice system (see ICCPR Article 14(1)). These

additional guarantees are: CROC Articles 3, 37 and 40, Beijing Rules 16.1, 17.1, Tokyo Rule 14.6.

Of these, the most universally accepted is the requirement in CROCArticle 3 that the best interests of a child be *"a primary consideration"*. We find it hard to believe that the Government would want best interests matters excluded from the process of deciding how a young life will be restricted for up to three months on a control order. We would also suggest that such enforced blindness to best interests would be anathema to judges and magistrates required to make such an order.

We would finally observe that applications for the interim control order which results in an *ex parte* hearing are not required by the Bill to be on oath. **We submit** this should be an express requirement under the legislation.

- *Standard of proof*

The restrictions, obligations and prohibitions contained in s, 104.5(3) are severe and comparable with the kind found in sanctions for serious criminal offences – for example home detention or the wearing of a tracking device for up to 12 months in the case of adults or 3 months in the case of older children. In such circumstances, and having regard to our discussion above of the Human Rights Committee *General Comment No. 8,* **we submit** that the correct interpretation of international law is that the proceedings should be characterised as crininal proceedings, and accordingly, the criminal standard of proof beyond reasonable doubt should apply and the ICCPR's Article 14(3) requirements should apply too.

Comments on the specific "real-life" context for the bill (provided by CMYI and Youthlaw)

A key context consideration we ask the Committee to bear in mind is that children and young people with legitimate grievances do not use complaints mechanisms.[38] By referring to *"young people"* we are deliberately including those in the roughly 18 to 25 year old age bracket for whom the Centre for Multicultural Youth Issues ('CMYI') and Youthlaw adovcate.

In preparing for their contribution to this submission, CMYI and Youthlaw contacted several other community based organisations which work with young people, particularly culturally and linguistically diverse (CALD) young people who will be most impacted by the legislation. Although these consultations were limited due to the short timeframes imposed by the inquiry, significant issues have been raised which need to be addressed as part of this inquiry. Some of these issues relate specifically to provisions of the Bill, notably stop, search and seizure powers, control orders and detention orders. However, many of the concerns relate to the indirect impact of the legislation.

Laws do not operate in a vacuum and the broader context in which these laws operate must be considered. Community organizations are particularly concerned about the social impacts of the legislation including increased fear and racial discrimination and the subsequent alienation and potential disengagement of young people.

Targeting young people

[38] Youth Affairs Council of Victoria (2005) *YACVic's response to the Human Rights Consultation Committee Discussion Paper*; Melbourne, Youth Affairs Council of Victoria; Dr Lyn Hillier (2005) 'Writing themselves in Again', Australian Research Centre in Sex Health and Society, Latrobe University; Youth Affairs Council of Victoria (2002) *Wanna Whinge? Supporting young people to use complaint systems*, Melbourne, Youth Affairs Council of Victoria; Louis Schetzer and Judith Henderson (2003) *Access to Justice and Legal Needs: a project to identify legal needs, pathways and barriers for disadvantaged people in NSW*; Sydney : Law and Justice Foundation of NSW.

We are concerned that the legislation will increase state intervention into young people's lives. The issue of CALD young people being targeted by police is well documented and continues to be ongoing issue. Young people already voice concerns about being indiscriminately targeted by police and their relationship with police is often strained.[39] There are many strategies in place to promote better relationships between police and young people (for example, full time Multicultural Liaison Officers in Victoria). However, our organisations continue to hear of young people, particularly young men, feeling harassed by police and there is concern that this legislation could lead to further tensions between police and young people if there is not adequate oversight of the use of these powers.

Of particular concern are the proposed police powers to stop, question and search people in relation to terrorist acts introduced by Schedule 5 of the Bill..

We are concerned that young people may be disproportionately affected by these powers, particularly given they are significant users of and highly visible in public space. When in groups, their presence can often attract suspicion and fear, particularly when perceived as troublemakers.[40] We do not see sufficient safeguards to ensure these powers are not used inappropriately to target particularly groups of young people.

In Victoria, legislation provides that police may stop and search young people regarding suspected volatile substance use[41] and weapon carriage[42] among other reasons. These laws have been in place for only a limited time and so there is little data available about the use of these powers. However anecdotally, Youthlaw has been contacted by young people who have

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39 National Police Ethnic Advisory Bureau (1995) *The first national summit on police and ethnic youth relations, Summit Report*; Western Young People's Independent Network & Equal Opportunity Commission Victoria (2003) *No Space for Racism: Young people's voices and reconditions*; Sercombe, H. (1999) 'Media representations, policing interventions: How language and discourse shape the policing of young people in public space', Paper presented to the Youth in the Plural City Conference Rome May 24-28 1999; Guerra,C., White,R., Perrone,S., Lampugnani,R. 2001 'Ethnic Youth Gangs In Australia – Do They Exist?' Brief Overview of the Main Findings, The Australian Institute of Criminology, pp.2-8.

40 Panelli, R., Nairn, K., Atwool, N. & McCormack, J. (2002) 'Hanging out: Print media constructions of young people in public space', *Youth Studies Australia*, Vol 21 No 4, p40; White, R *No Space of their own: Young People and Social Control in Australia*, Cambridge: Cambridge University Press.
Poynting, S Noble G, Tabar,P & Collins J. (2004) *Bin Laden in the Suburbs: criminalising the Arab Other*. Sydney Institute of Criminology.

41 *The Drugs, Poisons and Controlled Substances (Volatile Substances) Act* 2003 (Vic).

been stopped for suspicion of carrying weapons, for example, with little evidence of the purpose of this search. This is not only inappropriate targeting of young people but can lead to unintended consequences where there young person challenges the stop and search, and conflict with the police leads to subsequent conduct related charges being laid, such as resist arrest, offensive language and assault police.

The Bill provides few safeguards as to how these powers are to be exercised. The Bill states that police must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search and a person must not be detained for longer than is reasonably necessary for a search to be conducted. **We submit** that additional safeguards are necessary to ensure these powers are not used inappropriately nor target particular individuals or groups. For example, police should have to provide an explanation for why the person is being stopped/searched, record the search and provide a copy of this record to the person. These safeguards are in place in relation to the *Drugs, Poisons and Controlled Substances (Volatile Substances) Act* 2003 (Vic).

We draw the Committee's attention to the fact that in response to community concerns about the introduction of *The Volatile Substances Act*, a two year sunset clause was included with a review of the legislation to be undertaken in the meantime. The review is considering which young people are coming to the attention of police as a result of the legislation and whether the police are implementing the required protocols. This review is currently underway and public data is not yet available. However, community organisations do have a chance to feed in to this review and provide ongoing input to the Department. **We submit** the Committee should recommend an equivalent review in respect of the exercise of police powers under the Bill.

The concern that the proposed powers could be misused also relates to young people's lack of knowledge about the law and their rights, and the fact that young people are not inclined to make a complaint if their rights have been breached.

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[42] *Control of Weapons and Firearms Acts (Search Powers) Act* 2003.

Fear, discrimination and alienation

Of key concern to community organisations is the indirect impact of the legislation namely increasing fear and racial discrimination in the community and in turn further alienating and isolating young people. This parallels events after September 11. The increase in racial discrimination after September 11 was evidenced in a recent report published by the Human Rights and Equal Opportunity Commission.[43] The report details the disturbing rise in racial abuse, discrimination and violent attacks directed at members of Arab and Muslim communities following September 11. In the report, young people speak of feeling unsafe at school, in their neighborhoods and in public spaces because of the increase in racial discrimination. CMYI and Youthlaw, along with other community organisations, believe that the introduction of this legislation will have similar consequences. Following recent arrests of alleged terrorists in Sydney and Melbourne, one agency reported to us that 'backlash following yesterday's raids is already very powerful'. Key concerns in relation to this issue include:

- The impact on young people's social and mental health. When young people feel targeted and discriminated against, agencies report diminished self-esteem, an increase in aggressive, defensive and anti-social behavior, and increased expression of anger and violence. Young women tend to withdraw and drop out from school. Young men may become more emotionally charged and feel the whole world is against them. This sense of marginalization can further their disengagement from the wider community.

- Agencies are particularly concerned about young people dropping out of school, particularly as post-September 11, school often proved to be an unsafe space for CALD young people.[44] CMYI is concerned that it will receive an increase in referrals from CLD communities as young people disengage from school and their communities.

[43] Human Rights and Equal Opportunity Commission (2004) *Isma – Listen: National Consultations on eliminating prejudice against Arab and Muslim Australians.*

- Isolation. Parents fear that their children may be detained under the new laws and families are becoming increasingly insular and more protective of their children. Young people may not be allowed to participate in outside activities such as school or sport or meeting friends in public places.

These social effects patently curtail the right of children in CALD communities to enjoy the guarantees of the CROC.

Adolescent behaviours

Adolescence is a time of exploring new ideas, meeting new people and testing boundaries, and as a result young people are likely to be inadvertently caught up in these laws. Communities fear that young people could be investigated for possessing material, accessing internet sites, attending public forums etc that are in some ways linked to alleged terrorist activities or organisations even if there is no evidence that the person has directly engaged in terrorist-related behaviors. The extension of the laws to 16-18 years old increases the potential for young people to be disproportionately impacted by these laws.

Impact on community agencies

Agencies working with CLD young people have already reported increased calls for assistance. Following recent media about the proposed legislation and raids and arrests, agencies report being inundated with calls from people who are distressed and seeking support, an increase in demand for education about the laws from their communities, and reports of increased acts of racism towards clients. Particular mention was made of such conduct towards young women in Muslim dress. It was also reported that young men who fear racial targeting are more prone to only go into the public in groups which in fact in our

[44] Ibid page 57.

experience makes them more likely to attract police attention and the interaction problems this can bring.

Such increased demands puts pressure on agencies to provide counselling and support. Agencies are often not funded for crisis response or casework and are operating under tremendous pressure. There is also a concern that once the laws are introduced, agencies may not be able to adequately support families where there are limitations on information sharing (for example, prohibitions on revealing any information about a young person's detention) and this will limit the support families can received.

Implementation strategies

We submit it is vital that the introduction of legislation is accompanied by a comprehensive education campaign about the laws and resources for community organsiations to provide education to their communities. In addition to strategies targeting parents and adult family members, youth specific education is an important component of this. *Seen and Heard*[45] highlighted the barriers for young people accessing the legal system. Young people will require significant education about this legislation and access to appropriate and timely legal advice and information.

We also submit that the risk of school drop-out due to racist bullying must also be anticipated and addressed. In our experience, this is an area where schools need particular support in order to be approached for assistance and have the capacity, skills and knowledge to provide such help.

[45] Australian Law Reform Commission and Human Rights and Equal Opportunity Commission (1997) *Seen and heard: priority for children in the legal process*, Report No. 84.

Appendix 1 – List of Revelant Articles and Rules

ICCPR

Article 2 General comment on its implementation

1. Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

2. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

3. Each State Party to the present Covenant undertakes:

(a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted.

Article 4 General comment on its implementation

1 . In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their

other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.
2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.General comment on its implementation

Article 5
1. Nothing in the present Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.
2. There shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State Party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.

Article 7 General comment on its implementation
No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his free consent to medical or scientific experimentation.

Article 9 General comment on its implementation
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.

Article 10 General comment on its implementation
1. All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.
2.
(a) Accused persons shall, save in exceptional circumstances, be segregated from convicted persons and shall be subject to separate treatment appropriate to their status as unconvicted persons;
(b) Accused juvenile persons shall be separated from adults and brought as speedily as possible for adjudication. 3. The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation. Juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status.

Article 14 General comment on its implementation
1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal

established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.

3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:

(a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;

(b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;

(c) To be tried without undue delay;

(d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it;

(e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;

(f) To have the free assistance of an interpreter if he cannot understand or speak the language used in court;

(g) Not to be compelled to testify against himself or to confess guilt.

4. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.

5. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.

6. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a

new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
7. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

Article 16
Everyone shall have the right to recognition everywhere as a person before the law.

Article 17 General comment on its implementation
1. No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
2. Everyone has the right to the protection of the law against such interference or attacks.

Article 18 General comment on its implementation
1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others. 4. The States Parties to the present Covenant undertake to have respect for the liberty of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

Article 19 General comment on its implementation

1. Everyone shall have the right to hold opinions without interference.
2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others;
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 20 General comment on its implementation
1. Any propaganda for war shall be prohibited by law.
2. Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law.

Article 21
The right of peaceful assembly shall be recognized. No restrictions may be placed on the exercise of this right other than those imposed in conformity with the law and 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.

Article 22
1. Everyone shall have the right to freedom of association with others, including the right to form and join trade unions for the protection of his interests.
2. No restrictions may be placed on the exercise of this right other than those which are prescribed by law and 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. This article shall not prevent the

imposition of lawful restrictions on members of the armed forces and of the police in their exercise of this right.

…

Article 27 General comment on its implementation

In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.

CROC

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.

Article 4

States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Article 9

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

Article 12

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Article 13

1. The child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice.
2. The exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
(a) For respect of the rights or reputations of others; or
(b) For the protection of national security or of public order (ordre public), or of public health or morals.

Article 14
1. States Parties shall respect the right of the child to freedom of thought, conscience and religion.
2. States Parties shall respect the rights and duties of the parents and, when applicable, legal guardians, to provide direction to the child in the exercise of his or her right in a manner consistent with the evolving capacities of the child.
3. Freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others.

Article 15
1. States Parties recognize the rights of the child to freedom of association and to freedom of peaceful assembly.
2. No restrictions may be placed on the exercise of these rights other than those imposed in conformity with the law and 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.

Article 16
1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.

2. The child has the right to the protection of the law against such interference or attacks.

Article 20

1. A child temporarily or permanently deprived of his or her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall in accordance with their national laws ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption or if necessary placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background.

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.

Article 40

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
(vii) To have his or her privacy fully respected at all stages of the proceedings. 3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law and in particular:
(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The Beijing Rules, the UN Standard Minimum Rules for the Administration of Juvenile Justice

2.3 Efforts shall be made to establish, in each national jurisdiction, a set of laws, rules and provisions specifically applicable to juvenile offenders and institutions and bodies entrusted with the functions of the administration of juvenile justice and designed:

(a) To meet the varying needs of juvenile offenders, while protecting their basic rights;
(b) To meet the needs of society;
(c) To implement the following rules thoroughly and fairly.

6.1 In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of juvenile justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions.

6.2 Efforts shall be made, however, to ensure sufficient accountability at all stages and levels in the exercise of any such discretion.

6.3 Those who exercise discretion shall be specially qualified or trained to exercise it judiciously and in accordance with their functions and mandates.

7.1 Basic procedural safeguards such as the presumption of innocence, the right to be notified of the charges, the right to remain silent, the right to counsel, the right to the presence of a parent or guardian, the right to confront and cross-examine witnesses and the right to appeal to a higher authority shall be guaranteed at all stages of proceedings.

10.1 Upon the apprehension of a juvenile, her or his parents or guardian shall be immediately notified of such apprehension, and, where such immediate notification is not possible, the parents or guardian shall be notified within the shortest possible time thereafter.

10.2 A judge or other competent official or body shall, without delay, consider the issue of release.

10.3 Contacts between the law enforcement agencies and a juvenile offender shall be managed in such a way as to respect the legal status of the juvenile, promote the well-being of the juvenile and avoid harm to her or hi m, with due regard to the circumstances of the case.

13.4 Juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults.

14.1 Where the case of a juvenile offender has not been diverted (under rule 11), she or he shall be dealt with by the competent authority (court, tribunal, board, council, etc.) according to the principles of a fair and just trial.

14.2 The proceedings shall be conducive to the best interests of the juvenile and shall be conducted in an atmosphere of understanding, which shall allow the juvenile to participate therein and to express herself or himself freely.

15.1 Throughout the proceedings the juvenile shall have the right to be represented by a legal adviser or to apply for free legal aid where there is provision for such aid in the country.

15.2 The parents or the guardian shall be entitled to participate in the proceedings and may be required by the competent authority to attend them in the interest of the juvenile. They may, however, be denied participation by the competent authority if there are reasons to assume that such exclusion is necessary in the interest of the juvenile.

16.1 In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.

17.1 The disposition of the competent authority shall be guided by the following principles:
(a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
(b) Restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;

(c) Deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
(d) The well-being of the juvenile shall be the guiding factor in the consideration of her or his case. 17.2 Capital punishment shall not be imposed for any crime committed by juveniles.

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible.

19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period.

The Tokyo Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty

3.3 Discretion by the judicial or other competent independent authority shall be exercised at all stages of the proceedings by ensuring full accountability and only in accordance with the rule of law.

3.5 Decisions on the imposition of non-custodial measures shall be subject to review by a judicial or other competent independent authority, upon application by the offender.

3.6 The offender shall be entitled to make a request or complaint to a judicial or other competent independent authority on matters affecting his or her individual rights in the implementation of non-custodial measures.

3.7 Appropriate machinery shall be provided for the recourse and, if possible, redress of any grievance related to non-compliance with internationally recognized human rights.

6.3 The offender shall have the right to appeal to a judicial or other competent independent authority in cases where pre-trial detention is employed.

7.1 If the possibility of social inquiry reports exists, the judicial authority may avail itself of a report prepared by a competent, authorized official or agency . The report should contain social information on the offender that is relevant to the person's pattern of offending and current offences. It should also contain information and recommendations that are relevant to the sentencing procedure. The report shall be factual, objective and unbiased, with any expression of opinion clearly identified.

8.1 The judicial authority, having at its disposal a range of noncustodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the protection of society and the interests of the victim, who should be consulted whenever appropriate.

12.3 At the beginning of the application of a non-custodial measure, the offender shall receive an explanation, orally and in writing, of the conditions governing the application of the measure, including the offender's obligations and rights. **?control orders**

14.2 The modification or revocation of the non-custodial measure shall be made by the competent authority; this shall be done only after a careful examination of the facts adduced by both the supervising officer and the offender.

14.6 Upon modification or revocation of the non-custodial measure, the offender shall have the right to appeal to a judicial or other competent independent authority.

Economic and Social Council Resolution 1997/30 on Administration of juvenile justice 21 July 1997

11. Measures relating to policy, decision-making, leadership and reform should be taken, with the goal of ensuring that:
(a) The principles and provisions of the Convention on the Rights of the Child and the United Nations standards and norms in juvenile justice are fully reflected in national and local

legislation policy and practice, in particular by establishing a child-oriented juvenile justice system that guarantees the rights of children, prevents the violation of the rights of children, promotes children's sense of dignity and worth, and fully respects their age, stage of development and their right to participate meaningfully in, and contribute to, society;

12. … In those instances where the age of the child involved in the justice system is unknown, measures should be taken to ensure that the true age of a child is ascertained by independent and objective assessment.

14. Particular attention should be given to the following points:
…
(d) … Wherever necessary, national legislative and other measures should be considered to accord all the rights of and protection for the child, where the child is brought before a court other than a juvenile court, in accordance with articles 3, 37 and 40 of the Convention.

20. In order to maintain a link between the detained child and his or her family and community, and to facilitate his or her social reintegration, it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty, unless the best interests of the child would suggest otherwise.

Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region (As Amended at Manila, 28 August 1997)

2. The Universal Declaration of Human Rights (Art. 10) and the International Covenant on Civil and Political Rights (Art. 14(1)) proclaim that everyone should be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. An independent judiciary is indispensable to the implementation of this right.

3. Independence of the Judiciary requires that;

a) The judiciary shall decide matter before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source; and
b) The judiciary has jurisdiction, directly or by way of review, over all issues of a justiciable nature.

7. Judges shall uphold the integrity and independence of the judiciary by avoiding impropriety and the appearance of impropriety in all their activities.

10. The objectives and functions of the judiciary include the following:
a) To ensure that all persons are able to live securely under the rule of law;
b) To promote, within the proper limits of the judicial function, the observance and the attainment of human rights; and
c) To administer the law impartially among person and between persons and the State.

33. The judiciary must have jurisdiction over all issues of a justiciable nature and exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.

35. The assignment of cases to judges is a matter of judicial administration over which ultimate control must belong to the chief judicial officer of the relevant court.