SUPPLEMENTARY SUBMISSION to the
Senate Legal and Constitutional Legislation Committee

Anti-Terrorism Bill (No. 2) 2005

This submission supplements submission No. 237 to the Inquiry.

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

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About This Supplementary Submission

This is a supplementary submission to our initial submission registered as Submission No. 237. We maintain the arguments set out therein.

The authorship of this supplementary submission is the same as for Submission No. 237 with the addition of:

- Ms Georgie Ferrari, Executive Officer, Youth Affairs Council of Victoria was previously the Executive Officer of the NSW Association of Adolescent Health. She now directs the peak body and leading policy advocate on young people's issues in Victoria. YACVic provides a means through which the youth sector and young people voice their opinions and concerns in regards to policy issues affecting them.

We ask the Committee to note that The Youth Affairs Council of Victoria endorses our initial Submission No. 237.

Like submission No. 237, the principal focus of this submission is on whether the Bill breaches Australia's international human rights treaty obligations. It has been prepared in order to provide further submissions on matters arising from the transcripts of the public hearings and some of the documentary submissions that have been received by the Committee.

Introduction

The fundamental rationale for our continuing concern is to assist the Committee in the task which we characterised as follows in Submission 237:

> *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.* (emphasis added)

The importance of the Committee's task is underlined by the 30 September 2005 Concluding Observations of the Committee on the Rights of the Child in respect of Australia's second and third periodic reports on implementation of the CROC:

> *In accordance with article 2 of the Convention, the Committee recommends that the State party regularly evaluate existing disparities in the enjoyment by children of their rights and undertake on the basis of that evaluation the necessary steps to prevent and combat discriminatory disparities. It also recommends that the State party strengthen its administrative and judicial measures in a time-bound manner to prevent and eliminate de facto discrimination and discriminatory attitudes towards especially vulnerable groups of children and ensure, while enforcing its Anti-Terrorism legislation, a full respect of the rights enshrined in Convention.*[1]

The Committee's task has been and continues to be impeded by the ongoing refusal of the Government to release the technical advice upon which the Government relies for the assertion that the Bill does not breach international obligations.

We were hoping that some specific explanations would be provided in the transcripts of the evidence of representatives of the Attorney-General's Department on 14 and 18 November. Regrettably, the opening statement of Attorney-General's Department representative Mr McDonald,[2] which purported to justify the Government's claim, amounted to reciting provisions within the Bill and asserting compliance. At no stage did he identify the counter-arguments raised in many submissions and attempt to explain why such counter-arguments were not correct. **We submit** that this cannot satisfy the Committee that the Bill does comply with international obligations.

[1] Available at http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.268.pdf
[2] At pages 1-3, transcript of public hearing, 18 November 2005.

We note that he advised the Committee that the advice relied upon by the Government emanates from the Office of International Law within the Attorney-General's Department.[3] In this regard, we note that Senator Bartlett drew attention to advice of a similar type from that Office concerning immigration detention having been subsequently impugned.[4] In such circumstances, **we submit** it was incumbent, indeed essential, for the detail of the relevant advice to have been made public and measured against the contrary analyses contained in so many Inquiry submissions.

From this footing, we turn now to make specific submissions in respect of the content of the Bill.

Submissions

1. Compliance with International Obligations

We note that some members of the Committee were attracted to the idea of making specific reference to the ICCPR in the Bill or the Explanatory Memorandum, or incorporating the ICCPR in the legislation as an aid to the meaning of proportionality. We further observe that there was significant support for to this approach from witnesses (see transcript excerpts at Appendix 1).

In our submission, it is insufficient to refer to the international instruments in the Explanatory Memorandum as this is a secondary source of interpretation. **We submit** that their terms should be specifically incorporated in the legislation. In this regard we agree with Mr McDonald when he said:[5]

> ***Mr McDonald**—It comes back to this: at the end of the day, it is what is in your legislation that matters.*

[3] At page 12, transcript of public hearing, 18 November 2005.
[4] At page 27, transcript of public hearing, 18 November 2005.
[5] At page 29, transcript of public hearing, 18 November 2005.

We also submit that if this approach is adopted, reference to or incorporation of the ICCPR alone is insufficient to safeguard the additional rights to which children are entitled under the CROC and to this end, it is imperative that the CROC receive an identical legal status to that given to the ICCPR.

We note that the Human Rights and Equal Opportunity Commission (HREOC) gave evidence that there was a need for issues asociated with preventative detention to be the subject of protocols with a statutory base.[6] We agree with the suggestion of protocols on this subject however, like the Commission,[7] **we submit** that the requirement to separate children from adults in accordance with CROC Article 37(c) and Beijing Rule 13.4 is such a basic entitlement that it warrants specific and distinct inclusion in the body of the legislation.

We note that HREOC drew the Committee's attention to international standards pertaining to the required conditions for people deprived of their liberty.[8] In this regard, **we submit** that the standards relating to children must reflect the provisions that have been developed for children in particular, such as *The Tokyo Rules, the UN Rules for the Protection of Juveniles Deprived of their Liberty*. **We further submit** that those standards should inform the meaning for children of humane treatment mentioned in s.105.33.

In respect of such standards, a person who is subject to a preventative detention order (PDO) is restricted from contact with other people, with some minimal provisions to see a family member, a person they live with, and employer or employee. The issue of where individuals on PDOs would be held appears unresolved at this time. Should an individual on a PDO be held in either police cells or in State prison, presumably they would need to be held in solitary confinement to ensure they did not have contact with other prisoners.[9] The psychological implications of enduring solitary confinement, potentially for a long period of time, are highly concerning. The potential risk this would pose to the mental health and wellbeing of young

[6] At page 46, transcript of public hearing, 17 November, 2005.
[7] At page 49, transcript of public hearing, 17 November, 2005.
[8] At page 52, transcript of public hearing, 17 November, 2005.

people on PDO's would indicate not only a breach of human rights but also a breach of the duty of care responsibilities of the State.

We would also draw the Committee's attention to HREOC's concurrence with our submission that decision-makers under the legislation must be required to take the best interests of the child into account.[10] This refects CROC Article 3, again such a fundamental entitlement that **we submit** this requires specific and distinct inclusion in the body of the legislation.

We also submit, as has been suggested by other submissions, that the principle that a child shall only be detained as a measure of last resort be included in the Bill as is now the case with s. 4AA of the *Migration Act 1958* (Cth). However s.4AA only reflects part of the guarantee required by CROC Article 37(b). **We further submit** that such a legislative provision should additionally state "for the shortest appropriate period of time" which is also part of the wording of CROC Article 37(b) and of equal importance.

2. Secrecy

The secrecy provisions themselves expressed in the blanket form that they are, consist of a breach of the ICCPR. It quite clear that the ICCPR is not predicated upon secret detention or the imposition of secret control orders. It is true that Article 14(1) permits the press and public to be excluded from all or part of a trial for reasons of *inter alia* national security. However it is obvious that the decision to exclude on such grounds is one for a court in the individual cricumstances of the case before it and not for the Legislature or the Executive. It is also to be noted that Article 14(1) provides:

> *"…but any judgment rendered in a criminal case or a suit at law shall be made public"* (subject to an exception relating to juveniles, matrimonial disputes and the guardianship of children).

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[9] See the *Submission of the Human Rights and Equal Opportunity Commission* No. 158, 11 November 2005. Recommendation 8, p.17.

[10] At pages 49-50, transcript of public hearing, 17 November, 2005.

The existence of the blanket secrecy provisions means that those administering the legislation and those reviewing that administration are effectively non-accountable and the usual safeguard, that decisions of the courts are open to public scrutiny and discussion, is not present

3. Detention and "Judicial" Review

It is our primary submission on this topic that there is effectively no judicial review of detention orders and that the review that is provided for cannot and should not be said to be "judicial" review. The use of judges and federal magistrates as issuing authorities, apart from its doubtful constitutional validity, is merely a cloak for the fact that no real judicial review is provided and this is made worse by the failure to require delivery of reasons for their decision. They are only required to furnish the grounds for the decision.

If however, despite the criticisms we and other have made, the currently proposed regime is to find its way into law, **we submit** that Senator Brandis is correct in his suggestion that:[11]

> *in relation to the provision concerning control orders that the person subject to the order is to be furnished with a statement of grounds—and you will recall we discussed this earlier in another place as well—it would not do violence to the scheme of the bill, would it, to* ***also have the person furnished with the material on the basis on which the order was made****—in other words, the evidentiary material—so long as the appropriate excisions in relation to national security matters were made?* (emphasis added).

The inadequacy of material explaining the basis for making PDOs is is further compunded by the exclusion of the ADJR and the very limited capacity to seek to review a decision in the Federal Court which is itself removed when State and Territory provisions apply (s. 105.51). Other aspects relate to the monitoring of legal representation and the fact that only the individual and not their lawyer may apply for copies of the orders and the grounds upon

which it/they are made. Young people will be among the particular groups in the community who will be disadvantaged by this unusual onus upon the person themselves to make the request.

4. Control orders and "Judicial" Review

These again suffer from the secrecy provisions as already discussed. **We submit** it should be for a court to decide whether there is good reason why an application for a control order, the making of it, and the confirmation of it, should be secret. Similarly, like other crtics, we see no reason for a blanket requirement that interim control orders be issued through an *ex parte* process as compared with the existing power of a court to determine that a particular application should, on the alleged facts of the case, be dealt with initially on an *ex parte* basis. This is exaccerbated by the absence of a timelimit on the duration of an *ex parte* order. Given the nature of the existing court workloads we do not accept the suggestion that it should not be assumed in the absence of a legislative direction, that only a short period will expire between the making of an interim order and a further hearing.

A significant difference between the advocates of the control order system and their opponents relates to the nature of such orders. **It is our primary submission** in this regard that whatever the intention behind the seeking of a control order, the obtaining of one is essentially punitive in effect and warrants the criminal human rights safeguards discussed in our initial submission and other submissions. We consider the attempt to equate Control Orders with Apprehended Violence Order s to be disingenuous to say the least. At best some comparisons can be made at the lower end of the range of intrusiveness with control orders but the better analogy is with criminal provisions for home imprisonment with the associated use of tracking devices. Also, they bear greater similarity with conditions which may be imposed under probation orders and like as part of a sentencing process..

[11] At page 29, transcript of public hearing, 18 November 2005.

A significant difference between control orders and AVOs is that the latter rarely if ever involve interference with individual liberty that goes beyond a prohibition on harassing or being in the vicinity of a particular individual or individuals. The second difference is that they are public proceedings. A third difference is that succesive control orders would further emphasise the punitive nature of the distinction between them and AVOs because of the continued interference with liberty involved.

5. Police Power

Concern that the proposed police powers could be misused was not the subject of public hearings evidence. We would wish to reiterate that this risk is exacerbated by 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. This is particularly true of young people from CALD backgrounds. Research undertaken in 1997 relating to police use of non-lethal force found that people who speak English as a second language are more likely to say they are too frightened to make a complaint against police than English speakers. The research found that 'the lack of will (to make a formal complaint) is even greater for the more marginalised groups such as the ethnically diverse or the young, who in turn tend to become even more invisible because of the absolute silence expressed through fear, apathy, or ignorance about their rights. This issue is further influenced by what appears from the data as a general abrogation by police to inform citizens of their rights'.[12]

6. Questionnining people under PDOs

We submit that the prohibition on questioning people under PDOs offers absolutely no protection to them because, as was conceded by the legal adviser who appeared with representatives of the AFP and ASIG,[13] the Bill provides for a questioning warrant to be

[12] Biondo, S (1997) *Police brutality in victoria: invisible victims of state power*, Master's Thesis, La Trobe University, p.77.
[13] At page 59, transcript of public hearing, 17 November, 2005.

executed at the same time as a PDO is in place. This means that people, including minors can be released while under PDO for the purpose of being questionned by ASIO.

This is extremely troublesome because it effectively provides for a regime where persons may be held under what may be successive detention orders in circumstances which could involve virtual solitary confinement save for being released for the purpose of questioning. Again, this appears to resemble what might occur in a police state rather than in a democracy.

7. Involvement of the Ombudsman

We are conscious of the right of a person under a PDO to contact the Ombudsman (s.105.36). This requires the detained person to initiate the action. **We submit** that the more appropriate approach is for the Ombudsman's office to be notified of all persons who are detained under PDOs and for a representative of that office to contact and explain the Ombudsman's role to the detained person. This would better cater for the lack of understanding of the Ombudsman and the role of the office that we consider is predominant among young people and people from culturally and linguistically diverse backgrounds. It would also add an important safeguard for record-keeping about individuals that are subject to a secretive regime.

8. Concluding Submission

We wish to express our great concern at the haste with which this Committee hearing has had to be conducted and its brevity and single geographic location. We understand that the Committee had no choice over the timeframe in which it was expected to operate but we nevertheless consider that the end result is that this very important subject has been given extremely cursory consideration.

We also express great concern about the Government's failure to explain why it claims that this legislation is in accordance with Australia's international obligations under relevant treaties to which Australia is party. The response of the Attorney-General's Department relating to this has been merely to assert that advice from its Office of International Law is to this effect. At the same time we note that many distinguished international lawyers have expresed a contrary view.

We cannot understand any policy reason relating to issues of security otherwise as to why the Government will not disclose the nature of its advice and we find the statements of the representatives of the Attorney-General's Department to be most unconvincing. Significantly, there is nothing on the record from the Government which engages and precisely rebuts the specific arguments asserting breach that have been made in so many submissions. **We submit** that the failure to disclose the nature of this advice itself throws grave doubt upon the validity of the Government's assertions.

* * *

Appendix 1

Ms Stratton—We have signed it and ratified it, which means that at international law we are subject to its obligations. We have taken that on. Vis-a-vis the nations of the world, we have said, 'We respect this and we will respect, protect and fulfil the rights that are enshrined in there as well as the processes.' As for how it stands in Australia, that has not been directly legislated into law as a body of principles. It is attached to the Human Rights and Equal Opportunity Commission Act as a schedule, which means that it forms part of what human rights means for the purpose of that act. So the president of the Human Rights and Equal Opportunity Commission has a power, for instance, to investigate human rights issues.
Senator BOB BROWN—On that point, could you see a way in which the convention could be similarly incorporated into this bill?
Ms Stratton—Yes. That could be consistent with what Senator Stott Despoja was asking. An easy way of doing it would be to reference it as something that is part of the decision-making process, the review process, the judicial process and then to schedule it to the act—that could be one way of doing it.
Senator BOB BROWN—So that would ensure that Australia, the courts at least, could take—I know there are others; there is treaties power and so on—directly into consideration the convention when looking at people who might be arraigned under this legislation.
Ms Stratton—Yes, more easily if parliament includes that in the act that creates these powers and it would be in relation to the powers that are in the resulting act.

…

Senator BOB BROWN—Just following that through: would you recommend, as a previous witness did, that maybe the ICCPR ought to be incorporated, recognised, in the legislation—that that would at least provide some amelioration to the fears there are about the extent of this legislation in a country which does not have a bill of rights?
Mr Beckett—I would certainly support that incorporation in the sense that the way in which all the various tests that exist throughout the bill, including those applied by the law or by individual officers, should be done with respect to particular human rights, and they could be specified in the legislation merely by reference to schedule 1 of the Human Rights and Equal Opportunity Commission Act. It could be done simply in that way.
Senator BOB BROWN—Would you be kind enough to look at some proposal for the committee about that?
Mr Beckett—Sure. I will take that on notice.

…

Senator BOB BROWN—On the earlier matter of the ICCPR, the reality is that we do not have a bill of rights and we are not getting one soon. Do you see any use in terms of our obligations to abide by international covenants for incorporating a reference or acknowledgement of the international covenant into this legislation and if so how would you do it?
Dr Saul—Certainly, it may be useful to, as has been suggested, attach it or provide, for example, an express provision referring the legislation to HREOC, the Human Rights and Equal Opportunity Commission, for the purpose of seeking their opinion on the legislation. They already have a general competence to look at matters which affect human rights in Australia on the basis of complaints and so forth, but you could formalise that in a kind of annual review process by HREOC of the impact of the operation of the legislation once adopted on human rights in Australia—the human rights in the ICCPR, for example. You would have a regular kind of reporting process. I commend that to you because it is similar to the position in the UK. Lord Carlile's independent report on the proposed UK bill very much took into account its impact under the Human Rights Act as an explicit term of reference.

…

Senator STOTT DESPOJA—Thank you, Chair—and fellow seditious republican movement member! I want to begin by looking at this legislation in the context of international rights. When I asked Mr McDonald from the Attorney-General's Department on Monday about essentially what assessment had been made of this

legislation against rights, be they in international treaties like the Covenant on Civil and Political Rights or the Convention on the Rights of the Child, I was assured by him—and I do not want to misrepresent you, Mr McDonald, so you can let me know if I paraphrase too broadly—that every opinion given to the department and every article in the conventions has been looked at against this legislation. He said that you can see it right through the legislation and that it goes right down to requiring police when they are using force to not unnecessarily impact on the dignity of the individual and to making sure that people are informed at every step of the process. He said that our piece of legislation is 140 pages long et cetera. I am very partial to the idea, in lieu of a bill of rights or human rights act, of attaching the conventions to the legislation. But what international rights or fundamental rights are breached in this legislation?

Mr Murphy—It is quite clear that the provisions of the legislation, including the preventative detention orders, the control orders and their application against young people, breach those international conventions. The international Covenant on Civil and Political Rights provides a right to freedom from arbitrary detention and arrest, and the rights of children can be affected. While you might put in place a number of mechanisms to

try and ameliorate those problems, it is the substance of the legislation that goes against the grain of those instruments. Our suggestion is that, if you are going to have the legislation, you should incorporate those instruments into it so that the legislation can be read in that context. That provides, as a safeguard, a standard as to how it should be applied. In the absence of a bill of rights, it also may provide an opportunity for people to challenge action that has been taken under the legislation and provide a person who, for example, is a witness to a terrorist event an opportunity to seek relief.

Thinking about what might have happened had this legislation been in place during the recent raids, if it had been an ongoing investigation, the police may have had further search warrants they wished to execute. They may have started with one house. The whole street might have known about that, but the police might have wanted to keep that secret until they had completed the investigation. Under this legislation, they could have used control orders to basically keep those witnesses under house arrest until they had completed their investigation. They may have been people who had nothing to do with the terrorists—people who were unfortunate enough to be in the vicinity of some action that was taken against others. If these instruments were incorporated, you may at least have a basis to argue for the release of someone who is under one of those detention orders and who should not be for an excessively long period.

It is clear that this breaches these instruments in a number of ways, particularly in terms of the rights of the child and particularly in terms of the provisions for holding people in arbitrary detention. I am talking about people who the police do not have sufficient evidence to charge. That is the appropriate process in a democracy. You do not hold people in custody when there is no evidence against them.

Senator STOTT DESPOJA—In relation to the Convention on the Rights of the Child, you are talking about 16-year-olds being in detention, and not being clear as to whether or not they are alongside adults.

Mr Murphy—Yes, 16-year-olds being in detention. Other provisions are also worrying. There is this ridiculous situation where you cannot explain even to a parent why you are being held in custody. One parent might be able to be told but they cannot communicate that to their spouse. You cannot communicate to your employer. Having a statement there to say, 'I cannot tell you where I have been but I am safe,' is not really going to assist someone when they are trying to explain that to their employer. And it may be that they are held under one of these orders not because they have done anything wrong, not because they are even associated with terrorism, but, as I say, they might just be an innocent bystander who has been a witness to an event who has an order made against them.

Senator STOTT DESPOJA—In terms of the technicalities here, are we talking about literally attaching it as an appendix? How do we do this? Take the ICCPR as an example. We have asked other witnesses this. What are you envisaging—that it becomes part of the bill? How do we do it? And you can take that on notice if you want to think about it.

Mr Murphy—Just to answer briefly at this stage, I am no expert at legislative drafting but perhaps there could be a provision to incorporate it, putting the covenants into the bill, and then directing that the provisions of the bill need to be read in that context, so that when you read a section about a control order or preventative detention it means that anybody making an order has to have regard to that and so that you have a right to challenge that order that is being made, exercising your rights under those protocols.

…

Senator BOB BROWN—I go back to what Senator Stott Despoja was asking about—and you brought it up, Mr Murphy—of having the legislation, if it proceeds, interpreted in light of the ICCPR. Would you mind having a look at that? Could you suggest the incorporation of a reference to the ICCPR to have the legislation

interpreted in the light of it?
CHAIR—Can you take that on notice?
Thursday, 17 November 2005 Senate—*Legislation* L&C 39
Mr Bernie—We will take that on notice and provide a submission on that point.

…

Senator STOTT DESPOJA—I note in your supplementary submission to the committee that you have taken on board the issue that I have raised with a number of witnesses—that is, how we ensure this legislation is tested against international law, particularly the ICCPR. I note you have taken a different approach in terms of using various tests in the legislation. Can you elaborate on that for the committee? Where you give an example in your primary submission about the idea that 'the test to be applied under the amendments proposed by the commission to ss105.4(4) and (6) is that under article 9(1) of the ICCPR', are you suggesting that this be done throughout legislation? So, where there is a potential for, say, a breach of the international covenant in this case in relation to equality before the law or the Convention on the Rights of the Child, you would go through the legislation and put in those amendments or is that explicitly for the explanatory memorandum? I am trying to work out how that would work.
Mr von Doussa—We were thinking that it would be sufficient to put it into the explanatory memorandum. To go through as an exercise and try to write it into the act would be a monstrous task, both in time and in intellectual exercise to make sure you got it right. We certainly recommended that there be a provision put in that, in this case, in detention there was not some less restrictive means of achieving the purpose which we thought reflected the jurisprudence under article 9 of the ICCPR. But our wider suggestion was that there simply be something in the explanatory memorandum which would enable issuing authorities and reviewing courts to at least have regard to the jurisprudence arising under the convention.
Senator STOTT DESPOJA—I understand that point. I was just again trying to get at whether or not you were singling out the case of, say, detention and the potential breaches that might occur as a consequence. There seem to be potential breaches of international law and covenants throughout the legislation. I am wondering whether you need a specific reference to those articles or whether you just need a general reference to or an attachment of, say, the international covenant.
Mr von Doussa—Speaking for myself, we have not spent a lot of time discussing it. I would have thought a general reference was adequate. What we have endeavoured to do about the fair trial, for example, is to build a review process into the act itself.
Mr Lenehan—We have discussed, without necessarily endorsing this, that another approach would be the one that I think you have in mind, which is specifying particular obligations in terms of particular parts of the
Thursday, 17 November 2005 Senate—*Legislation* L&C 49
act. The advantage of that may be that a decision maker is directed more precisely to the relevant obligations in a particular circumstance.

…

Thursday, 17 November 2005 Senate—*Legislation* L&C 79
Senator BOB BROWN—Gentlemen, you may have heard the suggestion of earlier witnesses for the International Covenant on Civil and Political Rights to be acknowledged in the legislation as a reference point. Do you have any comment on that, what impact that may have or the value of that? Could I, on behalf of the committee, ask you to have a look at it for us.
Prof. McMillan—Perhaps I can respond by saying I do not have any concluded view on whether the international covenant should be written separately into laws, but it is probably worth saying that my own office is not unmindful of the existence both of the international covenant and of what we more generally define as fundamental rights and freedoms. I am certainly personally aware of the detail of the international covenant and it is a matter that is mentioned in the discussion, training and review that is undertaken with my own agency. I have no problem with things being written into laws, although I think there is sometimes a wrong assumption that the absence of any explicit statement of those rights or freedoms means that they are not being taken into account by agencies such as my own. They are uppermost, along with a whole range of other criteria, in the regular oversight we undertake.
Senator BOB BROWN—It does have the advantage, though, of indicating that the legislators had it in mind when the bill was passing the parliament.

Prof. McMillan—I have always made the point that I do not think anybody can object to having a simple legislative declaration of the issues that statutory officeholders should take into account in making decisions.