

**FURTHER SUPPLEMENTARY SUBMISSION to the  
Senate Legal and Constitutional Legislation Committee**

**Anti-Terrorism Bill (No. 2) 2005**

**This submission supplements submissions No. 237 and No. 237A to the Inquiry.**

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

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**Submitted on 24 November 2005 by email to [legcon.sen@aph.gov.au](mailto:legcon.sen@aph.gov.au)**

## **About This Supplementary Submission**

This is a supplementary submission to the submissions registered as Submission No. 237 and 237A. We maintain the arguments set out therein.

The purpose of this brief Further Supplementary Submission is to respond to some of the answers to questions on Notice provided by Mr McDonald of the Attorney-General's Department in Submission 290A.

Time constraints only allow us to select a few of these answers. They illustrate further **our overall primary submission** that the Committee should not be satisfied on the current evidence that the Bill complies with international obligations.

## **Attachment A**

At page 2, in the “general” comments to the answer to Questions 1,2, and 32, the submission states the test of whether detention is arbitrary. One of the adjectives used there is “proportionate” – a term with established international law jurisprudence associated with it. This descriptor is absent from the proposed legislation and **we submit** that at a minimum, for consistency with the Department's own test, the term “proportionate” must be included in the criteria for making preventative detention orders.

At page 4 in respect of the Convention of the Rights of the Child, the submission purports to demonstrate compliance with Article 37(b) which requires detention as “a last resort” for the “shortest appropriate time”. It does not in fact explain how compliance is achieved in circumstances where those key phrases are not within the legislation. We remind the Committee that specific words were warranted for the *Migration Act* (now reflected in par by s. 4AA) to impose the “last resort” obligation. We do not see how the Government can be satisfied that both the “last resort” and “shortest period of time” obligations can be satisfied by legislative silence. Indeed, the answer does not explain how. **We submit** that the answer does not show compliance with the relevant international law provisions.

## **Attachment B**

At page 11, in response to Question on Notice 14, the submission argues against requiring the legislation to contain a specific obligation, as per CROC Article 37(c), to separate children from adults.

It is said there that introducing an obligation in this legislation “could result in a contrary inference being drawn in relation to children in custody who are under arrest or in protective custody” (emphasis added). We note that no source for this claim is provided and further it is expressed as a possibility.

It is also said that to include the obligation to separate “could create difficulties in extraordinary or urgent circumstances”. (emphasis added)

**We submit** that the alleged problems are merely a matter of careful drafting and for the reasons identified in our previous submissions, the obligation to separate children should be a statutory presumption.

At page 19, in response to Question on Notice 5, the submission alleges that the Bill in respect of control orders and preventative detention orders, “already provides effectively for” (emphasis added):

- the issuing authority to be required to consider the child’s best interests; and
- the principle that the detention of children should only be used as a last resort for the shortest appropriate period of time.

a) best interests principle

In respect of control orders, it is said that the decision-maker must have regard to the “age” of the person. **We submit** this is plainly not the same as the “best interests” of the child. In respect of preventative detention orders, it is said that the high threshold of circumstances

justifying an order effectively calls attention to consideration of the child's best interests. **We submit** there is no logic to this claim.

b) last resort/shortest duration principle

In respect of control orders it is said that the statutory maximum period and the general discretion of the decision-maker to set the appropriate period is sufficient fulfilment of this CROC requirement. In respect of preventative detention orders, it is again said that the general discretion for decision-makers to make an order for an appropriate period is a sufficient reflection of the CROC requirement. **We submit** that these arguments fail to grasp that the entitlements under the CROC are designed to be additional specific guarantees to children and explicit criteria to guide decision-makers directions thus the general factors applicable to all subjects of such orders cannot be sufficient to make for compliance.

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