



19 September 2012

The Hon. Anthony Whealy, QC

C/- COAG Counter-Terrorism Review Secretariat
Security Law Branch
3-5 National Circuit
BARTON ACT 2600

By Email: CTReviewSubmissions@ag.gov.au.

Dear The Hon. Anthony Whealy, QC

COAG Review of Counter-Terrorism Legislation

The National Children's and Youth Law Centre thanks you for your invitation to contribute to this Review. We have considered the extent to which counter-terrorism legislation in Australia and its related framework, particularly at the Federal level, affects the rights of children and young people in Australia and make the following brief remarks.

The National Context

We acknowledge that terrorism is a serious and ongoing issue of national security and that ensuring the safety and peace of citizens is a primary obligation of the government. We also note that as a developed nation and signatory to the Convention on the Rights of the Child (“**Convention**”), Australia has certain responsibilities to its young people to protect, respect and promote their rights. The Convention sets out fundamental minimum protections afforded to children. Some of these rights, such as freedom of expression and association, can be restricted in conformity with the law on the grounds of public safety or national security.

However, there are some fundamental rights that cannot be restricted on such grounds. For example, the rights of the child not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment or to be detained unlawfully or arbitrarily guaranteed by Article 37. This article also establishes that a child should only be detained as a measure of last resort and for the shortest appropriate period of time. In light of this, it is a positive development that children are no longer liable to be detained for a period of 14 days under a preventative detention order, as was the case in an earlier iteration of the *Criminal Code Act 1995* (Cth). Nonetheless, several concerns remain.

Control Orders – Criminal Code

Under current legislation, a control order cannot be issued for a child under 16 years of age. However, between the ages of 16 and 18, a child may be placed on a control order for a period of three months.

Successive control orders can be made in relation to the same person and there is no limitation on the number of control orders that may be issued per individual.¹

It is our submission that control orders should be subject to far greater scrutiny than is presently the case. The ability to control and restrict the movement, actions and associations of a child has a clear potential to breach the rights of the child to free association and peaceful assembly (Convention, Art 15), as well as the rights of the child to freedom from unlawful or arbitrary interference with privacy, family, home or correspondence (Convention, Art 16). While the law requires the reasons for the order to be provided and for the order and its effects to be explained to the person subject to the order taking into account the person's age and mental capacity,² the Police do not have to comply with these requirements where it is impracticable to do so and failure to comply does not invalidate the order. The unlimited manner of the control is troubling and open to abuse. We suggest that, in order to better implement the aims of the control order (i.e. to prevent terrorist acts) as well as Australia's international human rights obligations, control orders imposed upon minors should be limited to one reissue, thus limiting the total term of control to six months.

Preventative Detention Orders – Criminal Code

A child has the right to seek legal advice for the purpose of giving instruction in relation to preventative detention orders, or to give instruction of a medical nature to seek care and any required assistance.³ However, the authorised contact must take place in the presence of an authorised police officer.⁴

Our submission is that this is wholly unacceptable and is contrary to principles of legal professional privilege. While the Code states that whatever is said to such professionals cannot be admitted as evidence,⁵ it nevertheless places a barrier to the free communication between a lawyer and their client. We suggest that a provision be adopted similar to that found in *Australian Security and Intelligence Organisation Act 1997* (Cth)⁶ that legal professional privilege is an exception to the right to monitor the accused person's contacts.

Extended Detention Period

The *Australian Security and Intelligence Organisation Act* states that a suspect detained under a warrant for questioning or detention may be detained for a period of no more than 168 hours, or seven days.⁷ We note that according to s34ZE, a child under the age of 16 is exempt from the effect of such a warrant.⁸ However, children between 16 and 18 years of age are subject to the full weight of this detention provision and we submit that this is unduly onerous. The extent of this possible detention is unreasonably extensive and therefore breaches article 37 of the Convention.

Please do not hesitate to contact me on [*ph redacted*] or via email at [*email redacted*] if I can be of further assistance.

Yours sincerely

Matthew Keeley,
Director

¹ *Criminal Code 1995* (Cth) div 104.28.

² *Ibid*, div 104.12(1)-(4).

³ *Ibid*, div 105.37.

⁴ *Ibid*, div 105.38(1).

⁵ *Ibid*, div 105.38(5).

⁶ *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34ZV.

⁷ *Ibid*, s 34S.

⁸ *Ibid*, s34ZE.