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RIGHTS OF THE CHILD

Written statement* submitted by the South Asia Human Rights Documentation Centre (SAHRDC), a non-governmental organisation in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[13 February 2006]

* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

Australia's Anti-Terrorism Act (No. 2) 2005 and the Rights of the Child

The Australian Government's new *Anti-Terrorism Act (No. 2) 2005* breaches numerous human rights in pursuit of security. Amongst the most important of these rights are the rights of children. Some of the most repressive aspects of the Act apply directly to children between 16 and 18 years. The Convention on the Rights of Child (CRC) defines the child as every human being below the age of 18. Whilst this definition is flexible, being subject to individual State determinations of the age of majority, in Australia the age of majority is 18 years in keeping with the Convention. Despite this, under the Act, minors can be subjected to control orders and preventative detention orders. Both of these orders restrict the human rights of their subjects; the repercussions are greater when it comes to children.

The Australian Government's justification for these new laws is clearly national security. Whilst the South Asia Human Rights Documentation Centre (SAHRDC) recognises that governments have an important obligation to combat terrorism, the measures taken to combat terrorism must conform to international law, including international human rights law.

Preventative Detention

Schedule 4 of the Act provides for a system of preventative detention in order to prevent an imminent terrorist act or to preserve evidence of such an act. This also applies directly to children aged 16 to 18 years. A preventative detention order may be made if:

(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).

There are two types of preventative detention orders. 'Initial' preventative detention orders can be requested by Australian Federal Police (AFP) members and issued by a senior AFP member. An initial order lasts for 48 hours. 'Continued' preventative detention orders may be issued in relation to persons subject to an initial preventative detention order by a Judge, Federal Magistrate, Administrative Appeals Tribunal (AAT) member or retired judge. Although the total period is limited to 48 hours, it is understood "that the States and Territories have similarly agreed to legislate to allow for a longer maximum period of 14 days for continued detention".

Pursuant to a Senate Committee recommendation, an amendment was made to initial drafts to prevent the detention of children in the same facility as adults. However, in exceptional circumstances, the senior AFP member can authorise such shared detention, which may, depending on the rationale for its invocation, breach Article 37(c) of the CRC and Article 10(2)(b) of the ICCPR.

Such preventive detention measures also breach Article 37(b) of the CRC, which requires that the detention of children should be the course of last resort and should last for the shortest

possible time. Preventative detention based on speculation about future unlawful activities breaches this requirement in the absence of stringent judicial controls. Although the regime is softened regarding children – with extended parental access – the fundamentals remain.

Judicial Review

The subject of an order cannot seek revocation of a preventative detention order. The subject is only entitled to make representations to the relevant senior AFP member, in relation to the order, with a view to having the order revoked. A detained person can contact the Ombudsman and a lawyer, though contact with a lawyer is to be monitored. Questioning of a person whilst detained is generally prohibited.

After an order ceases to be in force, a person can seek a remedy relating to the order before the Administrative Appeals Tribunal (AAT) Where a detention order is made under a corresponding State order, the person may also seek review in State or Territory courts of the making of that order or of his or her treatment. There is no judicial review available under the *Administrative Decisions (Judicial Review) Act 1977*. The review process is clearly flawed. Review is available only after an order ceases to operate. Even then the potential review is not of a judicial nature, but merely by the AAT, unless the relevant order was a State or Territory order.

According to the President of Australia's Human Rights and Equal Opportunities Commission, this constitutes "the most serious of the human rights issues in the whole procedure". This is clear in the violation of Article 37(d) of the CRC, which states that a child who is deprived of his or her liberty has "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". As a child detained under a preventative detention order cannot obtain any sort of meaningful review *during* the time of his or her detention this international requirement has not been met. During this period the detainee may only complain to the Ombudsman who has no power to set aside the order, or make representations to the senior AFP member, who retains total discretion.

Even the limited review available after an order ceases to operate is severely curtailed by the ability of the AFP to monitor detainees' communications with their lawyers. In effect, this also undermines the right to prompt access to legal assistance. The fact that a child and his or her lawyer is only entitled to a copy of the order, rather than all relevant information, makes it difficult to successfully challenge an order.

A Necessary Restriction of Human Rights?

The arbitrariness, inadequate judicial review, and secrecy of the regime have been shown to be unnecessary and thus disproportionate. Preventative detention orders also derogate from the right to liberty and the freedom from arbitrary arrest and detention. If preventative detention were classified as criminal punishment, such orders would also derogate from the presumption of innocence. This amounts to an abandonment of the presumption of innocence and the fundamental principle that individuals should not be deprived of their liberty without conviction for a criminal offence.

The Australian Government's justification for the preventative detention regime is that it is a necessary measure to safeguard national security. In the first place, it is doubtful whether

fundamental rights of the child can be derogated from due to a state of emergency. Second, even if this was possible, it is doubtful whether the uncertain terrorist threat facing Australia constitutes an emergency of the scale necessary to permit derogation from human rights. And third, the new preventative detention laws are a disproportionate and unnecessary response to the threat.

There are serious concerns that preventative detention is not necessary to achieve its stated goals. The Gilbert & Tobin Centre argues that "less invasive means" of preventing terrorist attacks or destruction of evidence are available. In addition, if there are reasonable grounds to suspect that the subject will engage in a terrorist act (or possesses a thing connected with a terrorist act, or has done an act in preparation for, or planning, a terrorist act), as is required to issue a preventative detention order, then there are a "number of existing offences under Division 101 of the *Criminal Code*, which would certainly avoid the intended terrorist act taking place". New powers given to the Australian Security Intelligence Organisation (ASIO) would also seem to adequately fulfil the stated objectives of the preventative detention regime.

As other, less intrusive, methods are available, the preventative detention regime breaches Article 37(b) of the CRC, which requires that the detention of children should be the course of last resort and should last for the shortest possible time. The lack of judicial review also makes it impossible to garner an independent assessment of whether detention is completely necessary and thus the last resort and whether the detention order provides for the shortest effective period of detention.

Conclusion

Australia's preventative detention regime has been shown to severely derogate from fundamental rights of the child. Without adequate review, and without evidence that such laws are necessary, such derogations cannot be justified under international law.
