The Commonwealth Anti-Terrorism Bill (No. 2) - Hide and Seek on Human Rights

About 300 documentary submissions and two and a half scheduled public hearing days informed a Senate Legal and Constitutional Legislation Committee Inquiry report on the Bill by the 28 November 2005 deadline. Victorian DCI-Australia Committee representative and submission co-author, Danny Sandor, laments both the Government's indifference to our compliance with binding international treaties and the lack of controversy over its censorship of the subject.

Cocky Vague and Secretive

That's been the Federal Government's approach to the far-reaching question of whether the radical national legislative scheme would meet Australia's ratified international human rights obligations. A good example is the following exchange on this topic between reporters and the Attorney General on ABC radio's *The World Today*: [2]

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

One would expect that such a confident spiel (but flawed reasoning) would be matched with a readiness to proffer the detail of the legal advice underlying it. Wrong. Attempts by submission writers to see the international law reasoning were knocked-back with the bland response: *"It is not the Government's practice to disclose whether it has received legal advice, nor to disclose the content of any such advice."*

Trust alone is expected to supplant the perils of an informed and precise debate. No need for inconvenient public discussion about citizen island abiding by the rule of international law just as much as the individual is subject to domestic regimen. That's law and order too. But under this Government, ignorance is not an excuse, it's a cultivated strategy of the chamber masters in the Canberra duplex.

More affronting still for a so-called parliamentary democracy has been the bureaucracy's refusal to give the Senate Committee *"comprehensive advice"*, remarking that is something "[they] *do not do*".[3]

It's not that the law is on the side of the Sir Humphreys

and the political lords who direct them. The convenient convention of embargo has no inherent legal protection against a parliamentary inquiry fully empowered to make a fuss and demand production of the international legal analysis. But only if it wants to.

Why it Matters

Our initial submission said of the Government's obstructive approach:[4]

> 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.

> 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]

Contrary to the Attorney's radio reasoning, there is a clear duty to ensure that no aspect of the terms of domestic legislation or its practical effects results in a breach. It continues in the context of terrorism. United Nations Security Council Resolution 1456 adopted 20 January 2003, par 6, 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*." Pursuant to Article 25 of the United Nations Charter: *"The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."*

The importance of the Senate Inquiry being able to properly assess compliance in relation to children was recently 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 Convention on the Rights of the Child ("CROC"):[5]

> In accordance with article 2 of the Convention, the [CROC] 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 the Convention.

Wasted words. The over-arching criticism of the Commonwealth scheme is that it contains no reference and mechanisms to give effect to the principle that restrictions on rights should be read in accordance with Australia's treaty obligations. In order to conform with those obligations, when Australia has no enveloping and enforceable bill or charter of human rights, the anti-terrorism legislation must be framed and be interpreted as subject to minimum human rights norms.

The second main structural failure is that none of the proposed factors and criteria to guide the exercise of power or decision-making are specific to children even though preventative detention, prohibited contact, and control orders order can be made against 16 and 17 year olds. They are treated the same as adults even though generally applicable international obligations demand a different approach that should be spelt out in the legislation, and further, they are entitled to the additional rights guarantees contained in the CROC (see particularly articles 3, 37 and 40).[6]

In the Senate Inquiry

Ruddock's representatives in their written and oral evidence purported to explain the compliance claim but did no more than regurgitate the provisions of the Bill together with monotonous assurances of the Government's satisfaction that all was in conformity. There was however an acknowledgment of the likely authorship of the hidden advice - the Office of International Law. This hardly makes one relaxed and comfortable and prompted Democrat Senator Murray to remark:[7] *"Are they the same people who have been telling me in committee hearings like this year after year that our Migration Act does not breach international law in detaining children for years?"*

It strains credulity to imagine that a legal advice about meeting human rights obligations could compromise national security. The Government's secretiveness therefore deserved deep suspicion and challenge, particularly when a bevy of submissions by experts, left able to only "shadow-box" the controversy, had precisely identified critical flaws and points of likely treaties contravention.

But leaving aside for a moment the rational notion that accurate analysis should underpin legislative action, Jane Stratton from the Public Interest Advocacy Center posed the crucial practical question that should have but didn't lock the international conventions within the Bill. If as claimed by the Government, the Bill indeed complies with our treaty obligations, why not attach them and direct that the new law is read pursuant to them?[8] Forget disclosure of the reasoning – reflect it. As the principal witness for the Attorney General's Department said in another context:[9]

> MR MCDONALD-It comes back to this: at the end of the day, it is what is in your legislation that matters.

But the absence of baseline international standards and having them apply seems to have mattered little to the most of the Inquiry members.

The Committee is used to dealing with the need to assess whether bills comply with international law. Indeed, the Inquiry into the Human Rights (Mandatory Sentencing of Juvenile Offenders) Bill 1999 was significantly concerned with whether existing laws in Western Australia and the Northern Territory were in breach.[10] In that Inquiry, senators through majority and minority reports gave their answers to these questions.

No such substance now. The majority Coalition and Labor senators did no more than say in cosy unison:[11] *"The Department explained that legal advice to the Government was that the Bill would withstand any constitutional challenge and was consistent with international law."* With Labor sharing the pen on the principal Inquiry report, the issue was put to bed by simply recording the Government's "she'll be right" say-so. Full stop. No comment. No protest over being stonewalled

In contrast, Greens Senators Brown and Nettle rejected the credibility of the Government's superficial reassurances:[13]

> Numerous submissions to the committee outlined how the legislation would violate Australia's commitments to the International Covenant on Civil and Political Rights (ICCPR). In response, assertions by the Attorney-General's Department that the bill did not breach the ICCPR rested entirely on a general claim that confidential legal advice to government that this was the case were not convincing.[14]

Coalition numbers on the Committee formally explains why there was no majority push for the assessment but it's also plain that Hansard does not reveal an Opposition champing for such candour and transparency even though compliance with the ICCPR was a public government promise.[12] Word probably got around that a call for the detailed

disclosure might distract from the frontmen jostling to join the big picture of fear and urgency. Less photo-op time-share of the superhero cloak is Labor bad press.

The Outcome

The homeland security attack on the Senate was heralded by gags and the guillotine. The Greens and the Democrats resisted, pressing to put the anti-terrorism laws within a human rights framework. Each proposed that the powers and decisions exercised under the legislation should be interpreted in light of the Convention Against Torture, the Covenant on Civil and Political Rights and the Convention on the Rights of the Child – treaties that Australia has already promised the world to honour and implement.[15]

The amendments they moved on December 5 are now disintegrating like Australia's reputation and leverage in the human rights arena. By refusing to allow the bill to include the minimum guarantees that Australia once took pride in crafting, the Coalition has rebuffed the importance of demonstrating that it acts in conformity with international law.

Combined with an increasingly equivocal approach to a bright line issue like capital punishment, this deliberate recoil from implementing human rights at home will further diminish our credibility abroad.[16]

Paratroopers of parliamentary supremacy will hold no mournful vigil at the tomb of the shunned treaties.Global norms are dangerous incursions on the supremacy and legitimacy of standard setting by ballot box for the national sovereignty glee club. They are staunch and at the ready to spruik the unique competency of our system as a bulwark against calls for platform human rights protections such as entrenched bills of rights which judges actually consider.

Of course not all binding international agreements are on their repellant radar. Enforceable W.T.O deals, worldwide travel insurance conventions and other solemn economic commitments are, well, different. They depend on compliance, consistency and interpretation no less than fundamental protection treaties. But they are laws for the "us" not the "them".

It was therefore eerie that when Ruddock's representatives politely sidelined the Senate Inquiry the "parliament uber alles patrol" was nowhere to be found. There was a deafening silence as the progress of the anti-terrorism Bill exemplified how the homegrown democratic structures they pedestal as proof of the irrelevance of international law for local standard setting utterly failed to compel the Government to provide Parliament with the detailed explanation it needed to get. On our behalf.

Yes, pragmatically, the outcome was going to be odds on futile. Even if there had been the will and the numbers to play a game of chicken and confront the withholding, the snakes and ladders of process would have inevitably brought the tussle back to Howard's Senate amidst orchestrated premonitions that the sky will fall during the haggling. But there was a wildcard worth a gamble.

Notable backbench figures are morphing tenuously into spaces of opposition void. Judging by recent gumption concerning asylum seekers and the welfare to work injustices, further impatience with the veil of ministerial arrogance and paternalism might have bubbled up to reveal some more examples of putting fact and analysis above dynastic team identity within the Coalition.

Leaving the crystal ball aside, the greater shame is that there were high stakes in play.

The easy concealment of the treaty advice without visible challenge stands as a memorable blow to the opponents of incorporating international conventions who claim that parliamentary architecture is enough to resist a white ant Executive and properly ensure the local observance of human rights under changing pressures and circumstances.

For those of us already convinced that key standards need to apply domestically, the episode was a cutting edge opportunity to portray a national identity and image that is genuine about the importance of transparency and accuracy in aiming for compliance, even when political heavyweights collude to undermine the task. Australia could have shown that it is serious about principled safeguards not just at home but elsewhere too and that we deserve to be treated as credible.

Canberra shamefully sent the opposite message as the Prime Minister toasted the success of progress.

Footnotes

1 Report of the Secretary General, *In Larger Freedom: Towards Development, Security and Human Rights For All*, A/59/2005, 21 March 2005, chapter 4, par 140 <http://www.un.org/largerfreedom/contents.htm>.
2 See <http://www.abc.net.au/worldtoday/content/2005/s1497863.htm>, broadcast 4 November 2005.
3 *Committee Hansard*, 14 November 2005, p. 12, <http://www.aph.gov.au/hansard/senate/commttee/S8921.pdf>.
4 Registered as submission 237. For our submissions see <www.dci-au.org/news> and as to other submissions posted on the Senate website see <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/index.htm>.
5 Available at <http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.15.Add.268.pdf>.
6 The rights of children of all ages are potentially infringed by orders made against adults in their lives: see Professor The Hon. Alastair Nicholson AO RFD QC, 'The Role of the Constitution, Justice, the Law, the Courts and the Legislature in the context of Crime, Terrorism, Human Rights and Civil Liberties', An Address to The Post-Graduate Student Conference Transgressions – Intersections of Culture, Crime and Social Control, for Mens Rea: The Post-Graduate Criminology Society, 4 November 2005 available at <http://www.criminology.unimelb.edu.au/staff/alastair_nicholson/transgressions_conference_unimelb_2005.pdf>.
7 *Committee Hansard*, 14 November 2005, p. 27, op. cit., footnote 3.
8 See PIAC's evidence in *Committee Hansard*, Monday 14 November 2005, op. cit., footnote 3 and the similar suggestions for incorporation by other witnesses.
9 *Committee Hansard*, 18 November 2005, p. 29, <http://www.aph.gov.au/hansard/senate/commttee/S8923.pdf>.
10 Available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/1999-02/mandatory/report/index.htm>, date completed 13 March 2000.
[11] See par 2.48 of the majority report available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf >.
[12] See Kirk McKenzie, 'How To Say 'Yes' When You Want To Say 'No'', *New Matilda*, 7 December 2005 <http://www.newmatilda.com/home/articledetailmagazine.asp?ArticleID=1197&HomepageID=117>
[13] See par 1.3 of their report available at <http://www.aph.gov.au/Senate/committee/legcon_ctte/terrorism/report/report.pdf >.
[14] We subsequently suggested to the Greeens that any amendments involving 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.
[15] The Greens' amendments further provided for invalidating parts of the Bill in conflict with international law by proposing that:
"If in any proceedings regarding any matter in relation to this Act a court is satisfied that a provision of the Act is inconsistent with a right arising under the International Covenant on Civil and Political Rights or the Convention on the Rights of the Child or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the court may make a declaration of that inconsistency and the provision of the Act shall be of no effect to the extent of that inconsistency."
[16] See Pia Di Mattina (2005) 'What manner of men and women are we?' No. 40 *Australian Children's Rights News*,35.
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Tender for New NYARS Project

The National Youth Affairs Research Scheme (NYARS) is a co-operative funding programme between the Australian, State and Territory Governments that facilitates nationally based research into factors affecting young people in Australia. The purpose of NYARS research is to inform the development and implementation of government policies and programmes for young people in Australia. The Australian Government Department of Family and Community Services (FaCS) is inviting tenders for a NYARS research project entitled 'Diversity in Young People's Participation in Government and Community Decision-making'. The FaCS Request for Tender (RFT) number is FACS/05/T480.

The research project has a specific focus on the issues and outcomes for the following diverse groups of young people: Indigenous young people; Young people with a disability; Young people from lower socio-economic backgrounds; Culturally and linguistically diverse young people, including emerging communities; and Young people under the guardianship of the Minister. The research project will culminate with the production of a major research report (of up to 60,000 words). This report may, at the discretion of NYARS, be published in the NYARS series. The budget allocation for the research project is $165,000 (GST inclusive). Tenders close at 2:00 pm Canberra Local Time on 13 January 2006. Documentation for RFT No. FACS/05/T480 can be obtained by contacting the NYARS Unit at email: nyars@facs.gov.au or phone: (02) 6212 9582. [from YACVic Annouce]