NSWCCL
NEW SOUTH WALES COUNCIL FOR CIVIL LIBERTIES
PO BOX 201 GLEBE NSW 2037 AUSTRALIA • TELEPHONE (02) 9660 7582 • FAX (02) 9566 4162

Wednesday, 2 November 2005

Committee Secretary
Joint Standing Committee on Treaties
Department of House of Representatives
Parliament House
CANBERRA ACT 2600

by email: jsct@aph.gov.au

Dear Committee Secretary,

Re: Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography

Thank you for this opportunity to make a submission on Australia's ratification of this Optional Protocol to the *Convention on the Rights of the Child*.

The New South Wales Council for Civil Liberties ('CCL') encourages the Committee to recommend that Australia ratify this Optional Protocol. It is an important human rights instrument aimed at protecting some of the most vulnerable members of our community – children.

While CCL has no issues with the text of the Optional Protocol, CCL draws to the attention of the Committee several issues with the implementation of the Optional Protocol in domestic legislation.

Currently there are as many definitions of 'child pornography' in Australian law as there are legal jurisdictions. The elements of child pornography offences also vary from jurisdiction to jurisdiction. As the Committee will be aware, the issue of standardising child pornography laws across the nation was referred to the Model Criminal Code Officers' Committee ('MCCOC') by COAG in June 2005. CCL supports this move and asks the Committee to endorse the referral of this issue to MCCOC.

The sexual exploitation of children in the production of child pornography is abhorrent and a gross violation of the rights of children. In the vast majority of cases the need to protect children will outweigh individual rights of free expression and privacy. However, there are legitimate civil liberties issues on the periphery of the child pornography debate.

Existing child pornography laws are overbroad and catch situations that they were never intended to.

For example, while it is lawful for seventeen years old in NSW to engage in consensual sexual conduct, it is a criminal offence for them to photograph that conduct for their own private use and transmit it to each other by way of their mobile telephones, iPods or the internet. Federal laws criminalise such activity of children under eighteen as the *producers*, *disseminators* and *possessors* of child pornography. Clearly these seventeen year olds are not paedophiles and do not represent any harm to other children. In Canada, similarly broad legislation has been read down to include an exception for self-depicting teenagers (*R v Sharpe*).

Australian child pornography legislation also enacts 'thought crimes' by criminalising the expression of child pornography created from an individual's own imagination and kept exclusively for his or her own personal use. In both the United States (*Ashcroft v Free Speech Coalition*) and Canada (*R v Sharpe*) the courts have ruled that such laws are unconstitutional because they breach freedom of expression – the freedom to express one's own personal thoughts on paper. To criminalise such activity is to criminalise thought itself. For example, a teenager recording in a diary their sexual fantasies (imagined or real) with another teenager could fall foul of current laws.

Some Australian child pornography laws criminalise depictions of children 'engaged in sexual activity'. This phrase encompass a much broader range of activity than the international standard of '*explicit* sexual activity'. Australian laws might even criminalise a photograph of two fully-clothed teenagers kissing.

It is quite clear that Australia's child pornography laws are so broad that they actually criminalise the very people they are trying to protect.

Australia does not have a Bill of Rights, which means that, unlike in North America, the courts have very little scope to review these broad laws against human rights standards. The *Human Rights (Sexual Conduct) Act 1994* (Cth) only applies to adults and would not protect the children described above.

It is important to remember that a child sex conviction can have catastrophic consequences for an individual. A teenager convicted of a child pornography offence under overbroad laws faces a life-long stigma because child sex offences are exceptions to spent conviction legislation and could severely limit that individual's career choices (i.e. prohibited from working with children). Under certain circumstances, such a teenager could even end up on a Child Protection Register for repeat child sex offenders.

CCL asks the Committee to recommend that domestic child pornography legislation explicitly state that it is made subject to the fundamental rights and freedoms set down in the *International Covenant on Civil and Political Rights* ('ICCPR'). Such an amendment would help to protect those peripheral circumstances where child pornography laws inadvertently infringe on the right to privacy and freedom of expression. This will allow judicial review of legislation, which is often written in a context of zealous zero-tolerance, against human rights standards on a case-by-case basis in a dispassionate fashion. Reference to the ICCPR in domestic law is not unprecedented: see, *Evidence Act 1995* (Cth) section 138(3)(f).

CCL also asks the Committee to remind the appropriate Ministers of the Committee's recommendation that Australia should ratify ILO Convention No. 182 ('C182'), which also seeks to protect children.[1] Like the Optional Protocol, C182 prohibits the 'use, procuring or offering of a child...for the production of pornography'. CCL also supports Australia's ratification of this significant children's rights convention.

For the Committee's information, I attach an updated copy of a background paper on the possession of child pornography. The document contains the background material to this submission. I hope that it will prove useful to the Committee's deliberations.

Yours sincerely,

Michael Walton
Committee Member
NSW Council for Civil Liberties

[1] Joint Standing Committee on Treaties, *Report 56* (1 December 2003) recommendation 3.