



CDPP

Australia's Federal Prosecution Service



INSLM review of the prosecution and sentencing of children for Commonwealth terrorist offences

CDPP response to request for information

1. **Since the implementation of s 15AA of the Crimes Act, in what proportion of cases involving juveniles has the CDPP opposed bail where the juvenile has been charged with, or convicted of:**
 - a. **A terrorism offence (other than an offence against s 102.8 of the Code); or**
 - b. **Any other offence referred to in s 15AA.**

- a. Since the implementation of section 15AA of the *Crimes Act 1914* (Cth) in 2004, eight juveniles have been charged with terrorism offences.

Four of these prosecutions have concluded. In each case, the juvenile was convicted of a terrorism offence. In one matter, the terrorism charge was withdrawn and the juvenile was convicted of a different offence. Three matters involving juveniles charged with terrorism offences are currently before the courts.

NSW

Seven of the eight juveniles charged with terrorism offences were, or are being, prosecuted in NSW. Each of these seven juveniles made an application for bail in the NSW Children's Court.¹ The CDPP opposed bail in each application. The NSW Children's Court refused each of the applications for bail.

A further five of the eight juveniles charged with terrorism offences applied for bail in the Supreme Court of NSW, following the refusal of their application in the NSW Children's Court. The CDPP opposed bail in each of the Supreme Court applications for bail. Two of the juveniles were granted bail by the Supreme Court and three had their applications for bail refused.

One juvenile also subsequently applied for bail in the NSW Court of Criminal Appeal following refusal of their application for bail by the NSW Supreme Court. The CDPP opposed bail and the application was refused by the Court of Criminal Appeal.

Victoria

To date there has only been one juvenile prosecuted for a terrorism offence in Victoria. The juvenile did not make an application for bail.

Further information is set out in Annexure A.

- b. CDPP records indicate that no juveniles have been charged with other offences referred to in s15AA of the *Crimes Act 1914* (Cth).

¹ One child made two applications for bail in the NSW Children's Court, the other six children made a single application.

2. Does the CDPP have a policy on how to deal with bail proceedings involving juvenile offenders? Please provide details.

The *Prosecution Policy of the Commonwealth* sets out general principles concerning the prosecution of juvenile offenders (see paragraphs 2.15-2.18). Although this part of the policy does not deal specifically with bail, it sets out a number of matters relevant to the prosecution of juveniles.

The CDPP has an internal Decision Making Matrix (DMM), which sets out the authority of CDPP staff to make certain decisions regarding the conduct of criminal prosecutions. The DMM identifies a range of prosecution decision making and authorises staff to make certain decisions based on their role within the organisation. Some prosecution decision making is also the subject of delegation by the Director.

Where bail proceedings involve:

- a juvenile accused; or
- any accused charged with a terrorism offence

the DMM requires that a decision about whether or not to oppose bail, or appropriate bail conditions, must be made by an Assistant Director (SES B1) or a Deputy Director (SES B2). The decision to appeal a grant of bail to a person charged with a terrorism offence can only be made personally by the Director.

In determining the CDPP's position on bail, the relevant CDPP decision maker will consider the applicable bail test, the views of police, the nature and seriousness of the offence and any other factors that may be relevant to the decision whether to oppose the application for bail.

3. Is the CDPP aware of any differences in the criminal procedure and/or remand arrangements between jurisdictions which have a bearing on the appropriateness of bail for federal juvenile offenders (either generally or in relation to terror offences specifically)?

Federal juvenile offenders are subject to state and territory bail laws and procedure by virtue of ss68(1), 79 and 80 of the *Judiciary Act 1903* (Cth). Where a juvenile is charged with a terrorism offence (other than an offence under s102.8 of the *Criminal Code*), section 15AA of the *Crimes Act 1914* (Cth) determines the test for bail, however the respective state and territory laws concerning bail and bail procedure will otherwise apply.

A number of States have made laws which relate specifically to applications for bail made by persons who have been previously charged with or convicted of a terrorism offence or have publically expressed support for a terrorist organisation.² These laws may apply to applications for bail made in Federal matters where such laws are not inconsistent with existing Federal laws.

While the criminal procedure in relation to bail will vary to some degree from state to state, the CDPP is not aware of any differences in procedure which have a bearing on the appropriateness of bail for federal juvenile offenders. The CDPP is unable to provide any information concerning remand arrangements for juveniles. These are matters for relevant State or Territory authorities.

4. I understand that in the case of children charged with terrorism offences, the CDPP consider they cannot 'force' a jury trial by filing an indictment and thus attracting the jury trial guarantee in s 80 of the Constitution, in the face of opposition by a State Children's court. Does the CDPP consider that the investing of federal jurisdiction under the Judiciary Act should be amended to make clear that the CDPP is not limited by State or Territory law in deciding whether or not to file an indictment instead of proceedings summarily?

² See for example s4(3)(ba) of the *Bail Act 1977* (Vic).

Section 80 of the *Constitution* provides that the trial on indictment of any offence against the law of the Commonwealth shall be by jury. Section 80 of the Constitution does not guarantee or require that all Federal indictable offences must be dealt with by way of a jury trial.³ Offences against a law of the Commonwealth punishable by imprisonment for a period exceeding 12 months are indictable offences.⁴ It is common practice for some Federal indictable offences to be heard and determined summarily with the consent of the prosecutor and the defendant.⁵

The Commonwealth Director of Public Prosecutions has a broad power to file an ex officio indictment pursuant to s6(2D) of *Director of Public Prosecutions Act 1983* (Cth). The CDPP is of the view that such a power would permit the Director to file an ex officio indictment in a matter involving a juvenile.⁶ The CDPP sees no need for any amendment to the *Judiciary Act* to clarify the scope of this power.

The States and Territories have each made laws which govern the prosecution of juveniles. To the extent to which they are not inconsistent with relevant Federal laws, these laws apply to the prosecution of children for Federal terrorism offences. In most State and Territory jurisdictions, the jurisdiction of the Children's Court is extensive and the Court is encouraged to exercise that jurisdiction in all but a relatively small number of serious cases. Where a Children's Court exercising Federal jurisdiction with respect to a child charged with a Federal indictable offence declines an application by the prosecution to commit the child for trial before a superior court, the Commonwealth Director would have the power to file an ex officio indictment. However, the exercise of this power may have the effect of complicating and delaying the proceedings. Any use of the ex officio power may come after an interlocutory appeal or judicial review⁷ of the Children's Court decision not to commit a matter to a superior court. Further, while the Director's decision to file an ex officio indictment itself cannot be reviewed, the court retains the power to manage its own processes. Any ex officio indictment filed in the absence of a committal proceedings may give rise to an application for a conditional or permanent stay of the proceedings.⁸ The CDPP also notes that in some jurisdictions, superior courts retain a discretion to remit a matter involving the prosecution of a juvenile back to the Children's Court for punishment.⁹

The question of whether the Children's Court should have jurisdiction to hear and determine matters involving the prosecution of juveniles for terrorism offences is a policy question for Government.

5. Are there instances where the CDPP has been prevented from proceeding by way of indictment and thus jury trial? Please provide details.

In relation to matters involving juveniles charged with terrorism offences, there have been no instances where the CDPP has unsuccessfully sought to have a committal hearing take place in the Children's Court with a view to the accused being committed for trial before a superior court. However, in AB (see below), an application by the prosecution to have the accused dealt with by the NSW District Court, rather than the Children's Court, for an offence which was not a terrorism offence was refused. Further details are set out below.

³ *Cheng v The Queen* (2000) 203 CLR 248, "Section 80 is not a great guarantee of trial by jury for serious matters. It guarantees trial by jury only when the trial is on indictment. Whether an offence is tried or triable on indictment depends in the first instance on Parliament's classification of the offence". See also *Kingswell v The Queen* (1985) 159 CLR 264 and *R v Archdall* (1928) 41 CLR 128.

⁴ See s4G of the *Crimes Act 1914*.

⁵ See s4J of the *Crimes Act 1914*.

⁶ *PM v The Queen* [2007] HCA 49; *R v Duffield* (1992) 28 NSWLR 638.

⁷ Whether an appeal could be pursued would depend on what was permitted by the legislation of the respective state or territory.

⁸ *PM v The Queen* [2007] HCA 49, [30],[101]; *Barton v R* (1980) 147 CLR 75; *Jago v District Court of New South Wales* (1989) 168 CLR 23.

⁹ Section 20 *Children (Criminal Proceedings) Act 1987* (NSW); Section 29 *Young Offenders Act 1993* (SA).

The CDPP is unable to provide a comprehensive response in relation to all Federal juvenile prosecutions conducted by the CDPP to date as its prosecutions database cannot be searched for this information.

NSW

In NSW, offences carrying a maximum penalty of life or 25 years cannot be finalised in the Children's Court and must be committed to a higher court.¹⁰ Of the seven NSW prosecutions, five involved terrorism charges carrying a maximum penalty of life imprisonment. In those matters the accused were each committed for trial or sentence in the Supreme Court of NSW.

In the matter of AB, the terrorism charge against the accused was withdrawn and the accused pleaded guilty to a charge contrary to s474.15(1) of the *Criminal Code* (Cth), which carries a maximum penalty of ten years imprisonment. In that matter, the CDPP made an application pursuant to s. 31(5) of the *Children (Criminal Proceedings) Act 1987* (NSW) seeking that the charge be committed to the District Court for sentence. The Children's Court refused that application and the matter was finalised in the Children's Court.

Details of one additional matter are set out in Annexure A.

Victoria

To date there has only been one juvenile prosecuted for a terrorism offence in Victoria.

MHK was initially charged with offences contrary to s101.6 and s101.4 of the *Criminal Code* (Cth). At that time,¹¹ the *Children Youth and Families Act 2005* created a presumption of summary jurisdiction for most matters involving juveniles, other than certain serious state offences.

However, s356(3) of the *Children Youth and Families Act 2005* provided that a matter could be committed to a higher court where the Court determined the charge was, by reason of exceptional circumstances, unsuitable to be determined summarily.¹² On application of the informant, the Children's Court of Victoria determined that exceptional circumstances required the charges proceed by way of committal hearing. MHK sought judicial review of the Children's Court decision. That application for judicial review was unsuccessful, see *K v Children's Court of Victoria & Anor* [2015] VSC 645. MHK was subsequently committed to the Supreme Court of Victoria for sentence.

6. Does the CDPP have any other suggestions for reform in relation to this review?

- The prosecution and sentencing of juveniles for Federal terrorism offences can give rise to unique and very difficult legal issues, and may not be well suited to determination by a busy Children's Court Magistrate. As matters presently stand, the jurisdiction of Children's Court to hear and determine a matter involving a Federal terrorism offence is not consistent and varies across jurisdictions.
- The CDPP is of the view that section 19AG of the *Crimes Act 1914* (Cth) applies to all persons sentenced to imprisonment for a terrorism offence, including children. Section 19AG requires that

¹⁰ *Children (Criminal Proceedings) Act 1987* (NSW) s3, s28 and s31. Offences punishable for life or 25 years are defined as 'serious indictable offences': State offences such as homicide and certain sexual and firearms offences are also serious indictable offences.

¹¹ Recent amendments to the *Children Youth and Families Act 2005* (Vic) create a rebuttable presumption that offences contrary to Division 101 of *Criminal Code* (Cth) will be committed to a higher court where the offender was 16 years or older at the time of the offence. Terrorism offences under Divisions 102, 103 and 119 of the *Criminal Code* (Cth) are not covered by the amendments.

¹² s356(3) *Children, Youth and Families Act 2005* (Vic).

where the court imposes a sentence of imprisonment for a terrorism offence, a single non-parole period of at least $\frac{3}{4}$ of the sentence must be imposed for that offence. Particular considerations apply when sentencing a child for criminal offences. Sentencing a child for a terrorism offence is likely to involve some balancing of the desirability of rehabilitation with the need for deterrence and community protection. In this context, the CDPP notes judicial comment suggesting s19AG may restrict the court's discretion to craft a sentence which is appropriate in the circumstances of terrorism offences committed by a child.¹³

¹³ See for example *DPP v MHK* [2016] VSC 742, [78].