



Australian
Human Rights
Commission

Independent National Security Legislation Monitor
(INSLM) Review – Prosecution and Sentencing of
Children for Commonwealth Terrorist Offences

**AUSTRALIAN HUMAN RIGHTS COMMISSION
SUBMISSION TO THE INSLM**

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1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Independent National Security Legislation Monitor (INSLM), Dr James Renwick SC, in relation to his review of certain legislation and powers in relation to the prosecution and sentencing of children for Commonwealth terrorist offences (the Review).
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It is Australia's national human rights institution.
3. The INSLM is required to have regard to Australia's international human rights obligations.¹ That is consistent with the objects of the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act), one of which is to ensure that Australia's national security legislation is consistent with Australia's international human rights obligations.²
4. The INSLM has indicated that the present review will consider, in particular, the following:
 - (a) **Prosecution of children:** Section 20C of the *Crimes Act [1914]* (Cth) means that a child charged with a Commonwealth terrorism offence may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. The requirements for the trial of children differ among the States and Territories. The review will consider whether Commonwealth legislation should ensure a consistent approach to such matters.
 - (b) **Sentencing:** Section 19AG of the *Crimes Act 1914* (Cth) establishes minimum non-parole periods for persons convicted of certain offences. For most terrorism offences, upon conviction, s 19AG(2) compels the court to fix a single non-parole period of at least three-quarters of the sentence for that offence. The review will consider whether s 19AG should be amended for children convicted of Commonwealth terrorism offences.³
5. The INSLM has indicated that, for the purposes of the Review, 'children' means people between 10 and 17 years of age. The scope of the Review 'does not include consideration of changing the age of criminal responsibility for children'.⁴
6. As well as addressing the two particular matters above, this submission briefly addresses several further matters which the INSLM has indicated may be considered in the course of the Review.

2 Summary

7. The Commission recognises the vital importance of ensuring that law enforcement agencies can effectively prosecute terrorism offences and that courts can impose appropriate penalties to safeguard Australia's national security and protect the community from terrorism. Indeed, such steps are consistent with Australia's obligations under international law, pursuant to United Nations Security Council Resolutions,⁵ and the obligation to protect the

right to life of persons within Australia’s jurisdiction. This right is itself a human right, enshrined in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR).⁶

8. Human rights law assumes that relevant authorities will be granted sufficient powers to fulfil their legitimate mandate. Human rights law also accepts, subject to certain conditions, that prosecutions and sentences may impinge to some extent on individual rights and freedoms. Critically, any such limitation on human rights must be:
 - (a) **prescribed by law.**
 - (b) **necessary** to achieve a legitimate objective compatible with international human rights law.
 - (c) **proportionate** to achieving the legitimate objective.⁷
9. As the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) has observed, ‘the purpose of security measures is, fundamentally, to protect freedom and human rights’.⁸ It is therefore essential that fundamental human rights are protected in the struggle against terrorism.⁹
10. Children enjoy the same human rights as adults, which are protected by a number of core human rights treaties. However, in recognition of the special status of children, their rights receive additional elucidation and protection under the *Convention on the Rights of the Child* (CRC).¹⁰ By ratifying the CRC, Australia has acknowledged that the unique status of children warrants ‘special safeguards and care, including appropriate legal protection’.¹¹ These include special considerations that must be taken into account in relation to the prosecution and sentencing (including the administration of sentences) of children for criminal offences, including terrorism offences.
11. This submission contains:
 - (a) an outline of the minimum requirements of human rights law applying to the prosecution, sentencing and imprisonment of children
 - (b) a brief discussion of the application of these principles to ss 20C and 19AG of the *Crimes Act 1914* (Cth)
 - (c) a brief discussion of several other matters the INSLM has indicated he may consider in the course of the Review.

3 Recommendations

Recommendation 1

The INSLM should undertake, or recommend that the Australian Government cause to be undertaken, a complete survey of the relevant State and Territory provisions governing the prosecution and sentencing of children for terrorism offences. This survey should include an assessment of whether these

provisions are consistent with the rights of the child protected by the *Convention on the Rights of the Child* outlined in this submission.

Recommendation 2

The INSLM should recommend that, following the review contemplated in Recommendation 1, the Commonwealth, States and Territories legislate to ensure that any child charged with a Commonwealth terrorism offence be tried, punished or otherwise dealt with in accordance with the rights protected by the *Convention on the Rights of the Child*.

Recommendation 3

The INSLM should recommend that s 19AG of the *Crimes Act 1914* (Cth) relating to minimum non-parole periods be amended so that it does not apply to children.

Recommendation 4

The INSLM should recommend that s 15AA of the *Crimes Act 1914* (Cth) relating to bail for persons accused of certain Commonwealth offences be amended so that it does not apply to children.

4 Human rights framework

12. Australia is a party to seven key human rights treaties.¹² A number of these treaties protect rights relevant to the sentencing and prosecution of people for terrorist offences. This submission focuses on the rights protected by the CRC, which provides the overarching international human rights framework for the protection, promotion and fulfilment of rights of children and young people.¹³ The CRC recognises the special status of children, including the needs of the child for ‘special safeguards and care, including appropriate legal protection.’ The CRC relevantly provides further detail about the requirements of the criminal process rights and guarantees articulated in the ICCPR in relation to their application to children.
13. The following discussion describes the principal human rights relevant to the Review, and is intended to provide a framework to assist the INSLM in determining whether the legislation under consideration is consistent with the human rights of children.

4.1 General principles relating to juvenile justice

14. The CRC contains a number of rights protecting children who are involved in the criminal justice system. In its *General Comment 10*,¹⁴ the UN Committee on the Rights of the Child¹⁵ has conducted a survey of these rights, and shown they embody a comprehensive policy for juvenile justice.¹⁶ As the Committee has explained, the following rights in the CRC have particular relevance to any system of juvenile justice that is adequately to protect the rights of the child:

- **Non-discrimination (art 2):** States parties must take all necessary steps to ensure that all children in conflict with the law are treated equally.¹⁷ No child should be discriminated against for any reason, no matter their religion, race or abilities; whatever they think or say; what their culture is; whether they are boys or girls or whether they are rich or poor.¹⁸
 - **The best interests of the child (art 3):** Any decision made or action taken that may affect a child must *a/ways* make the best interests of the child a primary consideration. This means that when adults make decisions that affect children, they should consider what would be best for the child. Importantly for present purposes, the Committee has stated:

The protection of the best interests of the child means ... that the traditional objectives of criminal justice, such as repression/retribution, **must give way to rehabilitation and restorative justice objectives in dealing with child offenders.**¹⁹
 - **Ensuring the child’s survival and development (art 6):** Every child has the inherent right to life, and it is the responsibility of decision-makers to ensure they are provided every opportunity to develop and reach their potential — physically, spiritually, morally and socially. The deprivation of liberty has very negative consequences for the child’s development and ‘seriously hampers his/her reintegration in society’.²⁰
 - **Participation and the right to be heard (art 12):** Children are experts in their own lives and experiences, and have the right to have their say in decisions that affect them. Every child has the right to express his or her opinion, and can provide advice and valuable insight into how their rights can best be protected and fulfilled.²¹ The Committee has stated that ‘decision makers in judicial or administrative proceedings [should] explain the extent of the consideration given to the views of the child and the consequences for the child’.²² Although children’s views must be taken into account, there is no requirement to make decisions consistent with those views, where departure from those views is justified by other considerations.
15. General Comment 10 also discusses the treatment of children in the juvenile justice system, including the use of disciplinary measures, the use of force and restraint, monitoring and accountability, and access to complaints mechanisms.²³ The United Nations has promulgated other rules and guidelines addressing the rights of children involved in the justice system, including the Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules or Havana Rules)²⁴ and the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).²⁵
16. Australia’s obligations under the CRC apply to all children in Australia. For the purposes of the CRC, children are individuals under 18 years of age.²⁶ That means that the rights in the CRC apply to all those who are ‘children’ for the purposes of the Review.

4.2 Articles 37 and 40 of the CRC

17. Further to the rights outlined above, the CRC includes particular provisions relating to the prosecution and sentencing of children. In considering the rights below, it must be borne in mind that all human rights — including rights that pertain specifically to children — are interrelated and indivisible. The content of the rights described below is therefore to be read in light of all the rights in the CRC.
18. **Article 37** of the CRC safeguards the rights of children in contact with the youth justice system, and requires that:
- No child shall be subjected to torture, or other cruel, inhuman or degrading treatment or punishment (art 37(a)).
 - No child shall be deprived of their liberty unlawfully or arbitrarily (art 37(b)).
 - Deprivation of liberty, including arrest, detention and imprisonment, should be used only as a ‘measure of last resort’ and for the ‘shortest appropriate period of time,’ so that the child’s right to development is fully respected and ensured (art 37(b)).
 - Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner that is consistent with their developmental age (art 37(c)).
 - Detained children must be separated from adults, unless that separation is not in the child’s best interests (art 37(c)).
 - A child deprived of their liberty shall have the right to maintain contact with his or her family through correspondence and visits, except in exceptional circumstances (art 37(c)).
 - Children have the right to legal and other assistance if they come into contact with the justice system (art 37(d)).
19. **Article 40** of the CRC outlines a number of minimum guarantees that apply to children in criminal proceedings. In particular, article 40 contains the following protections:
- The prohibition of retroactive criminal laws (art 40(2)(a)). The Committee on the Rights of the Child has emphasised that in a time of increasing legislation aimed at preventing or combating terrorism, it must be ensured that these laws ‘do not result in retroactive or unintended punishment of children’.²⁷
 - The presumption of innocence (art 40(2)(b)(i)) — all children are presumed innocent until proven guilty according to law.²⁸
 - The right to effective participation in criminal proceedings (art 40(2)(b)(iv)).
 - The requirement that prompt and direct information of any criminal charges be given to the accused child and, if appropriate, their parent/guardian (art 40(2)(b)(ii)).²⁹

- The right to timely determination of criminal charges. Criminal matters must be heard and determined without delay and with appropriate parental involvement (art 40(2)(b)(iii)). The requirement for appropriate parental involvement is related to the right of the child to maintain regular personal relations and direct contact with his or her parents, in accordance with art 9(3) of the Convention, which helps ensure the well-being of children deprived of their liberty.
 - The freedom from compulsory self-incrimination (art 40(2)(b)(iv)). The Beijing Rules observe that the right to silence is a ‘basic procedural safeguard’.³⁰
 - The availability of diversions from the criminal justice system (art 40(3)(b)). Whenever appropriate and desirable, children should be diverted away from judicial proceedings, provided that human rights and legal safeguards are fully respected. This promotes the rights of the child, as it avoids the negative effects of criminal proceedings on the child, including the stigma of conviction, and provides a mechanism through which unnecessary arrest, detention and/or imprisonment can be avoided in accordance with art 37(b) of the CRC.³¹
 - The right to appeal (art 40(2)(b)(v)).
 - The right to have privacy respected at all stages of proceedings (art 40(2)(b)(vii)).
20. The rights described above must be protected in any laws allowing for or regulating the prosecution and sentencing of children, whether substantive or procedural in nature. It will be seen that a number of the rights above will best be protected by the creation of special procedures for trials involving children, to ensure (for example): that children can be heard in a way appropriate for their level of development; that all decisions in relation to a particular prosecution (including the decision to prosecute, decisions about legal representation, procedural decisions, and sentencing decisions) make the best interests of the affected child a primary consideration; that rehabilitation and restorative justice are the primary aims in juvenile sentencing; and that children are only sentenced to imprisonment or other forms of detention as a matter of last resort.

5 Prosecuting children – consistency across States/Territories

21. Section 20C of the Crimes Act provides that a child or young person charged with a Commonwealth offence, including a terrorism offence, may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. Legislation and rules of court regulating criminal trials, including those involving children, differ among the States and Territories.
22. Taken together, the rights protected by the CRC provide a set of principles which must apply in any prosecution of a person who is younger than 18 years of age. The CRC therefore requires uniformity between State and Territory rules governing the trial of children in the sense that it requires the prosecution

and sentencing of children in all jurisdictions to comply with the CRC. That includes a requirement that children be treated and sentenced in a manner that is appropriate to their status as children. Provided that the fundamental rights of children are adequately protected, the CRC does not require absolute uniformity between the States and Territories. As Van Bueren has put it, the key requirement is that '[w]here separate systems of justice are established, they should still be in conformity with international human rights law'.³²

23. In the context of the ICCPR, the UN Human Rights Committee has determined that, in a federal system, the right to a fair trial does not require uniformity of all procedural rules across all jurisdictions.³³ However, the ICCPR protects the right to equality before the courts, as well as to the right to non-discrimination on unreasonable grounds.³⁴ Therefore, where a significant procedural right is enjoyed by people to a different extent, solely on the basis of their place of residence, that difference *may* impermissibly limit the human rights of the affected person. That will depend on the nature and extent of the procedural difference.³⁵
24. The Commission submits that, before any conclusion is reached about the need for uniformity in the procedure applicable in trials of children for terrorism offences, a comprehensive survey of State and Territory laws and rules of court should be undertaken. At the conclusion of that survey, the following principles should be applied:
 - (a) The rules in each State and Territory governing the prosecution of children for terrorism offences should be assessed for compliance with the rights protected by the CRC, as outlined above.
 - (b) In the event that any State or Territory jurisdiction does not fully protect the rights of children in terrorism trials, those laws should be amended accordingly.
 - (c) Where 'best practices' to protect the rights of children in terrorism trials are identified in particular jurisdictions, those practices should be implemented in other jurisdictions.
 - (d) Any attempt to impose uniformity of rules in relation to the prosecution of children for terrorism offences should not involve any 'levelling down'; that is, uniformity should not be achieved at the cost of reducing protections for children in any particular State or Territory.
25. The Commission considers that a thorough review of the prosecution and sentencing of children could appropriately also include for consideration:
 - (a) the conditions in which children are detained (both on remand and following conviction), to ensure that the conditions of detention are not inconsistent with the human rights contained in the ICCPR and the Convention against Torture³⁶
 - (b) the minimum age of criminal culpability. The National Children's Commissioner has recommended that the minimum age be raised to 12 years.³⁷

Recommendation 1

The INSLM should undertake, or recommend that the Australian Government cause to be undertaken, a complete survey of the relevant State and Territory provisions governing the prosecution and sentencing of children for terrorism offences. This survey should include an assessment of whether these provisions are consistent with the rights of the child protected by the *Convention on the Rights of the Child* outlined in this submission.

Recommendation 2

The INSLM should recommend that, following the review contemplated in Recommendation 1, the Commonwealth, States and Territories legislate to ensure that any child charged with a Commonwealth terrorism offence be tried, punished or otherwise dealt with in accordance with the rights protected by the *Convention on the Rights of the Child*.

6 Sentencing children – minimum non-parole periods (s 19AG)

26. Section 19AG of the Crimes Act establishes minimum non-parole periods for persons convicted of certain offences. When a person is convicted of a terrorism offence,³⁸ s 19AG(2) compels the sentencing court to fix a single non-parole period of at least three-quarters of the sentence imposed. Section 19AG applies to both children and adults sentenced in relation to relevant offences.
27. The Commission has not identified significant commentary from the UN Human Rights Committee or the Committee on the Rights of the Child addressing parole regimes. However, the Commission considers that a number of the rights protected by the CRC require that courts have a significant degree of flexibility in determining non-parole periods when sentencing children. For that reason, the Commission considers that s 19AG(2) of the Crimes Act is likely to be inconsistent with the rights of affected children.
28. Section 19AG was introduced into the Crimes Act by the *Anti-Terrorism Act 2004* (Cth). The Second Reading speech of the Minister for Justice in relation to that legislation stated that ‘sentences for convicted terrorists should reflect community concern about terrorism’. The Minister continued:
- The significant period that those sentenced are serving on parole – which in most cases is necessary to reintegrate prisoners back into the community – is not warranted in the case of terrorists and does not reflect community concern about the crimes.³⁹
29. The Commission notes two aspects of these remarks:
- (a) First, the Minister acknowledged that parole is ‘necessary to reintegrate prisoners back into the community’.

(b) Secondly, the Minister suggested that the objective of ‘reintegration’ is ‘not warranted in the case of terrorists’.

30. These remarks were said to justify restricting the right to parole for persons convicted of terrorism offences. As the Minister went on to observe, fixing the minimum non-parole period in this way was an ‘extraordinary measure’.⁴⁰
31. Whatever may be said about these remarks insofar as they apply to adult offenders, the CRC requires, in the case of children, that:
- (a) the focus of criminal justice must be rehabilitation and restorative justice, and particularly requires the consideration of ‘the child's age and the desirability of promoting the child's reintegration ... in society’⁴¹
 - (b) deprivations of liberty be for the ‘shortest appropriate period of time’⁴²
 - (c) alternatives to punitive detention should be considered in the case of child offenders and detention of children should always be a last resort.⁴³
32. Contrary to the stated objects of s 19AG, the CRC requires that a court have flexibility in sentencing child offenders to ensure they are not imprisoned beyond the time necessary for rehabilitation. It also requires that parole authorities have discretion to release convicted children on parole where the purpose of detention has been served. It is not permissible to prolong the imprisonment of children for purely punitive purposes, or because of a perception that the community may have a ‘concern about terrorism’. The need for flexibility in sentencing children is heightened in the context of terrorism offences because of the heavy penalties attached to those offences. In those circumstances, a mandatory minimum non-parole period may have a significant impact on development, education and capacity to integrate of an affected child, at a critical period of neurological, socio-emotional and physical change.
33. In the case of *R v MHK* [2016] VSC 742, Lasry J was required to sentence a child who had pleaded guilty to a charge of a relevant Commonwealth terrorism offence. His Honour imposed a head sentence of seven years imprisonment. Section 19AG required the court to direct that the child ‘serve at least a minimum period of 75% of the head sentence’,⁴⁴ which amounted to a minimum term of five years and three months.⁴⁵ In making this order, Lasry J observed, in addressing the child:
- had I been permitted to do so, I would have fixed a minimum term of four years, which would have better enabled your supervision and rehabilitation given your youth.⁴⁶
34. These remarks illustrate that concerns about the operation of s 19AG are not purely theoretical. Section 19AG imposes a blunt sentencing requirement that detracts from a sentencing judge’s capacity to make an individualised assessment of what is necessary and appropriate in the context of the particular child offender before the judge. Specifically, the section can lead to results that are not consistent with the human rights of children, in that:

- (a) it does not allow the best interests of the child to be made a primary consideration in all sentencing decisions
 - (b) it can lead to terms of imprisonment longer than are strictly necessary
 - (c) it can lead to results which may be contrary to a judge’s assessment of the specific supervision and rehabilitation requirements in respect of an individual child offender.
35. In relation to children involved in the criminal justice system, art 40(4) of the CRC requires that:
- A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available.
36. The article also requires that children be ‘dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence’.
37. Any sentence must be proportionate both to the seriousness of the offence and to the circumstances of the offender. These circumstances include age, physical and mental health, family and socio-economic background, cultural affiliations, intellectual development and level of educational attainment. The sentencing authority must take into account all the relevant circumstances of each individual case.
38. By requiring the imposition of a mandatory minimum term of imprisonment at the time of sentencing, s 19AG diminishes the capacity of both sentencing courts and parole authorities to ensure sentenced children are detained for the minimum justifiable period, taking into account all of their individual circumstances from time to time.
39. For the above reasons, the Commission considers that s 19AG is not consistent with the rights of children.
40. For the purposes of this submission the Commission has not considered whether s 19AG of the Crimes Act is consistent with the human rights of adults prosecuted for relevant Commonwealth offences.

Recommendation 3

The INSLM should recommend that s 19AG of the *Crimes Act 1914* (Cth) relating to minimum non-parole periods be amended so that it does not apply to children.

7 Other matters relating to the prosecution and sentencing of children for terrorist offences

7.1 ‘Arbitrary’ deprivations of liberty

41. Article 37(b) of the CRC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. ... The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

42. The Committee on the Rights of the Child has considered the deprivation of liberty of children in a wide range of circumstances, including police custody for children accused of terrorism.⁴⁷
43. Depriving children of liberty has particularly severe consequences, given their dependency and vulnerability to abuse and victimisation. This can have negative impacts on their social reintegration and rehabilitation.⁴⁸ All deprivations of liberty for a child should ensure that any harm to the child's development is minimised.⁴⁹
44. Article 37(b) requires that detention should not be 'arbitrary'. The UN Human Rights Committee has determined that 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.⁵⁰ Schabas has explained that a deprivation of liberty would be 'arbitrary' for the purposes of article 37(b) if it exhibited further elements including 'unreasonableness, capriciousness and [dis]proportionality'.⁵¹
45. Importantly, non-discretionary restrictions on liberty should be avoided. As Schabas notes:

mandatory pre-trial detention and sentencing of children is not compatible with article 37(b) of the CRC, because it ignores the principle of proportionality and the discretion necessary for the decision in the individual case.⁵²
46. This principle is reflected in the recommendation made by the National Children's Commissioner in her 2016 report, that mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.⁵³
47. The UN Economic and Social Council's *Guidelines for Action on Children in the Criminal Justice System* state that, to facilitate social reintegration, 'it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty', unless their best interests suggest otherwise.⁵⁴
48. The right not to be subject to arbitrary detention has been referred to above, in the context of the minimum non-parole period mandated by s 19AG of the Crimes Act. However, the right is important at all stages of the prosecution of children, including arrest and bail, both pre and post charge. To the extent the INSLM considers any of these matters in the course of the Review, the Commission submits that current legislation and practice should be scrutinised closely to ensure that it complies with the requirements in article 37(b) of the CRC.

7.2 Separating child offenders from adult offenders

49. The INSLM has invited the Commission to provide information about whether art 37(c) would necessarily preclude retaining offenders in the juvenile detention system once they turn 18 years of age.
50. There are significant risks associated with detaining minors in adult correctional facilities, including that they may be subject to sexual or other forms of assault. In the *Study on Violence Against Children*, an independent expert appointed by the UN Secretary-General found that children detained in adult facilities were at ‘heightened risk of self-harm or suicidal behavior’.⁵⁵
51. Article 37(c) of the CRC relevantly provides that every child deprived of liberty shall be separated from adult prisoners unless it is in the child’s best interest not to be so separated. It applies in cases of both criminal and non-criminal detention.
52. Article 10(2)(b) of the ICCPR similarly requires that accused juveniles be separated from adults and brought as speedily as possible for adjudication.
53. It follows that the detention of children in adult prisons is generally contrary to the provisions of the CRC.⁵⁶ So, too, is the detention of adults in juvenile facilities.
54. Australia maintains a reservation to the obligation under article 37(c) of the CRC to separate children from adults in prison. The reservation states that:
- the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by Article 37(c).⁵⁷
55. The Committee on the Rights of the Child has said that this reservation is unnecessary, as ‘there appears to be no contradiction between the logic behind it and the provisions of article 37(c) of the Convention’.⁵⁸ The Commission notes that the reservation is limited to the stated need to detain children in locations close to their families, in light of Australia’s geography and demography. It does not have broader application. The National Children’s Commissioner has recommended that the reservation be withdrawn.⁵⁹
56. Article 37(c) of the CRC relevantly provides:
- [E]very child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
57. The Committee on the Rights of the Child has commented that this paragraph of art 37(c):

does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after h/she turns 18. **Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.**⁶⁰

58. The above remarks of the Committee on the Rights of the Child recognise that a person who has committed a crime while a child, and sentenced to a term of imprisonment that extends beyond their eighteenth birthday, may themselves be placed at risk if, on turning 18, they are immediately transferred to an adult facility. These risks are likely to be particularly severe in the case of persons sentenced for terrorism offences, who, as adults, are likely to be detained in maximum security facilities, and at least in some cases with other adults convicted of terrorism offences.
59. However, any decision to allow a person to remain in a juvenile detention facility after turning 18 may only be made if that is not contrary to the interests of the younger children in the facility. That will require a careful assessment of the circumstances of each person sentenced as a child who remains liable to imprisonment on turning 18. The general principle remains one of separation. By way of illustration, the joint detention of children with persons up to 25 years in Germany was the subject of critical comment by the Committee on the Rights of the Child.⁶¹ A blanket policy allowing persons over the age of 18 to remain in juvenile detention facilities will therefore not be consistent with the CRC.
60. The Commission submits that some of the key factors that should be taken into account in considering the placement or movement of young people to adult facilities are:
- (a) whether they committed the offence as a child and so should be treated as a child in sentencing
 - (b) whether they are deemed to be at risk in an adult custodial setting, whether under or over 18
 - (c) in the case of young people who turn 18 while in juvenile detention, the practice of a number of States and Territories to permit young people over 18 to stay in juvenile facilities into their early twenties may be permissible if it is in the best interests of each particular young adult offender and does not impinge on the rights of others in the relevant place of detention. In fact, in appropriate cases it may be beneficial to have an older positive peer model for younger inmates.
61. The unique situation of persons who turn 18 years while serving terms of imprisonment suggests that special consideration should be given to devising measures to ensure that these people are not placed at risk by being immediately transferred to adult prisons. In some circumstances, it may be permissible for individual young offenders to remain for a time in juvenile detention facilities after they turn 18, provided that would not negatively affect the rights of children in those facilities. More generally, however, it might involve consideration of the construction of special facilities for the detention of

younger adults, and/or the development of guidelines to ensure that young adults are not imprisoned in inappropriate facilities where they may be at risk due to their age.

7.3 Who should make decisions about where young offenders should be detained?

62. In a letter dated 16 May 2018, the INSLM invited the Commission to provide information about whether it would be more consistent with the CRC for any decision about whether a child serves a custodial sentence in a juvenile or adult facility to be made, at least in the first instance, by an exercise of judicial (as opposed to administrative) power.
63. Generally speaking, the CRC does not dictate whether decisions affecting a child must be made by a judicial or an administrative body.
64. With respect to deprivations of liberty, art37(d) provides that children shall have 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.
65. The reference to a ‘court or other competent, independent and impartial authority’ in art 37(d) indicates that the decision need not necessarily be taken by a judicial organ, but any organ meeting the CRC requirements. Of particular importance are the impartiality of the body, and that it be empowered both to review the legality of detention and to order immediate release if necessary.⁶² A decision on the legality of detention must be taken ‘promptly’. Some guidance about the speed with which a review of detention must be made may be found in the jurisprudence of the UN Human Rights Committee, which has, on a number of occasions, considered the equivalent protection in art 9(4) of the ICCPR.⁶³
66. Article 40(2)(b)(iii) provides a general minimum guarantee that children have a matter determined ‘without delay’:
- by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.⁶⁴
67. Article 40 includes the words ‘authority or judicial body’ to encompass all bodies of an adjudicatory nature which have a responsibility in the juvenile justice field.⁶⁵ There is no requirement under international law that the body determining the charge be judicial, so long as the authority’s procedures comply with the safeguards enshrined in the CRC.
68. In summary, the CRC does not require decisions about detention placement to be made by judicial bodies, as distinct from other forms of tribunal. Whichever

body is authorised to make these decisions must comply with the requirements of the CRC, most relevantly: the body must be impartial, and must make its decisions promptly; in any decision, the best interests of the child must be a primary consideration; the body must ensure that the views of the child are heard; and the body must ensure that any detention is for the minimum duration necessary and is no more restrictive than necessary. Given the evolving capacities of each child, and the importance of prioritising rehabilitation in the juvenile justice system, it is also essential that whichever body is authorised to make decisions about the location or duration of detention is authorised to conduct regular reviews to ensure that detention does not continue longer than strictly necessary, and that the location of any detention remains appropriate from time to time.

7.4 Bail

69. Section 15AA of the Crimes Act regulates the grant of bail to defendants charged with certain offences, relevantly including most Commonwealth terrorism offences.⁶⁶ Section 15AA does not distinguish between adult defendants and child defendants.
70. The practical operation of s 15AA is that it establishes a presumption against bail for relevant terrorism offences and puts the onus on a defendant to reverse that presumption by establishing that there are ‘exceptional circumstances’ such that bail should be granted. If ‘exceptional circumstances’ are established, the relevant bail authority will determine bail in accordance with relevant State or Territory laws. Whatever decision is made by the bail authority is subject to appeal. Where the decision is to grant bail and the prosecution seeks to appeal, the initial decision to grant bail is stayed until the appeal is determined. That means that, even where a bail authority grants bail at first instance, bail is effectively denied until such time as the prosecution appeal is decided.
71. The Crimes Act does not define ‘exceptional circumstances’. The Supreme Court of NSW considered the application of s 15AA to a 16 year old charged with a terrorism offence in the matter of *R v NK* [2016] NSWSC 498. In deciding to grant bail on ‘strict conditions’, Hall J held that:
- depending upon the evidence, in some cases the possible vulnerability of youth to adult persuasion or influence may be a relevant consideration in a determination as to whether exceptional circumstances under s 15AA exist.⁶⁷
72. The Commission considers that the fact that an accused is under 18 years of age is always, in the relevant sense, an ‘exceptional circumstance’. The CRC requires that children should be detained only where that is demonstrated to be necessary and proportionate. That strongly supports the view that there should be a presumption in favour of granting bail to children accused of all offences. That presumption can, of course, be displaced where a court is satisfied bail would not be appropriate in all the circumstances, including that the best interests of the child are outweighed by other factors.

73. In *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042, the Supreme Court of NSW again considered an application for bail by a child accused of a terrorism offence. Despite finding that exceptional circumstances did exist to justify bail, Beech-Jones J nevertheless concluded that he was obliged to refuse bail under the relevant NSW bail laws because the bail conditions that had been proposed:

[did] not address the form of attack that AB discussed in his online posts and because the potential harm that could result from the materialisation of the appreciable risk that he will carry out those threats is so great it means that the risk of harm to the community is unacceptable even allowing for the hardship that will be occasioned to AB from being detained pending trial.⁶⁸

74. His Honour noted that it was ‘concerning’ that a ‘vulnerable youth’ could be detained despite the charges against him being weak.⁶⁹ He concluded that that ‘strongly suggests that what has been undertaken is an exercise in preventative detention’, which, if justified, ‘can only provide a measure of short term security for the public’.⁷⁰ He went on to observe:

I note that the maintenance of terrorism charges that I have found to have only weak support in the evidence serves only to prolong the period that AB is in pre-trial custody and prevents him receiving the supervision, counselling and assistance that he clearly needs. In the medium to long term it is that form of intervention which is far more likely to protect the community rather than the continued detention of AB.⁷¹

75. This latter case demonstrates that s 15AA of the Crimes Act cannot be read in isolation. It is part of a matrix of bail provisions that can apply to prevent people under the age of 18 charged with Commonwealth offences from being granted bail even when courts, having considered all of the circumstances of a particular case, do not consider that pre-trial detention is warranted. That is a result that is not consistent with the rights of the child described in this submission.

Recommendation 4

The INSLM should recommend that s 15AA of *the Crimes Act 1914* (Cth) relating to bail for persons accused of certain Commonwealth offences be amended so that it does not apply to children.

Endnotes

- ¹ *Independent National Security Legislation Monitor Act 2010* (Cth) s 8(a)(i).
- ² *Independent National Security Legislation Monitor Act 2010* (Cth) s 3(c)(i).
- ³ Independent National Security Legislation Monitor, *Review - The prosecution and sentencing of children for Commonwealth terrorist offences*. At <https://www.inslm.gov.au/current-review-work> (viewed 9 June 2018).
- ⁴ Independent National Security Legislation Monitor, *Review - The prosecution and sentencing of children for Commonwealth terrorist offences*. At <https://www.inslm.gov.au/current-review-work> (viewed 11 June 2018).
- ⁵ United Nations Security Council, Resolution 1373 (2001), 4385th meeting, [UN Doc. S/RES/1373 \(2001\)](#) (28 September 2001); United Nations Security Council, Resolution 2249 (2015), 7565th meeting, [UN Doc. S/RES/2249 \(2015\)](#) (20 November 2015).
- ⁶ *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ⁷ See eg United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985). Available at <http://www.refworld.org/docid/4672bc122.html> (viewed 15 June 2018).
- ⁸ Mary Robinson, UN High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (23 September 2002), 1. At http://www.un.org/en/sc/ctc/docs/rights/2002_09_23_ctcchair_note.pdf (viewed 28 April 2017).
- ⁹ Human Rights and Equal Opportunity Commission (as the Commission was then known), Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. At <http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005> (viewed 28 April 2017); Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws> (viewed 28 April 2017).
- ¹⁰ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ¹¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Preamble.
- ¹² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 12 October 1984, 1465 UNTS 85 (entered into force 16 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). At <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (viewed 26 January 2015).
- ¹³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
- ¹⁴ UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007).
- ¹⁵ The Committee on the Rights of the Child is an expert body established by article 43 of the *Convention on the Rights of the Child*.
- ¹⁶ UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007) [5].
- ¹⁷ See *Convention on the Rights of the Child*, art 2. UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007) [6].

- ¹⁸ See *Convention on the Rights of the Child*, art 2. UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007) [6].
- ¹⁹ UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (2007) [10] (emphasis added).
- ²⁰ Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), [11].
- ²¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
- ²² Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, 51st session, UN Doc CRC/C/GC/12 (1 July 2009) [33].
- ²³ Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [89].
- ²⁴ *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45th sess, 68th plen mtg, UN Doc A/RES/45/113 (14 December 1990).
- ²⁵ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985).
- ²⁶ *Convention on the Rights of the Child*, above, article 1.
- ²⁷ Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), 13 [41].
- ²⁸ Article 14(2) of the ICPPR also guarantees the presumption of innocence.
- ²⁹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(b)(ii).
- ³⁰ *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40th sess, 96th plen mtg UN Doc A/RES/40/33 (29 November 1985) [7.1].
- ³¹ Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 28.
- ³² Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 25.
- ³³ *Hesse v Australia*, UN Doc CCPR/C/75/1087/2002 (2002).
- ³⁴ Articles 14(1) and 26 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- ³⁵ See eg *Cheban v. Russian Federation*, UN Doc CCPR/C/72/D/790/1997 (2002), *Kavanagh v. Ireland*, UN Doc CCPR/C/71/D/819/1998 (2001).
- ³⁶ *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). At https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en (viewed 3 May 2018).
- ³⁷ Australian Human Rights Commission, *Children's Rights Report 2016*, 191 (recommendation 9).
- ³⁸ 'Terrorism offence' is defined in s 3 of the *Crimes Act 1914* (Cth).
- ³⁹ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).
- ⁴⁰ Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).
- ⁴¹ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 40(1).
- ⁴² *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b).
- ⁴³ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 40(3), 37(b).
- ⁴⁴ *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- ⁴⁵ *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- ⁴⁶ *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- ⁴⁷ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 61 (referring to UN Committee on the Rights of the Child, *Concluding Observations: Spain*, UN Doc. CRC/C/15/Add.,185,2002 (2002) [53]-[54]).
- ⁴⁸ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 58.
- ⁴⁹ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 58.

⁵⁰ *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8]; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) at [9.2]. These communications considered the prohibition on arbitrary detention contained in article 9 of the ICCPR, which contains an equivalent protection to that in art 37(b) of the CRC.

⁵¹ William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 82.

⁵² William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 64.

⁵³ Australian Human Rights Commission, *Children's Rights Report 2016*, 196 (recommendation 12).

⁵⁴ UN Economic and Social Council, *Guidelines for Action on Children in the Criminal Justice System*, Resolution 1997/30 (1997), [20].

⁵⁵ *Report of the independent expert for the United Nations study on violence against children*, UN Doc A/61/299 (29 August 2006), [63].

⁵⁶ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), note 5, art 37(c). See note 7 for the effect of Australia's reservation to article 37(c) of the CRC.

⁵⁷ United Nations Treaty Collection, *Convention on the Rights of the Child* (Declarations and Reservations) (Australia). At

https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en#EndDec (viewed 8 June 2018).

⁵⁸ Committee on the Rights of the Child, *Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (2012), para 9. At

http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf (viewed 15 May 2015).

⁵⁹ Australian Human Rights Commission, *Children's Rights Report 2016*, 185 (recommendation 7).

⁶⁰ Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), 23 [86] (emphasis added).

⁶¹ CRC Committee, *Concluding Observations: Germany* (UN Doc. CRC/C/15/Add.226, 2004), para. 60, referred to in William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 93.

⁶² William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 94.

⁶³ Article 9 of the ICCPR uses the language 'without delay.' See William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 94.

⁶⁴ *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(2)(b)(iii).

⁶⁵ Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 15.

⁶⁶ *Crimes Act 1914* (Cth), s 15AA(1)–(2).

⁶⁷ *R v NK* [2016] NSWSC 498, [40]–[41].

⁶⁸ *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042 at [5]–[6].

⁶⁹ *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042 at [5]–[6].

⁷⁰ *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042 at [5]–[6].

⁷¹ *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042 at [5]–[6].