Victorian Council for Civil Liberties Inc
Reg No: A0026497L
GPO Box 3161
Melbourne, VIC 3001
t 03 9670 6422
info@libertyvictoria.org.au

libertyvictoria.org.au

31 May 2018

Dr James Renwick SC
Independent National Security Legislation Monitor
One National Circuit
Barton ACT 2600

Email: INSLM@inslm.gov.au

Dear Dr Renwick SC,

The prosecution and sentencing of children for Commonwealth terrorist offences

1. Thank you for the opportunity to make a submission to this review.
2. Liberty Victoria is committed to the defence and advancement of human rights and civil liberties. We seek to promote Australia's compliance with the rights recognised by international law and the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic). We are a frequent contributor to federal and state committees of inquiry, and we campaign extensively for better protection of human rights in the community. More information on our organisation and activities can be found at: https://libertyvictoria.org.au/.

The review

3. The review focuses on two main issues:
    a. **Prosecution of children**: Section 20C of the *Crimes Act 1914* (Cth) (**Crimes Act**) 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 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.

4. This submission examines each of these issues in turn.

Prosecution of children: s 20C

5. Section 20C was first introduced into the Crimes Act in 1960. It provides that children charged with Commonwealth offences may be tried, punished or 'otherwise dealt with' as if the offence was an offence against a law of a State or Territory.

6. The effect of s 20C is that most young federal offenders are tried and sentenced under the youth justice legislation of the relevant State or Territory.[1] It reflects the fact that Australia has no separate, federal youth justice system.

7. Section 20C raises important issues of consistency. Each State and Territory has its own framework for youth justice. These frameworks differ from one other in significant respects. This means that, for example, a child charged with a Commonwealth terrorism offence in Victoria will generally be tried and punished differently from a child charged with the same offence in the Northern Territory.

8. This is deeply concerning. As Justice Mason noted in *Lowe v The Queen*:

> Just as consistency in punishment - a reflection of the notion of equal justice - is a fundamental element in any rational and fair system of criminal justice, so inconsistency in punishment, because it is regarded as a badge of unfairness and unequal treatment under the law, is calculated to lead to an erosion of public confidence in the integrity of the administration of justice. It is for this reason that the avoidance and elimination of unjustifiable discrepancy in sentencing is a matter of abiding importance to the administration of justice and to the community.[2]

9. The Australian Law Reform Commission has identified this issue on several occasions in the past, and called for reform to bring greater consistency to the treatment of federal young offenders.[3]

---

[1] ALRC, [27.30].

[2] (1984) 154 CLR 606, 610-1. See also *Leeth v Commonwealth* (1992) 174 CLR 455, 484-7 (Deane and Toohey JJ).

[3] See Australian Law Reform Commission, *Sentencing*, Report 44, 1988, [225]; Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report 84, 1997, [19.1]-[19.13]; Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103, April 2006, [27.15]-[27.22].

10. Liberty Victoria considers that s 20C should be amended to establish national, minimum standards for the trial and punishment of children charged with Commonwealth terrorism offences (and Commonwealth offences more broadly).

11. These minimum standards should include the following matters, among others:

    a. trial process (eg, a presumption in favour of proceeding by summons, rather than arrest);[4]

    b. sentencing principle (eg, rehabilitation as the paramount consideration in the sentencing of young offenders);[5]

    c. sentencing options (eg, deferral of sentencing for the purpose of enabling the child to participate in group conferencing);[6] and

    d. detention (eg, a prohibition on the use of isolation except where strictly necessary to prevent harm to others).[7]

12. Furthermore, the potential for mistreatment of children in different State and Territory criminal justice systems has been demonstrated by recent events in Victoria and the Northern Territory. These experiences underscore the need for national, minimum standards for youth justice:

    a. In 2016 and 2017, the Victorian Government was found to have breached the human rights of children in detention, by transferring them to a designated section of Barwon Prison, a prison built for adult prisoners.[8]

    b. The Royal Commission into the Protection and Detention of Children in the Northern Territory, established following the revelations about the mistreatment of children in the Don Dale Youth Detention Centre, uncovered systemic failings in the youth justice system in the Territory. Commissioner Margaret White has commented that '[a]t every level we have seen that a detention system which focuses on punitive – not rehabilitative – measures fails our young people.'[9]

13. The establishment of national, minimum standards will go a significant way towards addressing the potential for unequal and unfair treatment of children charged with federal terrorism offences, which currently exists under s 20C.

Sentencing: s 19AG

14. Section 19AG of the Crimes Act provides that, for most terrorism offences, a court must fix a single non-parole period of at least three-quarters of the sentence for that offence.

---

[4] See, eg, *Children, Youth and Families Act 2005* (Vic), s 345(1) (**CYF Act**).
[5] See *CNK v The Queen* (2011) 32 VR 641.
[6] See, eg, CYF Act, s 415.
[7] See, eg, CYF Act, s 488.
[8] *Certain Children by their Litigation Guardian Sister Marie Brigid Arthur v Minister for Families and Children* [2016] VSC 796; *Certain Children v Minister for Families and Children (No 2)* [2017] VSC 251.
[9] Helen Davidson, 'NT youth detention system a failure, says royal commission', *The Guardian* (31 March 2017).

15. Liberty Victoria opposes s 19AG in principle. Section 19AG unjustifiably interferes with the discretion of the courts to impose a just sentence in the individual case, including the fixing of an appropriate non-parole period. Every case is different. We firmly believe that the courts are in the best position to identify the appropriate non-parole period in a particular case, based on the offender's culpability, remorse, prospects for rehabilitation, and other relevant factors. As with all mandatory minimum sentencing regimes, s 19AG undermines the notion of individualised justice which lies at the core of the criminal law tradition.[10]

16. Liberty Victoria specifically endorses Stary Norton Halphen's submission in relation to s 19AG, noting their experience in representing children charged with terrorism offences. As their submission demonstrates forcefully:

    a. There is no coherent or persuasive rationale for s 19AG, either generally or in its application to terrorism offences.

    b. In its application to children, s 19AG contravenes Australia's obligations under the *Convention on the Rights of the Child* and the *International Covenant on Civil and Political Rights*.

    c. Section 19AG imposes a structural barrier to the rehabilitation of child offenders. By making it more difficult for child offenders to rehabilitate and reintegrate into society once they have served their sentence, s 19AG imposes significant, long-term social costs.

17. If you have any questions regarding this submission, please do not hesitate to contact Liberty Victoria President Jessie Taylor or the Liberty office on 9670 6422 or info@libertyvictoria.org.au.

18. This is a public submission and is not confidential.

Jessie Taylor

President, Liberty Victoria

president@libertyvictoria.org.au

[10] The High Court has consistently emphasised the importance of individualised justice in sentencing. See, recently, *Elias v The Queen* (2013) 248 CLR 483, [27] (French CJ, Hayne, Kiefel, Bell and Keane JJ); *Bugmy v The Queen* (2013) 249 CLR 571, [36], [41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).