

Attorney-General's Department and Department of Home Affairs

Response to Notice under section 24 of the INSLM Act 2010

Introduction

The Attorney-General's Department and the Department of Home Affairs provide the following comments in response to the notice issued by the Independent National Security Legislation Monitor on 20 July 2018 under section 24 of the *Independent National Security Legislation Monitor Act 2010* (Cth).

Subsection 20C(1) of the *Crimes Act 1914* (Cth)

Subsection 20C(1) of the Crimes Act enables a child or young person to be tried, punished or otherwise dealt with as if the offence were an offence against a law of a state or territory. This reflects the fact that the states and territories have established their own juvenile justice systems and have extensive expertise in dealing with child offenders. The effect of subsection 20C(1) inevitably means that provisions for prosecution and sentencing may differ based on the state or territory in which the child is being dealt with reflecting differences which exist within the state or territory legislation.

The departments note the CDPP's comments regarding the desirability of achieving greater consistency in the sentencing and prosecution of children or young people for federal offences. In developing any proposals to achieve greater consistency for the prosecution and sentencing of Commonwealth child terrorist offenders consideration would need to be given to the potential for such changes to result in inconsistency between a child charged with, or convicted of, state or territory offences in a jurisdiction compared with a child charged with a federal offence or a combination of state and federal offences in the same jurisdiction. It would also require close consultation with, and the support of, the states and territories, to determine which features of which systems should be adopted as well as to ensure ongoing awareness amongst the legal profession and judiciary of the different processes which would apply as between those charged with offences under Commonwealth law and those charged under State and Territory law.

Interaction with state and territory law

The departments agree with the CDPP's interpretation of subsection 20C(1) of the Crimes Act—namely, that it enables sentencing options and other provisions under state or territory law to be applied as 'surrogate' federal law in prosecuting and sentencing children or young people. The departments also agree that the section does not exclude or override other provisions for the sentencing of federal offenders in the Crimes Act, meaning that sentencing provisions in the Crimes Act will prevail over state or territory legislation in the case of an inconsistency or where the Crimes Act exhaustively provides for the same subject matter. The departments agree that subsection 20C(1) of the Crimes Act applies to a child or young person charged with, or convicted of, an offence against a law of the Commonwealth but not pre-charge diversionary options.

The departments also appreciate the work undertaken by the CDPP to examine the sentencing options available in the various States and Territories and note their uncertainty regarding the

sentencing options available and the interaction between the Commonwealth, State and Territory regimes. The departments agree that it would be undesirable for there to be uncertainty in sentencing offenders and that it would be undesirable for persons convicted of terrorism offences to be dealt with through mechanisms which do not allow the full range of sanctions laid down by Parliament for federal terrorism offences to be imposed as appropriate. An appropriate forum to pursue these discussions could be the Australia-New Zealand Counter-Terrorism Committee (ANZCTC) Legal Issues Working Group (LIWG). It is the primary inter-jurisdictional forum for officer-level consideration of counter-terrorism legal issues to ensure national consistency and to build strong relationships across jurisdictions. It includes representatives of the Justice and Attorney-General's departments from the Commonwealth and all its states and territories, and New Zealand.

Definition of 'child or young person'

The departments note the CDPP's suggestion about adopting a consistent definition of 'child or young person' for the purposes of prosecuting and sentencing children or young people for federal offences. The departments note that the CDPP has not raised any specific issues or cases in which the absence of a Commonwealth definition of 'child or young person' has caused problems in the CDPP's prosecution of these federal offenders or where the matter has been the subject of confusion in any particular prosecution. The CDPP notes that it is unlikely that section 20C would operate to apply state or territory laws if the offender was not a child or young person at the time of their charge or conviction. The departments agree with this observation.

The departments note that the absence of a Commonwealth definition of a 'child or young person' for the purposes of section 20C reflects the responsibility of the states and territories for juvenile justice systems, programs and facilities. Accordingly, the departments consider it appropriate that the relevant state or territory law is applied to determine whether someone is a child or young person.

Sentencing alternatives to imprisonment

The departments acknowledge that as a product of our federal system, there will be variation between state and territory juvenile justice legislation and this may result in different sentencing outcomes for children or young people convicted of Commonwealth terrorism offences. Additionally, the discretionary nature of sentencing means that courts will never achieve absolute equivalence in the sentences handed down.

It is in line with community expectations, the seriousness of the offending, and the need to protect public safety that where a court has determined that a person be sentenced to imprisonment for a terrorism offence, that imprisonment should be served in prison rather than in the community such as on a home detention or intensive corrections order. Therefore it is appropriate that certain detention and imprisonment sentencing alternatives are not available to terrorist offenders as outlined by the CDPP. Likewise, as stated by the CDPP, Commonwealth recognizance release orders are not available as a sentencing option for convicted adult or child terrorist offenders.

However, as far as possible, the Commonwealth supports children and young people serving their sentence in the juvenile justice system and to this end, various state and territory sentencing options

are available to the courts when sentencing children and young people convicted of terrorism offences through the application of subsection 20C(1) of the Crimes Act.

Section 19AG of the Crimes Act

The departments agree with the CDPP's interpretation that section 19AG applies to adults as well as children sentenced to a term of imprisonment for a terrorist offence.

Section 19AG, in its current form, was introduced in 2004 through the *Anti-Terrorism Act 2004* to address concerns that the sentences for convicted terrorists should reflect community concern about terrorism. Prior to this, no mandatory non-parole period was in place. The change was to reflect the increased focus on the protection of the community from the risk posed by terrorist offenders.

A person who is convicted of a terrorism offence has been proven, to the satisfaction of the law, to be a danger to the Australian community, irrespective of their age. The age of an offender does not obviate the obligation upon government to ensure community safety. Further, it is appropriate that crimes which have the potential to have a serious impact on community safety attract greater penalties. Consistency in the application of non-parole periods for certain offences is desirable because these offences are in the most serious category, regardless of an offender's age.

The departments note that the mandatory minimum non-parole period only applies where the court has determined that another penalty is not appropriate and to impose a term of imprisonment. Section 19AG reflects the serious nature of terrorist offences and the need to protect public safety while preserving the sentencing court's discretion in relation to whether to sentence the offender to imprisonment and, if so, the length of any head sentence. In determining a head sentence, the sentencing court is able to take into account a child or young offender's individual circumstances (including a potential diminished responsibility as a result of the age of the offender), together with other factors relevant to the offender and the offending in determining an appropriate sentence.

The departments agree that when sentencing children for criminal offences, the sentencing judge would balance providing adequate opportunity for the offender's rehabilitation with the need for deterrence and community protection. It is important that sentences of imprisonment for terrorist offenders include enough time for these offenders to complete rehabilitation programs specific to their offending and to prepare them for their successful reintegration into the community once on parole.

Section 15AA of the Crimes Act

The departments agree with the CDPP's views regarding the operation of section 15AA and the way the courts have applied the provision in relation to children and young people. The departments agree, in particular, with the CDPP's statement that it has not observed any difficulties with the operation of section 15AA in prosecuting terrorism offences, including in matters involving children.