Independent National Security Legislation Monitor

Review of the Prosecution and Sentencing of Children for Terrorism Offences

Background Paper

Contents

The Independent National Security Legislation Monitor (INSLM)

1. The Prime Minister announced the appointment of Dr James Renwick SC as the Acting Independent National Security Legislation Monitor (INSLM) on 13 February 2017; his appointment was made permanent later that year. As INSLM, Dr Renwick succeeds the Hon Roger Gyles AO QC and before him Bret Walker SC.

2. The INSLM is an independent statutory office holder appointed by the Governor-General under the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act) to carry out a number of statutory functions, including:

    a. to review the operation, effectiveness, and implications, of Australia's counter-terrorism and national security legislation (s 6(1)(a)); and
    b. to consider whether this legislation contains appropriate safeguards for protecting the rights of individuals, remains proportionate to any threat of terrorism or threat to national security or both, and remains necessary (a 6(1)(b)).

3. The INSLM Act also requires the INSLM to consider and report on matters referred to the INSLM from time to time by the Prime Minister (s 6(1)(c)), and provides for the INSLM to carry out its functions with respect to a matter referred by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (s 6(1A)).

4. The INSLM carries out his functions by holding public and private hearings (see s 21 of the INSLM Act) and inviting public submissions. The INSLM has a range of information gathering powers, including the power to issue a summons requiring a person to attend a hearing to give evidence on oath or affirmation or to produce a document or thing. The INSLM also consults with agencies that are involved in implementing Australia's counter-terrorism and national security legislation, as well as other interested agencies, including the Commonwealth Ombudsman, the Information Commissioner, the Australian Human Rights Commission, and the Inspector-General of Intelligence and Security.

5. INSLM review requires a close and detailed examination of each provision, its legislative history and context, and the practical and jurisprudential impacts of each provision both in and on contemporary litigation processes and counter-terrorism and national security objectives. The review is informed by submissions received and evidence given during hearings, as well as independent research.

6. In performing his functions, the INSLM must have regard to the following (see s 8 of the INSLM Act):

    a. Australia's international obligations including in the area of human rights, counter‑terrorism, and international security.
    b. Arrangements agreed from time to time between the Commonwealth, the States and the Territories to ensure a national approach to countering terrorism.

Review of the Prosecution and Sentencing of Children for Terrorism Offences

Prime Minister's reference

7. On 23 February 2018, the INSLM announced that the Prime Minister had referred for his review 'the prosecution and sentencing of children for Commonwealth terrorist offences'. The review will include the following matters:

    a. **In relation to prosecution of children:** s 20C of the *Crimes Act 1914* (Cth) (the 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 review will consider whether Commonwealth legislation should ensure a consistent approach to such matters.
    b. **In relation to bail:** s 15AA of the Crimes Act establishes a presumption against bail for those charged with particular offences relating to terrorism including children.
    c. **In relation to sentencing:** s 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.

8. The report must be delivered to the PM by December 2018. Under s 30 of the INSLM Act, the PM is then required to present the report to each House of the Parliament within 15 sitting days.

Relevance of State and Territory law

9. As noted in the PM's reference, '[t]he requirements for the trial of children differ among the States and Territories.'

10. While the INSLM's role is to review Commonwealth legislation, doing so in the context of the current review requires him to consider State and Territory legislation under which children accused of Commonwealth terrorism offences are dealt with. State and Territory legislation is of most acute relevance in relation to the INSLM's review of s 20C of the Crimes Act, but also has a bearing on the review of ss 15AA and 19AG.

11. Accordingly, as part of the current review, the INSLM is engaging closely with governments, agencies, courts and practitioners in each State and Territory, and welcomes submissions drawing attention to or providing further information on aspects of State and Territory law relevant to the review. Preliminary summaries of potentially relevant State and Territory legislation are available on the INSLM website.

Commonwealth law under review

12. The following sets out, briefly, background information on the areas of Commonwealth law noted above as the subject of the INSLM's current review.

Section 20C of the *Crimes Act 1914* – offences by children and young people

Summary of legislation

13. Section 20C of the Crimes Act sets out the approach where a child or young person is alleged to have committed a Commonwealth offence, including a terrorism offence.[1]

> **20C Offences by children and young persons**
>
> (1) A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State of Territory.
>
> (2) Where a person under the age of 18 years is convicted of an offence against a law of the Commonwealth that is punishable by death, he or she shall not be sentenced to death but the court shall impose such other punishment as the court thinks fit.

14. The provision is permissive. As explained by the National Judicial College in the context of sentencing, for instance, a court may decide to deal with a child or young person under Part IB of the Crimes Act rather than under State or Territory law.[2]

Legislative history of s 20C

15. Section 20C was added to the Crimes Act in 1960.[3] In the main, the Bill which introduced s 20C dealt with amendments to offences against the Government including treason, treachery and sabotage. However, the Bill also made a range of miscellaneous and technical amendments to the Act, including the introduction of s 20C. [4]

16. Debate on the Bill did include some consideration of the degree to which young offenders across different jurisdictions should be dealt with consistently under Commonwealth law, in relation to both proposed s 20C and s 17 of the Act, then dealing with the declaration of persons as 'habitual criminals'.

17. New South Wales and Victoria had each amended their laws to provide that offenders under the age of 25 years could not be declared habitual criminals, and the Opposition sought to impose a similar restriction under the Commonwealth Crimes Act. Debate on this amendment considered questions of rehabilitation particular to young offenders, but also questions of consistency and uniformity in the application of Commonwealth law. The then-Deputy Leader of the Opposition Gough Whitlam said:

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[1] Note that the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017* (Cth), presently before the House of Representatives, would repeal s 20C(2) on the basis that it is obsolete.
[2] National Judicial College of Australia, *Principles and Practice* (2012) 'Categories of Federal Offenders: Child or Young Person'.
[3] *Crimes Act 1960* (Cth).
[4] Commonwealth, *Parliamentary Debates,* House of Representatives, 8 September 1960, 1022 (Sir Garfield Barwick).

> The Federal Parliamentary Labour Party believes that the Commonwealth act should not be more archaic or less advanced than is the legislation in New South Wales and Victoria … We believe that by 25 years of age a person is more set in his ways than is a younger person, and that 25 years therefore should be the minimum age at which a person can be declared an habitual criminal. It is now the minimum age at which he can be so declared in Victoria and New South Wales. We believe that that should also apply in respect of Commonwealth crimes. In the light of the amendments to the principal act which the Attorney-General himself is sponsoring, it would seem that in New South Wales or Victoria a person under the age of 25 who had a record of convictions under Commonwealth or State acts, or both, could be declared an habitual criminal under our legislation, but not under State legislation. If his crimes had been under the Commonwealth act alone or under both State and Commonwealth acts he could be declared an habitual criminal, although under the age of 25; but if his crimes had been only breaches of State acts, he would not be so declared while under the age of 25 years.[5]

18. The Government opposed this amendment. Then-Attorney General Sir Garfield Barwick noted:

> …Commonwealth law has to accommodate itself to the laws of the States, and live up to a fairly general principle in this matter. As far as possible the Commonwealth system is fitted in with the State systems. We use the States' laws as to evidence, very largely. We use a number of the State procedures too. The idea is to allow the Commonwealth legislation to run with the State legislation as nearly as possible.
>
> The Deputy Leader of the Opposition, in making his proposal, overlooks, I think, the fundamental human fact that whereas it may be quite all right in New South Wales to select a particular age as the minimum age below which a person may not be declared an habitual criminal, that does not necessarily fit the community circumstances of other places. It is quite wrong to think of Australia as absolutely uniform in those respects. It may very well be that a State - which, after all, has a very good knowledge of its own conditions and of the threats to its own system - may fix a particular age below which a person may not be declared an habitual criminal. One State may fix the age at eighteen years and another at 25 years. [6]

19. The Attorney-General also argued that consistency across jurisdictions in regards to the handling of young offenders under Commonwealth law would entail inconsistency *within* jurisdictions depending on whether an offence was a Commonwealth or a State offence:

> For the Commonwealth to fix a minimum age and to apply it over all the States would, in some instances, throw a State into disconformity in this sense: It fixes eighteen years as the age below which it will not declare an habitual criminal in respect of offences against its law, yet in respect of Commonwealth laws it must observe the minimum age of 25 years. It is not a good thing for any State to allow two standards for the people - one in relation to Commonwealth law and one in relation to the State… I could not make these provisions uniform, because the effect would be to make them ununiform in the broad sense. If one person happens to be charged under a State law and another under a federal law - sometimes these may overlap - they would be treated differently. The idea is to have them treated uniformly in a State but not necessarily uniformly over the whole Commonwealth… What the Deputy Leader of the Opposition has suggested would only cause want of uniformity within the States which is undesirable, and we are not prepared to accept the amendment.[7]

20. Against the background of debate on this amendment, there was some reference to s 20C. The Attorney-General discussed the interaction of ss 17 and 20C in the House:

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[5] Commonwealth, *Parliamentary Debates,* House of Representatives, 17 November 1960, 3016 (Gough Whitlam).
[6] Commonwealth, *Parliamentary Debates,* House of Representatives, 17 November 1960, 3017 (Sir Garfield Barwick).
[7] Ibid.

When the sitting was suspended, I was speaking about on amendment moved by the Opposition to limit section 17 of the Crimes Act to provide for the declaration of a person as an habitual criminal if he is over 25 years but not if he is under 25. I had pointed out that the laws of the States are not uniform in this respect. Some of the States fix the minimum age at which a person can be declared an habitual criminal at less than 25 years; some fix the minimum at 25. New South Wales has given up the idea of an indeterminate sentence so that, strictly speaking, there are no provisions for the declaration of an habitual criminal in that State. As I have said, we have provided in proposed new section 20C -

> A child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory.

This, of course, is permissive. It will allow a State court exercising federal jurisdiction and trying young offenders against Commonwealth law, to deal with them in the same manner as the court would deal with young people who had committed an offence against the laws of that State. This might yield different results in different States. In clause 17 of the bill, which amends section 19 of the act, there is also a permissive provision. Neither of these provisions is mandatory. There is a permissive clause that a court dealing with an offender against the law of the Commonwealth may impose an indeterminate sentence. I believe that these two provisions will work out in this way: The State courts will treat an offender against Commonwealth law in the same manner as they will treat an offender of the same age in respect of an offence against State law. Some States might not regard a person of 25 years as a young person; other States may. If they regard a person as a young person at eighteen years or at 25, whichever is the minimum age under the State code, then the probability is that the courts will not declare him an habitual criminal although they would be entitled to under the amendment made by clause 17. If, on the other hand, the State law treats a person of that age as not a young person, then the courts will treat him as an adult. In that event, more likely than not, they will declare him an habitual criminal if the other elements are proven.[8]

21. The Leader of the Opposition in the Senate subsequently remarked:

> I am not overlooking proposed new section 20C, which the Government is seeking to inject into the act...I point out to the committee that the expressions "child" and "young person" are not defined. There is some support for the proposition that a "young person" referred to in that sub-section is a person under the age of eighteen years, because sub-section (2.) of the proposed new section refers to "a person under the age of eighteen years ". It would appear, only in a broad way and by propinquity, that "young person" means a person under the age of eighteen years. That does not touch the difficulty that the Opposition feels in respect of a person of the age of seventeen or eighteen years, who is convicted of an indictable offence, having previously been convicted of two indictable offences - whether under Commonwealth or State law will not matter - having passed upon him under this legislation an indeterminate sentence, which, subject to the will of the Attorney-General, will mean life imprisonment. I suggest that the matter be cured simply by the amendment the Opposition proposes.[9]

22. The Opposition amendment was defeated in both the House of Representatives and the Senate.

23. Despite review, discussed below, the substance of s 20C remains unchanged since its introduction.[10]

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[8] Ibid.

[9] Commonwealth, *Parliamentary Debates,* Senate, 6 December 1960, 2098 (Senator McKenna).

[10] ALRC, *Sentencing,* ALRC 44 (1988), [225]; ALRC & HREOC, *Seen and Heard: Priority for Children in the Legal Process,* ALRC 84 (1997), [19.8]-[19.5], ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders,* ALRC 103 (2006), [27.15]-[27.22].

Judicial consideration

24. There has been judicial comment on the undesirability of inconsistency between jurisdictions in the handling of Commonwealth offences committed by juveniles. In *R v Lovi*, Atkinson J noted by way of *obiter* that:

> 'The anomaly demonstrated by this case is that notwithstanding the fact that Australia signed the United Nations Convention on the Rights of the Child in 1990 and ratified it on 17 December 1990, only in Queensland, and in no other jurisdiction in Australia, are 17 year old offenders dealt with as if they were adults. There appears to be no justification in principle for a criminal justice regime which punishes a 17 year old in Coolangatta differently from a 17 year old in Tweed Heads for precisely the same offence against Commonwealth law.'[11]

25. This particular inconsistency has now been removed by the enactment of the *Youth Justice and Other Legislation (Inclusion of 17-year-old persons) Amendment Act 2016* (Qld).

26. The Supreme Court of Western Australia has considered issues of federal jurisdiction which arise in the application of s 20C. In *Newman v 'A' (a Child)*, 'A' entered a guilty plea to two offences of knowingly making a false statement in writing to the Commonwealth Department of Employment, Education and Training in relation to a benefit. Relying on s 20C the Children's Court referred 'A' to a children's panel. On appeal the court determined that the Children's Court was bound, by s 39(2)(d) of the *Judiciary Act 1903* (Cth) (the Judiciary Act), to exercise the jurisdiction itself and could not refer the matter to a non-judicial body for disposition.[12] The Court said that s 20C:

> is not a provision which itself is expressed in terms apt to confer federal jurisdiction upon a State Court. The provision, in its terms, is concerned to make it clear that the law to be applied by a State court, upon which jurisdiction has been conferred to deal with charges of federal offences against children, is State law. Such a provision may not overcome or widen the limitations upon the conferral of jurisdiction upon the court to which I have referred above.

27. Citing this case, the National Judicial College of Australia advises judicial officers to take care to ensure that State or Territory juvenile justice provisions are capable of being applied to young federal offenders, noting that federal judicial power may only be exercised by courts. The College states that 'this may restrict the ability of a state or territory court to refer a child or young person through diversionary non-judicial juvenile justice processes.'[13]

28. In *R v Lovi*, the Commonwealth submitted that s 20C is concerned with the age of an offender at the time of charge or conviction rather than at the time of their offence, though the Queensland Court of Appeal did not decide this point in that case.[14]

Previous review by the ALRC

29. The Australian Law Reform Commission (ALRC) has previously reviewed s 20C in the context of a broader review of Part IB of the Crimes Act. The ALRC was asked to consider whether Part IB provided an efficient, effective and appropriate regime for the sentencing, administration and release of offenders convicted of an offence against Commonwealth

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[11] *R v Lovi* [2012] QCA 24. See also *R v Loveridge* [2011] QCA 32, [5]–[7] and *R v GAM* [2011] QCA 288, [50]–[51].
[12] *Newman v 'A' (A Child)* [1992] WASC 643.
[13] National Judicial College of Australia, above n 2.
[14] See for example *R v Lovi* [2012] QCA 24, [14]–[24]. See also CDPP National Legal Directions, *Sentencing of Juveniles* (2014).

law. The ALRC review was conducted over almost two years and involved significant community consultation. The final report *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC 103) was published in 2006.[15]

30. Part H of ALRC 103 deals with special categories of federal offenders, with chapter 27 specifically focusing on young federal offenders. The ALRC identified three central concepts underpinning their recommendations in relation to young federal offenders:

    a. Promoting consistency in the treatment of young federal offenders across states and territories;
    b. Adhering to internationally accepted principles applicable to the sentencing of young people; and
    c. Ensuring the efficacy of the federal criminal justice system.[16]

31. The ALRC noted the following particular problems with s 20C of the Crimes Act:

    a. The absence of a definition of a 'child or young person' in Part IB of the Crimes Act.
    b. The absence of a clear statement about whether s 20C precludes the use of Part IB in the sentencing of young federal offenders.
    c. The absence of a statement that the penalty imposed on a young offender should be no greater than that imposed on an adult who committed an offence of the same kind.
    d. Difficulties accessing diversionary options provided by the states and territories.
    e. Doubts about the power to apply state or territory enforcement provisions if a young federal offender breaches a sentence.
    f. Disparity between the states and territories in legislative principles, procedures and sentencing options applicable to young federal offenders and in their patterns of sentencing.[17]

32. The ALRC made four detailed recommendations, which can be summarised as follows:[18]

    a. Recommendation 27-1: Young federal offenders should continue to be dealt with within the juvenile justice system of the relevant state or territory, but federal sentencing legislation should establish minimum standards for the sentencing, administration and release of youth offenders. …. (recommended minimum content of the standards followed).
    b. Recommendation 27-2: Federal sentencing legislation should require that the following provisions applicable to adult federal offenders be applied to young federal offenders….
    c. Recommendation 27-3: Until such time as a federal Office for Children is established, the Australian Juvenile Justice Administrators, in consultation with relevant government and non-government organisations, should develop national best practice guidelines for juvenile justice, including guidelines relating to the sentencing of young people.
    d. Recommendation 27-4: The Office for the Management of Federal Offenders should monitor and report on young offenders. … (specific requirements follow).

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[15] ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders,* ALRC 103 (13 September 2006).
[16] Ibid, 633.
[17] Ibid, 636. See also ALRC, *Sentencing Federal Offenders*, Issues Paper 29 (15 January 2005) and ALRC, *Sentencing Federal Offenders*, ALRC 70 (15 November 2005).
[18] ALRC, *Same Crime, Same Time: Sentencing of Federal Offenders,* ALRC 103 (13 September 2006), 57–60.

33. None of the ALRC's recommendations relating specifically to young offenders have been implemented.

Section 15AA of the Crimes Act – bail not to be granted in certain cases

Summary of legislation

34. Section 15AA details a presumption against bail in relation to certain offences.

15AA Bail not to be granted in certain cases

(1) Despite any other law of the Commonwealth, a bail authority must not grant bail to a person (the *defendant*) charged with, or convicted of, an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.

(2) This subsection covers:

(a) a terrorism offence (other than an offence against section 102.8 of the *Criminal Code*); and

(b) an offence against a law of the Commonwealth, if:

(i) a physical element of the offence is that the defendant engaged in conduct that caused the death of a person; and

(ii) the fault element for that physical element is that the defendant intentionally engaged in that conduct (whether or not the defendant intended to cause the death, or knew or was reckless as to whether the conduct would result in the death); and

(c) an offence against a provision of Subdivision C of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if:

(i) the death of a person is alleged to have been caused by conduct that is a physical element of the offence; or

(ii) conduct that is a physical element of the offence carried a substantial risk of causing the death of a person; and

(d) an ancillary offence against a provision of Subdivision C of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if, had the defendant engaged in conduct that is a physical element of the primary offence to which the ancillary offence relates, there would have been a substantial risk that the conduct would have caused the death of a person.

(3) To avoid doubt, the express reference in paragraph (2)(d) to an ancillary offence does not imply that references in paragraphs (2)(a), (b) or (c) to an offence do not include references to ancillary offences.

(3A) Despite any law of the Commonwealth, the Director of Public Prosecutions or the defendant may appeal against a decision of a bail authority:

(a) to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is satisfied that exceptional circumstances exist; or

(b) to refuse to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is not satisfied that exceptional circumstances exist.

(3B) An appeal under subsection (3A):

(a) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals (however described) from directions, orders or judgments of

the bail authority referred to in subsection (3A), whether the jurisdiction is in respect of appeals relating to bail or appeals relating to other matters; and

(b) is to be made in accordance with the rules or procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.

(3C) If:

(a) a bail authority decides to grant bail to a person charged with or convicted of an offence covered by subsection (2); and

(b) immediately after the decision is made, the Director of Public Prosecutions notifies the bail authority that he or she intends to appeal against the decision under subsection (3A);

the decision to grant bail is stayed with effect from the time of the notification.

(3D) A stay under subsection (3C) ends:

(a) when a decision on the appeal is made; or

(b) when the Director of Public Prosecutions notifies:

(i) the bail authority; or

(ii) if an appeal has already been instituted in a court—the court;

that he or she does not intend to proceed with the appeal; or

(c) 72 hours after the stay comes into effect;

whichever occurs first.

(4) To avoid doubt, except as provided by subsections (1), (3A), (3B), (3C) and (3D), this section does not affect the operation of a law of a State or a Territory.

Note: These provisions indirectly affect laws of the States and Territories because they affect section 68 of the *Judiciary Act 1903*.

(5) In this section:

ancillary offence has the meaning given in the *Criminal Code*.

primary offence has the meaning given in the *Criminal Code*.

35. Section 15AA relates to the provision of bail to defendants charged with either terrorism offences, or (stated broadly) offences which either caused the death of a person, or carried a substantial risk of causing the death of a person (collectively, 'specified offences').

36. Section 15AA(1) prevents a bail authority from granting bail to a defendant charged with a specified offence unless the bail authority is satisfied that 'exceptional circumstances exist to justify bail'. The phrase 'exceptional circumstances' is not explicitly defined in the section.

37. Section 15AA(3A) provides both the Director of Public Prosecutions (DPP), and the defendant, with a right to appeal a decision regarding bail made pursuant to s 15AA(1). However, where the appeal is brought by the DPP, the bail authority's decision to grant bail is stayed with effect from the time the DPP provides notification of its intention to appeal the decision until the appeal is decided: s 15AA(3C).

38. The note to s 15AA(4) states that s 15AA affects the operation of s 68 of the Judiciary Act. Section 68(1) of the Judiciary Act provides that the laws of a State or Territory for holding persons accused of an offence against a Commonwealth law to bail are to be applied by a State

or Territory court, so far as those laws are applicable. Section 15AA therefore augments the operation of s 68 by establishing the presumption against bail where the offence against a Commonwealth law is a specified offence, but otherwise does not displace the application of State and Territory bail laws in relation to specified offences.

Legislative history of s 15AA

39. Section 15AA was added to the Crimes Act in 2004 by sch 1 to the *Anti-Terrorism Act 2004* (Cth). The Minister for Justice's Second Reading speech to the *Anti-Terrorism Bill 2004* indicates that s 15AA was inserted into the Crimes Act to 'provide for a national solution to bail for terrorism offences rather than relying on a patchwork of bail laws to be updated by the states and territories'.[19]

40. The section was also informed by a Government view that Australia's bail laws should treat suspected murderers and terrorists in the same way. This provision was enacted following reported public dissatisfaction with the New South Wales Supreme Court granting bail to accused terrorist Bilal Khazaal, on the basis that bail legislation in New South Wales contained a presumption in favour of bail for offences other than murder.

41. Section 15AA was subsequently amended in 2004 to clarify that a terrorism offence did not include an offence against s 102.8 of the Criminal Code (which establishes broad offences relating to association with terrorist organisations), and again in 2006 to relocate the definition of 'bail authority'.

42. Further amendments were made in 2010 to remove what was then subsection (1), and replace it with what is now subsections (3A), (3B), (3C), and (3D) (ie, the current provisions relating to appeal rights and stays of bail where the DPP intends to appeal the granting of bail). The note flagging the impact on s 68 of the Judiciary Act was also amended slightly at this time.

43. The Explanatory Memorandum to the *National Security Legislation Amendment Act 2010* (Cth) indicates that the 2010 amendments were made to address confusion with respect to appeals of decisions made pursuant to s 15AA. Prior to these amendments, the Act had been silent on how a bail determination under s 15AA may be appealed, and differing State and Territory legislation was being relied upon to facilitate these appeals. Accordingly, the amendments were introduced to establish a nationally consistent right of appeal against bail decisions made pursuant to s 15AA.

44. The note in s 15AA was also inserted at this time to demonstrate that the amendments were not intended to affect relevant State and Territory laws, except indirectly through the Judiciary Act (ie, ancillary State and Territory laws addressing bail-related matters not specifically addressed by s 15AA, such as procedures and processes for hearing bail applications, will remain applicable to bail applications falling within s 15AA). Section 15AA received further minor amendments in 2014, limiting the scope of s 15AA(2)(c) and (d) to subdiv C of div 80 of the *Criminal Code* (Cth) (the Criminal Code) (whereas previously, the provision was drafted to apply to the entirety of div 80). This was a consequential amendment made following amendments to the structure of div 80 in the Criminal Code.[20]

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[19] Commonwealth, *Parliamentary Debates,* Senate, 17 June 2004, 24181 (Senator Ellison).

[20] Those amendments were made to implement recommendations of the former INSLM, Mr Bret Walker SC, in his Fourth Annual Report, to broaden and clarify the definition of 'terrorism offences' in s 3 of the Crimes Act,

Judicial consideration

45. Most of the cases available in relation to s 15AA focus on whether 'exceptional circumstances' exist in relation to a particular accused. The meaning of 'exceptional circumstances' as used in the context of s 15AA has been developed having regard to use of the term 'exceptional' in other laws for determining bail. In *DPP (Cth) v Tang and Ors* [1995] VSC 220, in relation to the use of 'exceptional' in State bail legislation, Beach J stated:

> 'Exceptional' is a word commonly used in legislation… I consider it was the clear intention of the legislature that any person charged with an offence falling within [the relevant provisions] bears an onus of establishing that there is some unusual or uncommon circumstance surrounding his [sic] case before a court is justified in releasing him [sic] on bail.
>
> In my opinion the normal delay which occurs in this State between arrest and committal, and committal and trial, cannot of itself amount to an exceptional circumstance. I do not say that delay per se may not amount to an exceptional circumstance. If there is inordinate delay, it very well may.[21]

46. In *Hammoud v DPP* [2006] VSC 516, Bongiorno J built upon this, and stated: '[w]hat must be shown [by the applicant] is that there is some situation which is out of the ordinary in some respect which the detainee can point to as justifying the adjective "exceptional"'.[22] His Honour went on: '[a] bail application at some point in the future may be able to be based on an exceptional circumstance related to the length of a possible sentence compared to the time already served on remand'.[23] It has also been stated that exceptional circumstances 'may be constituted by a combination of matters which taken together render the case exceptional'.[24]

47. In *DPP (VIC) v Cozzi* [2005] VSC 195, Coldrey J identified the following factors which have been considered by courts, and which may give rise to exceptional circumstances:

    a. the strength of the Crown case (where it may be sensibly assessed);
    b. the question of delay to committal and/or trial;
    c. principles of parity (insofar as they are applicable to a bail application);
    d. strong family support;
    e. stable accommodation;
    f. constant/stable employment;
    g. low risk of flight or re-offending;
    h. family situation of the accused (eg, carer's responsibilities); and
    i. a lack of criminal history.[25]

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and what activities constitute offences within this definition. As part of these developments, div 80 (which originally only dealt with sedition and treason together, without any subdivisions) was amended to include new provisions relating to urging and advocating terrorism. At this point, div 80 was broken into subdivisions, with the terrorism provisions populating subdiv C, thereby motivating the amendments to s 15AA(2)(c) and (d).

[21] [1995] VSC 220, [14]–[15].

[22] [3].

[23] [10].

[24] *Haddara v Commonwealth Director of Public Prosecutions* [2006] VSC 8, [5] (Osborn J).

[25] [22].

48. After considering the differing results courts have come to considering these matters in differing contexts, His Honour further commented:

> [t]his brief examination indicates, in my view, that there are a variety of factors taken into account by courts in considering the question of exceptional circumstances. In each case it appears to be a question of degree. Moreover, the lack of matters constituting unacceptable risk… are often taken into consideration.[26]

49. Below is a summary of some of the main cases in which s 15AA has been applied. They suggest that the standard required by 'exceptional circumstances' is high:

    a. *Hammoud v DPP* [2006] VSC 516 — Circumstances pleaded: applicant will reside with his wife and baby, amidst a supportive family, with prospect of full employment, and will report to police, undergo a curfew and put up adequate surety. Held: no exceptional circumstances.

    b. *Haddara v Commonwealth Director of Public Prosecutions* [2006] VSC 8 — Circumstances pleaded: strong ties to the jurisdiction, family support, good employment prospects, and potential for delay (applicant also claimed the Commonwealth's case was weak, but this was not accepted by the court). Held: no exceptional circumstances.

    c. *R v Baladjam and Ors [No 21]* [2008] NSWSC 1446 — Circumstances pleaded: mother dying, and if remanded on bail, applicant may not have another opportunity to see her. Held: no exceptional circumstances.

    d. *Raad v DPP* [2007] VSC 330 — Circumstances pleaded: applicant held in prison where was subject to close confinement, shackling, strip searching, and other processes, some of which were found to 'lack any rational justification' for remand prisoners. There was a risk of delay in the case, and the applicant was at risk of slipping into depressive state and becoming suicidal. Surety could be provided for the applicant, and the applicant had both prospects of employment and stable and strong family supports if bail was granted. Held: no exceptional circumstances.

    e. *Kent v the Queen* [2008] VSC 431 — Circumstances pleaded: delay between the applicant's imprisonment and his trial would be at least 3.5 years. Held: exceptional circumstances existed and bail granted.

50. One further case which may also be relevant is *DPP (Cth) v Thomas* [2005] VSC 85. This was an appeal against the Victorian Magistrates' Court to grant bail upon a finding exceptional circumstances existed. In this case:

    a. the accused had previously been detained in Pakistan for five months, where he was said to have been subjected to solitary confinement, frequent interrogations, and threats of torture to both himself and his family;

    b. the accused was held in solitary confinement of 21–23 hours per day in Australia, which reminded him of his detainment in Pakistan, and reportedly exacerbated symptoms indicative of anxiety and depressive psychopathologies, and potential post-traumatic stress disorder;

[26] [25].

c. the accused's personal circumstances, including family supports and employment, were reported to be able to assist the accused with his psychological concerns;

d. the accused lacked prior convictions, had surety available, and had renounced terrorist organisations;

e. there was some doubt about the strength of aspects of the case against him; and

f. the accused had provided significant assistance to Australian authorities.

51. The Supreme Court dismissed the appeal.

52. The accused's bail was again challenged by the CDPP in *DPP (Cth) v Thomas (Ruling No 5)* [2005] VSC 435. Here, the presiding judge upheld the accused's bail, on the basis that he had undergone a committal, a *voir dire*, and a bail revocation application, and yet still 'constantly and loyally fulfilled his obligations under the terms of his bail'. The judge considered that the good conduct of the accused amidst these events constituted exceptional circumstances sufficient to allow bail to be confirmed.

Judicial consideration specific to children

53. Two judgments to date consider the application of s 15AA to a child charged with a Commonwealth terrorism offence.

R v NK [2016] NSWSC 498

54. On 24 March 2016 NK was arrested and charged with collecting funds for, or on behalf of, a terrorist organisation (s 102.6(1) Criminal Code). It was alleged that the offence was committed between 21-14 March 2016. On 24 March 2016 the Parramatta Children's Court refused an initial bail application. NK applied for bail in the Supreme Court and the CDPP contested the application at a hearing on 18 April 2016.

55. At the time of the hearing NK was 16-years-old, an Australian citizen with no prior criminal record who had resided in NSW all her life. Prior to her arrest NK had been enrolled in a Sydney high school, however her attendance began to decline after April 2015 and she began to mix with 'older persons.'[27]

56. In support of the application it was submitted that NK had a significant number of family members in the community. NK did not possess a passport and undertook not to apply for travel documents. NK also expressed willingness to be subjected to strict conditions including electronic monitoring. It was also noted that NK's co-accused were adult males and a delay in the allocation of a joint-trial date was anticipated.[28]

57. NK's submission was supported by:

a. A psychologist's report indicating the applicant had been assessed as suffering from a chronic adjustment disorder with mixed anxiety and depressed mood. The report indicated that an extended period of incarceration would significantly impact on her psychological health, possibly impacting on her ability to instruct legal counsel.

[27] *R v NK* [2016] NSWSC 498, [33].
[28] *R v NK* [2016] NSWSC 498, [13]–[17].

b. An affidavit from the applicant's aunt stating that if bail was granted the applicant could live with her and she would undertake full-time supervision of the applicant.

c. An affidavit from another of the applicant's aunts stating she was willing to use equity in her real estate amounting to $500,000 as surety for the applicant.[29]

58. The Crown submitted that there is a heavy onus on the applicant to show exceptional circumstances and that the applicant must show something unusual or out of the ordinary, when compared to any other accused in the same position. The Crown submitted that the case against the applicant was not weak and that the conditions in custody did not amount to an exceptional circumstance. The Crown submitted that there were no exceptional circumstances to warrant releasing NK on bail.[30] The Crown further submitted that if the court were of the view that exceptional circumstances did exist, and that the s 15AA presumption against bail was overturned, an assessment of the bail consideration set out in ss 17–19 of the *Bail Act 2013* (NSW) would exclude bail because, in particular, the risk of NK reoffending could not be mitigated.[31]

59. On 22 April 2016 Justice Hall granted NK's bail application on 'strict conditions.'

60. In relation to youth and exceptional circumstances Justice Hall stated:

> 'The issue of a juvenile's youth, as I have earlier stated, is a relevant factor in determining the issue of exceptional circumstances. It is also evidence, in my opinion, that is relevant to actions or dealings between adults intent on engaging a juvenile in the implementation of a plan that may be associated with any alleged involvement by the juvenile.
>
> The observations to which I have referred in paragraph [39] are not, of course, in any way intended or are to be taken as expressing any view or conclusion upon any issue as to possible criminal liability or responsibility of the applicant. They are intended to provide no more than an illustration 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 15 AA exist.'[32]

61. In relation to unacceptable risk Justice Hall stated:

> 'I have considered, in accordance with the provisions of s 18(1)(p) [*Bail Act 2013* (NSW)] whether bail conditions can reasonably be imposed so as to address any bail concerns in accordance with s 20A. Having regard to the provisions of the last mentioned section I consider that conditions can be imposed which satisfy the matters set out in s 20A(2) and meet any 'unacceptable risk.'[33]

AB v Director of Public Prosecutions (Cth) [2016] NSWSC 1042

41. On 14 June 2016 AB was arrested and charged with two charges under the Criminal Code:

a. s 101.6(1) an act in preparation for a terrorist act.

b. s 474.14(2) used a telecommunications network with the intention to commit a serious offence.

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[29] Ibid.
[30] Ibid, [18]–[25].
[31] Ibid.
[32] Ibid, [40]–[41].
[33] Ibid, [54].

62. On 26 July 2016 AB applied for bail in the NSW Supreme Court, at the time of the hearing AB was 17-years-old (**Folder Item 3**). AB had been diagnosed as having an intellectual disability and Asperger's syndrome. It was alleged that AB published a series of posts on a website indicating that he intended to attack members of the public with a knife in a suicidal attack on a crowded public area in Sydney. It was not alleged that AB planned his attack in association with any group or other person or that he sought to promote any religious or radical cause. Instead, it was alleged that he intended to carry out his threats to make a statement about the mistreatment of persons with mental illness.[34]

63. The Crown presented a detailed statement of facts including copies of AB's online activities and transcripts of interviews with the police. The statement included several posts made by AB regarding possible knife attacks, killing his parents and killing himself. AB's online activity prior to arrest included a map identifying possible target areas in the Sydney Central Business District. Following his arrest AB was interviewed by the police on four occasions, transcripts of all of these interviews were not presented to the court, possibly due to admissibility concerns.[35] The court noted that across the interviews AB indicates that he had been planning the attack for three months and later that he had no intention of carrying the attack out.[36] There does appear to be some consistency in AB's statements regarding his motivation being centred on making a statement on mental health issues and bullying rather than being motivated by type of ideology.[37]

64. The court noted four matters in particular regarding the material presented by the Crown:

    c. Police searched AB's residence and did not locate any knife that could have been used in the type of attack described by AB online.

    d. AB's online activity had set out a specific window for the attack, he was arrested at his home, located two hours from Sydney by public transport, towards the end of that window of time.

    e. AB indicated that he had researched the legal meaning of 'terrorist attack'.

    f. Police had not completed reviewing AB's computer or obtained deleted material from Facebook.

65. The court considered the strength of the prosecution case, highlighting two particular points:

> 'First, it is apparent from the material tendered on this application that there is a significant issue about whether the acts said to be undertaken by AB were in fact done in preparation for, or planning, a violent attack on the public as opposed to, say, being threats made by an isolated and depressed youth who has no genuine intention to carry them through.'[38] …..
>
> Second, the definition of 'terrorist act' requires that CDPP demonstrate that the relevant action be undertaken 'with the intention of advancing a political, religious or ideological cause.' It is not suggested that AB had any connection to any religious or political group or that he even sought to identify with any such group. Instead the CDPP contends that the 'ideological or political purpose for

[34] *AB v Director of Public Prosecutions (Commonwealth)* [2016] NSWSC 1042.
[35] Ibid, [8]–[14].
[36] Ibid, [14]–[16].
[37] Ibid, [16].
[38] Ibid, [25].

> the [proposed] attacks was to raise awareness of mental health and suicide awareness'. The only material concerning this are the statements he allegedly made to the ambulance officer, and assuming they are admissible, the statements he is said to have made to the police in the ambulance. I have great difficulty in accepting that that material is capable of demonstrating an intention to advance a 'political, religious or ideological cause.'[39]

66. Overall, the court assessed the CDPP's case to be weak. [40]

67. The court considered AB's personal circumstances, including that:

    a. AB had a previous criminal conviction for assault when he was 14 (threw a rock at a car).

    b. AB is an only child and was diagnosed with Asperger's in pre-school. In year 7 AB was diagnosed with major depression and a mild cognitive disability.

    c. AB attempted suicide in year 7 as a result of bullying and was withdrawn from school. AB attended a special needs school in 2014 but was withdrawn after further bullying and another suicide attempt.

    d. AB was medicated in 2012, however his mother reported that this made him aggressive.

    e. Prior to being taken into custody AB had not spent a night away from his mother.

    f. It was reported that there were threats against AB in custody which had resulted in his relocation. AB had expressed suicidal thoughts to his mother since being incarcerated.

    g. On ten occasions between 2012-2015 AB received attention from a doctor or a hospital following an alleged threat to harm himself or others, the most serious being a threat to place a bomb at his school.

    h. A forensic psychiatrist's report characterised AB's behaviour as attention seeking and concluded it was 'unlikely' that AB meant to carry out the proposed attack or had a proper understanding of the seriousness of his statements.[41]

    i. The forensic psychiatrist also noted a heightened risk of deterioration in AB's mental health with continued incarceration.

68. The bail application proposed that AB be confined at home except when reporting to the police, attending court or if deemed appropriate attending educational services either in the company of his parents or a disability service provider. The arrangements also proposed no access to the internet or social media and electronic monitoring.[42] Surety of $550,000 was also offered.[43]

69. The court found that exceptional circumstances did exist in AB's case, primarily the weakness in the CDPP case, and that the impediment to bail created by s 15AA was removed.[44] The court went on to deal with the application in accordance with the *Bail Act 2013* (NSW). Justice Beech-Jones considered that the risk of AB committing a serious offence and/or endangering the safety of the community could not be mitigated. Justice Beech-Jones stated:

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[39] Ibid, [26].
[40] Ibid, [27].
[41] Ibid, [30]–[37].
[42] Ibid, [29].
[43] Ibid, [41].
[44] Ibid, [46].

'However, I am driven to the conclusion that the risk posed by a nihilistic attack on people congregating in a public place cannot be adequately mitigated, even by a form of strict house arrest. Realistically someone willing to perpetrate that form of attack would be able to leave their home and inflict harm even if the authorities were immediately informed that they have absconded. As AB stated 'I can get a real long sharp knife and just cut up and kill as many people that I can under a minute.'[45]

'For the reasons that follow I am satisfied that exceptional circumstances exist. In particular I am satisfied that the prosecution case against AB is weak partly because the preponderance of evidence before the Court suggests that it was unlikely that AB intended to carry out his threats but principally because I consider that the prosecution has minimal prospects of establishing that he planned a "terrorist attack", that is, one carried out with the "intention of advancing a political, religious or ideological cause". Despite this finding and despite my acceptance that AB will be affected by his incarceration due to his youth and mental fragility and notwithstanding the strictness of the proposed bail conditions I am obliged to refuse bail. This is so because the proposed bail conditions do 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 of 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.

The result that such a vulnerable youth is to be detained even though the charges against him are weak is concerning. It is an outcome mandated by the *Bail Act* but it, nevertheless, strongly suggests that what has been undertaken is an exercise in preventative detention. Even if that is justified, it can only provide a measure of short term security for the public. I note that at the hearing of the application the solicitor for the CDPP advised the Court that the charges would be "very, very carefully reviewed". While the outcome of that process is a matter exclusively for the CDPP, 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.'[46]

[45] Ibid, [54].
[46] Ibid, [5]–[6].

Section 19AG of the Crimes Act – non-parole periods for sentences for certain offences

Summary of legislation

71. Section 19AG provides:

> **19AG Non-parole periods for sentences for certain offences**
>
> (1) This section applies if a person is convicted of one of the following offences (each of which is a ***minimum non-parole offence***) and a court imposes a sentence for the offence:
>
> (a) an offence against section 24AA;
>
> (b) a terrorism offence;
>
> (c) an offence against Division 80 or 91 of the *Criminal Code*.
>
> Note: A sentence for a minimum non-parole offence is a federal sentence, because such an offence is a federal offence.
>
> (2) The court must fix a single non-parole period of at least 3/4 of:
>
> (a) the sentence for the minimum non-parole offence; or
>
> (b) if 2 or more sentences have been imposed on the person for minimum non-parole offences—the aggregate of those sentences.
>
> The non-parole period is in respect of all federal sentences the person is to serve or complete.
>
> (3) For the purposes of subsection (2):
>
> (a) a sentence of imprisonment for life for a minimum non-parole offence is taken to be a sentence of imprisonment for 30 years for the offence; and
>
> (b) it does not matter:
>
> (i) whether or not the sentences mentioned in that subsection were imposed at the same sitting; or
>
> (ii) whether or not the convictions giving rise to those sentences were at the same sitting; or
>
> (iii) whether or not all the federal sentences mentioned in that subsection are for minimum non-parole offences.
>
> (4) If the person was subject to a recognizance release order, the non-parole period supersedes the order.
>
> (5) Sections 19AB, 19AC, 19AD, 19AE and 19AR have effect subject to this section.
>
> Note: The effects of this include preventing a court from:
>
> (b) confirming (under paragraph 19AD(2)(d)) a pre-existing non-parole period; or
>
> (c) confirming (under paragraph 19AE(2)(d)) a recognizance release order; or
>
> (ca) making a recognizance release order under paragraph 19AE(2)(e) or 19AR(2)(e); or
>
> (d) declining (under subsection 19AB(3) or 19AC(1) or (2) or paragraph 19AD(2)(f)) to fix a non-parole period.

72. Section 19AG establishes non-parole periods for persons convicted of certain offences, referred to as 'minimum non-parole offences' within the section.

73. Where a person is convicted of a minimum non-parole offence, s 19AG(2) compels the court to fix a single non-parole period of at least three-quarters of the sentence imposed for the minimum non-parole offence, or if two or more sentences have been imposed, three quarters of the aggregate of those sentences.

74. Section 19AG(1) defines minimum non-parole offences to be:

    a. offences against s 24AA of the Crimes Act (ie, offences relating to treachery, including attempts to overthrow the Constitution, or either the Commonwealth or a State government, or levy a war);

    b. terrorism offences (a copy of the definition of 'terrorism offences' is provided at **Folder Item 2**); and

    c. offences against divs 80 and 91 of the Criminal Code (div 80 establishes offences relating to treason, urging violence, and advocating terrorism, while div 91 establishes offences relating to espionage and the communication of information concerning the Commonwealth's security or defence).

75. The Prime Minister's referral relates only to the application of s 19AG to children convicted of Commonwealth terrorism offences.

Legislative history of s 19AG

76. Section 19AG took its current form[47] under amendments to the Crimes Act implemented by sch 1 to the *Anti-Terrorism Act 2004* (Cth).[48] the Minister for Justice's Second Reading speech on the Bill indicates that the section was implemented to address Government concern

> that sentences for convicted terrorists should reflect community concern about terrorism. 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.[49]

77. This provision was introduced in response to reported community dissatisfaction with the sentence handed down to fifty year old Jack Roche by the Supreme Court of Western Australia after pleading guilty to plotting to bomb the Israeli embassy in Canberra (nine years imprisonment with a non-parole period of four years).[50]

78. The Minister for Justice's Second Reading speech further explains that s 19AG uses the fraction of three-quarters to determine the non-parole period imposed as

> [t]errorism offences in the Criminal Code have a diverse range of maximum penalties. It would be difficult to specify a fixed non-parole period for each separate offence that could

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[47] In 2015, a cross-reference in the note in s 19AG(5) was removed as a consequence of an amendment to s 19AB: see *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth).

[48] There was an earlier version of s 19AG created by s 9 of the *Crimes Legislation Amendment Act (No 2) 1989* (Cth). However, this provision was substantially different to the provision inserted into the Crimes Act in 2004, and was repealed in 2002 by sch 3, s 2 of the *Crimes Legislation Amendment (People Smuggling, Firearms Trafficking and Other Measures) Act 2002* (Cth).

[49] Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).

[50] See eg, Cynthia Banham, 'Crackdown on Bail Laws After Terrorism Trial Outrage', *The Sydney Morning Herald* (16 June 2004); ABC TV, 'Govt Moves on Non-Parole Period for Convicted Terrorists', *ABC News* (online) (3 June 2004).

> adequately take into account the court's sentencing discretion and the range of maximum penalties that could be imposed. Consequently, the government amendments specify the application of the minimum non-parole period as three-quarters of the head sentence imposed for terrorism and other terrorism related offences… While this may appear to be an extraordinary measure, it has been used before in the context of people-smuggling, and terrorism raises extraordinary issues.
>
> In increasing the prison time to be served by terrorists, the government recognises the need to ensure that courts still maintain sentencing discretion about whether someone should be imprisoned and, of course, about the total period of the sentence concerned… The community has, as a result of the activities of terrorists, paid a huge cost in terms of emotional wellbeing from a loss of peace of mind as well as financially. These amendments are about making those convicted of terrorism offences spend more time in prison in recognition of that cost, and further ensuring the protection of the Australian community.[51]

79. Neither the Supplementary Explanatory Memorandum to the Bill nor the Minister's Second Reading speech refer to the application of s 19AG to children, though Senator Nettle made passing reference to this issue during parliamentary debate:

> These proposals attack judicial independence, the importance of the discretion of the judiciary to decide important matters such as pre-trial custody or detention and an appropriate length of sentence based on the individual and particular circumstances of the crime and the defendant. They are arbitrary and quite possibly in breach of the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, there being no exemption, we understand, for children.[52]

Judicial consideration

80. The Supreme Court of Victoria Court of Appeal considered arguments on whether s 19AG applied to inchoate offences in *Fattal v The Queen*.[53] It was argued that the offence of conspiracy was not a 'terrorism offence.' The court considered the statutory construction of the provisions and rejected the argument:

> 'It follows that the reference in s 3 of the *Crimes Act* to an offence against Part 5.3 of the *Criminal Code,* which includes the offence of doing an act in preparation for, or planning a terrorist act, contrary to s 101.6(1) of the *Criminal Code,* must be taken to include the offence of conspiring to do an act in preparation for, or planning a terrorist act. So too s 19AG, when referring to 'a terrorism offence', must be interpreted to include a conspiracy to perform a terrorism offence. On this construction, Aweys was both convicted of a terrorism offence and sentenced in respect of that offence. The three quarters rule was thus properly engaged.'[54]

81. The New South Wales Supreme Court considered arguments on whether the court should set a lower head sentence because of the implications of s 19AG. The court did not accept this position[55] and the New South Wales Court of Criminal Appeal upheld this position and the sentence imposed:

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[51] Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).
[52] Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24178–79 (Sen Kerry Nettle).
[53] *Fattal v The Queen* [2013] VSCA 276.
[54] Ibid, [212].
[55] *R v Lodhi* [2006] NSWSC 691, [107].

> 'Section 19 AG does not detract in any way from the obligation of a sentencing judge to first impose a proportionate sentence before considering the non-parole period.
>
> Whealy J rejected the appellant's submission that because of the operation of s 19AG it was necessary to fix a lower head sentence than might otherwise have been appropriate. His Honour did not err in doing so and this ground of appeal fails.'[56]

82. In the same matter the court also stated:

> 'Rehabilitation and personal circumstances should often be given very little weight in the case of an offender who is charged with a terrorism offence. A terrorism offence is an outrageous offence and greater weight is to be given to the protection of society, personal and general deterrence and retribution.'[57]

83. *Obiter dicta* the Supreme Court of Western Australia has suggested s 19AG may have a flow on effect for establishing the non-parole period for offences other than the stated minimum non-parole offences, stating:

> '[T]he range of non-parole periods customarily imposed for drug offences, on a proportionate or percentage basis, could not as a matter of statutory construction, be higher than the three quarter (75%) minimum specified in s 19AG, which is reserved for the most serious offences in which general deterrence is a weighty factor. However, 75% is not a non-parole period ceiling for other types of offences in unusual circumstances.'[58]

[56] *Lodhi v R* [2007] NSWCCA 360, [261]–[262].
[57] Ibid, [274].
[58] *Lam v The Queen* [2014] WASCA 114, [56].