



Independent National Security Legislation Monitor

Dr James Renwick SC

Opening Remarks at Public Hearing 2 August 2018 reviewing ‘The Trial and Punishment of Children for Terrorism Offences’.

Introduction

I welcome everyone here in Canberra, and those live streaming online, to this public hearing under s 21 of the *Independent National Security Legislation Monitor Act 2010* (Cth). At the request of the Prime Minister, I am conducting a review into the trial and punishment of children for terrorism offences. Today is an opportunity for me and those assisting me to question and hear from government agencies and other people who have made submissions. I thank everyone for their helpful submissions. The program is publicly available. I will now set out my role and some preliminary thoughts and what I might ultimately recommend at the conclusion of this review.

My Role

My role as set out in the Act is, independently:

- to review the operation, effectiveness, and implications of Australia’s counter-terrorism and national security laws, and
- having regard to Australia’s international obligations both human rights and security, and constitutional arrangements between the Commonwealth, the States and the Territories, to consider whether such laws:
 - contain appropriate safeguards for protecting the rights of individuals,
 - remain proportionate to any threat of terrorism or threat to national security or both, and
 - remain necessary.¹

As Monitor, I see all relevant material regardless of security classification: I have already had a closed hearing where classified material was referred to. Today is a fully open hearing. Finally, my report to the Prime Minister is due no later than 1 December and must be tabled in Parliament within 15 sitting days of it being received by him.

¹ www.inslm.gov.au

Sitting with me are:

- My principal adviser: Mr Mooney
- My Counsel Assisting for this review: Ms Single of the NSW Bar and Mr Tran of the Victorian Bar, and
- My Solicitor Assisting for this review: Mr Rowe, from the Office of the Australian Government Solicitor.

Let me say something more about the review and some of my preliminary views.

First, some definitions:

- By *child* I mean someone older than 10 and younger than 18. Ten is the age of criminal responsibility for federal law. Any review of that age is beyond the Prime Minister's reference to me.
- By *young person* I mean someone between 18 and 25 years of age.
- Unless I say otherwise, my references to *terrorism laws* are to federal laws, almost all of which are to be found in the *Criminal Code* and the *Crimes Act 1914* (Cth), and *Parliament* means the Commonwealth Parliament.

There are of course eight States and self-governing territories. All terrorism trials are to be heard in State and Territory courts, including the eight children's courts. As you will hear, although the Parliament could cover the field concerning the trial and punishment of federal terrorism offenders and thereby prevail over inconsistent State and Territory laws, it does not generally choose to do so: in court proceedings, State and Territory procedural and sometime substantive laws are picked up as what are sometimes called 'surrogate federal laws', often with uncertain results.

Finally, there being no federal prisons, all federal terrorism offenders who are sentenced to a term of imprisonment are sent to State or Territory prisons or places of detention as s 120 of the Constitution envisages.

INSLM view concerning threats

As I am required by the Act to consider whether the laws are proportionate to any threats, let me say something about this topic first. We will be hearing shortly from ASIO and other agencies on this topic. But let me set out my general understanding.

First, the current threat of a terrorist act occurring in Australia remains at the "probable" level, as it has been for the past four years. In my reports last year I concluded that:

- *the credible threat of one or more terrorist attacks will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future;*
- *while more complex or extensive attacks cannot be ruled out and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely;*

- *there can be no guarantee that the authorities will detect and prevent all attacks; and*
- *there is also the risk of opportunistic if unconnected 'follow-up' attacks in the immediate aftermath of a completed attack at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality.*

I understand that remains the position.

As I expect we will hear next, broadly speaking terrorist threats in Australia come predominantly from radical Islamist action, which of course is to be contrasted with the major world religion of Islam which practices peace. As Mr Justice Haddon-Cave, the Presiding Terrorism Judge of England and Wales, said recently when sentencing the Parson's Green Bomber, in terms I would adopt:

48. ... the Qur'an is a book of peace; Islam is a religion of peace. The Qur'an and Islam forbid anything extreme, including extremism in religion. Islam forbids breaking the 'law of the land' where one is living or is a guest. Islam forbids terrorism (hiraba). The Qur'an and the Sunna provide that the crime of perpetrating terror to "cause corruption in the land" is one of the most severe crimes in Islam. So it is in the law of the United Kingdom'.²

(And, I would add, so it is in the law of Australia.)

There are also terrorist threats emanating from radical right wing groups. We have not yet seen children charged with terrorism or related offences from such groups so I say no more about them now.

Since 2014, for people under 18 there have been significant increases (sometimes from zero) in levels of:

- intelligence interest, adverse security assessments and passport cancellations;
- police investigation and arrests by the Joint Counter Terrorism Teams which exist now in each jurisdiction; and
- charges and convictions.

I can give some actual numbers of charges and convictions. The total number of persons charged with or convicted of terrorism offences in Australia approaches 100. As of today 54 have been convicted and 39 remain before the courts.

Five of those convicted are children (that is, under 18 when the offences occurred). Two children remain currently before the courts, and a number of other children have been charged with non-terrorism offences, although they were caught up in some way in terrorist activity. The sentences range considerably in severity but have been up to 13 and a half years as a head sentence with a sentence of 10 years and one month (or 75%) for the non-parole period. We will hear more about s 19AG of the Crimes Act, which

² Remarks of Haddon-Cave J. <https://www.judiciary.uk/wp-content/uploads/2018/03/r-vhassan-sentencing.pdf>

compelled the sentencing court to impose a non-parole period of this length, and which applies to both adults and children alike.

Terrorism offences are the most serious federal criminal offences children currently face.

Although the absolute numbers remain small, the increases are concerning. Since 2014 10% of the total number convicted were under 18 at the time of offending; a further 25% were between 18 and 25, so a third of the total group of offenders were under 25.

I have just returned from the United Kingdom, and they also have been experiencing an increase in the number of convictions of persons for terrorism related offences who were children when the offences occurred.

Since 2015, 21 children have been charged with a terrorism-related offence in Great Britain, and 14 have been convicted following a charge for such an offence. A recent UK Home Office publication stated that “Arrests of those aged ‘under 18’ made up 6% of all arrests (27 arrests) in the latest year; the highest number and proportion since the data collection began in 2001.”³

Among those convicted, one UK offender – the then 14-year-old boy who inspired the would-be Australian Anzac Day bomber in Melbourne – was given a life sentence with a minimum non-parole period of 5 years (S), and another was given a life sentence with a minimum non-parole period of 11 years (Gunton). Other sentences have included a 24-month detention and training order (Gamble), and a 12-month intensive referral order (TM).⁴

I note that Australian courts have steadily increased the sentences being imposed for terrorism offences, many of which have maximum penalties of life or 25 years imprisonment. There have been sentences of more than 10 years for people who were children at the time they committed terrorism offences. In the important case of *MHK*,⁵ the Victorian Court of Appeal recently made clear how seriously it regards this type of criminal offending, which it described as ‘the scourge of terrorism’. The court said:

56. In the present case, the respondent was only 17 years of age at the time of the offending. Ordinarily, and in general, the youth of an offender is an important mitigating circumstance. It is relevant to an assessment of the moral culpability of the offender, as the law recognizes that the immaturity and impressionability of youth may be, and commonly is, an important contributing factor to the involvement of a young offender in the crime for which that offender is to be sentenced. In addition, the law regards the rehabilitation of young offenders of substantial, if not primary, importance, not only in the interests of the offender, but also in the interests of the community.

³ Operation of police powers under the Terrorism Act 2000 and subsequent legislation: Arrests, outcomes, and stop and search, Great Britain, financial year ending March 2018 Statistical Bulletin 09/18. <https://www.gov.uk/government/statistics/operation-of-police-powers-under-the-terrorism-act-2000-financial-year-ending-march-2018>

⁴ Hyperlinks to judgments can be found on www.INLSM.gov.au

⁵ *DPP (Cth) v M H K (a Pseudonym)* [2017] VSCA 157 (23 June 2017)

57. *On the other hand, it is recognised that those principles need to be appropriately moderated where, as in a case such as this, the offender has been involved in serious and dangerous offending.*

...

73. *In the upshot, as we have stated, the offending in this case was particularly serious. Notwithstanding the age of the appellant, and the steps that he has taken to rehabilitation, the principles of general deterrence and denunciation are of primary importance. Unless appropriate weight is given to those considerations in a case such as this, the criminal justice system will not have sufficiently discharged its duty to properly express the community's outrage at the conduct of the respondent, and to deter other like-minded individuals from indulging in the same or related conduct.*

Key Laws

Broadly, there are three groups of federal laws raised in my review:

- Section 15AA of the Crimes Act, which establishes a presumption against bail for those charged with particular offences relating to terrorism;
- Section 19AG, which for most terrorism offences requires a court to fix a minimum non-parole period of at least three-quarters of the sentence for that offence;
- Section 20C, which provides in effect 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.

INSLM Preliminary General Views

I accept that when most terrorism laws were enacted, there was no particular consideration given to children being convicted of those offences. As the progress of this review to date has already shown, there are troubling and unforeseen problems in the juvenile justice system often caused because of considerable differences in trial and punishment depending upon the State or Territory in which the federal prosecution takes place. I will give just a few examples:

- First, the role of the children's courts in the various jurisdictions differ quite significantly – potentially, offending which would be dealt with in the children's court in one jurisdiction would be dealt with in a general court in another, causing material differences to the way the matter is conducted and resolved.
- Second, there is scope for significantly divergent sentencing outcomes. All children's courts have caps on their sentencing powers of some sort which would in any serious case mean much shorter sentences than would otherwise be imposed.

- Third, there is inconsistency in the circumstances in which juvenile sentencing principles will apply to a child sentenced for crimes as serious as those relating to terrorism.

Those inconsistencies require explanation, analysis, and at least some reform. Having now undertaken the analysis of nine different legal systems, including 8 different children's courts, I can understand why the reform might have been put in the 'too hard' basket over recent decades.

However, the Prime Minister has requested this review and I intend to fully answer all questions the review throws up.

I have been fortunate to receive a number of submissions from government (both Commonwealth and State and Territory), from human rights bodies and civil society organisations, professional associations and the public. Those instructing me have done an excellent summary of the submissions which I will make available.

Those submissions of course reflect a range of views, but I offer the following observations:

- First, there is a good deal of productive discussion whether ss 19AG and 15AA comply with Australia's international obligations, and, more generally, whether it is appropriate that those provisions apply to children. Most non-Government submissions recommend that s 19AG, in particular, not apply to children.
- Second, and somewhat unusually for an INSLM review, I have had the benefit of the assistance of State and Territory authorities. I have received a formal submission from NSW Justice, and anticipate further submissions from State and Territory governments. Not all States and Territories have chosen to provide a formal submission, but Ministers, courts and agencies across the country have been extremely generous in the time and effort devoted to consultations with me and those assisting me. I am grateful in particular for the assistance that has been offered me in relation to the detail of particular State and Territory laws.
- Finally, while I have been assisted with the detail of the law in particular jurisdictions, the submissions to this review generally offer more limited guidance on the *inconsistencies* which might exist between jurisdictions. It appears common ground that arbitrary discrepancies between jurisdictions are generally undesirable, though submitters have quite properly also noted that the federal approach taken to juvenile justice in Australia necessarily invites *some* inconsistencies between jurisdictions. Understandably, given the small number of cases of juvenile terror offending to date and the complexity of comparing different juvenile justice systems in the abstract, the submissions have generally not engaged with the fine detail of potential inconsistencies. It has been suggested that further work be done in this regard – the Australian Human Rights Commission recommended in its submission that 'a comprehensive

survey of State and Territory laws and rules of court should be undertaken' to identify inconsistencies. In this review I intend to identify such inconsistencies as far as I can: indeed, a submission from the Commonwealth DPP is particularly helpful in this regard: and I should here acknowledge my gratitude to her and her staff.

Preliminary INSLM view concerning s 19AG

My preliminary view is that the inflexible $\frac{3}{4}$ rule set by s 19AG should not apply to children. My reasons include the following:

- a. A number of submissions persuasively argue that s 19AG breaches the Convention on the Rights of the Child because it precludes any judicial discretion in setting the non-parole period.
- b. It is no answer to say that the court has a discretion on setting the head sentence. Commonwealth sentencing law requires the court first to set the head sentence; it is impermissible to do this by reference to parole (whether set by s 19AG or at the court's own discretion).
- c. This conclusion is not surprising. In other areas, for example, people smuggling and a current bill in relation to possession of weapons, there is a carve-out for children in relation to mandatory head sentences. It appears that the reason for that carve-out for children is to avoid breaching Australia's obligations under the Convention.
- d. I am not suggesting that any non-compliance was deliberate at the time s 19AG was enacted, only that now it is being used against children and, as such, it needs reform.
- e. I also consider it is counterproductive to have an inflexible rule like s 19AG in every case, particularly when it comes to children. The inflexibility in s 19AG can be compared to Britain where children have been given life sentences for terrorism offences but relatively short minimum non-parole periods. Of course, it remains for the offender to demonstrate that they should be released on parole at the relevant time. In Australia at present, they would need to demonstrate their suitability to the Commonwealth Attorney-General, who personally considers all parole applications by terrorism offenders.

Preliminary INSLM views concerning s 15AA

I will also need persuading that s 15AA is not in breach of the Convention on the Rights of the Child, although there may be more room for differences of opinion in relation to s 15AA because the decision on whether or not to grant bail is ultimately at the discretion of the court. The primary area of concern appears to be that the provision may preclude the best interests of the child from being a primary consideration in each case.

The English position is that there is a presumption in favour of bail for everything except murder and attempted murder, however, those charged with terrorism offences almost never receive bail.

There may be some merit in a carve-out for children from the exceptional circumstances requirement in s 15AA. This could be replaced with language similar to that used in the control order legislation, where the best interests of the child are *a primary consideration* but *the paramount consideration* is the protection of the community. This approach was used in the control orders legislation by the government at the suggestion of the PJCIS. If used in relation to s 15AA it would appear to comply with the Convention, but still allow the bail authority fully to protect the community. And in practice it may be the case that bail is not given any more often for children in terrorism cases than it has been to date.

Finally, I hope to better understand the COAG decision last year concerning harmonising State and Territory bail laws. It is possible this has overtaken anything I might recommend.

Preliminary INSLM views concerning s 20C

The most difficult part of my review is s 20C. The legal framework surrounding the prosecution and sentencing of children for Commonwealth terrorism offences is complex. There are 8 different legal systems, plus the Commonwealth system.

State and Territory provisions concerning the prosecution and sentencing of juveniles operate alongside the sentencing provisions of the Crimes Act, to the extent that they are not inconsistent with the Crimes Act, or where the Crimes Act has not otherwise exhaustively provided for the same subject matter.

While this principle appears relatively straightforward in theory, there can be considerable complexity in its application as the submissions have demonstrated. Even the CDPP is not absolutely sure what aspects of State and Territory law might be picked up on some occasions; the submissions by the CDPP expertly describe the complexities in this area, and have been of immense help to me.

The submissions in this review show that there are a range of inconsistencies in the way cases could be dealt with.

These inconsistencies include that:

- First, there is no consistent definition of ‘child or young person’ in s 20C, and as yet no authoritative decision on how it is to be applied.
- Second, there is apparently some potential for significantly divergent sentencing outcomes. In Queensland, for instance, it appears that a juvenile offender (including a federal terrorism juvenile offender) can only receive a sentence of greater than 7 years where:
 - first, an offence is punishable by life imprisonment; and
 - second, the offence involves violence against a person; and
 - third, the court considers the offence ‘particularly heinous’.

Take the offending of *MHK* in Victoria, who undertook preliminary steps towards a terrorist act: unless the court found the offence was

‘particularly heinous’, the sentence available under Queensland law would have been capped at 7 years, significantly lower than the 11-year term imposed on MHK by the Victorian Court of Appeal.

- Third, there are jurisdictional differences as to whether and when a matter may be uplifted from a children’s court to a superior court. Usually, State and Territory children’s courts may only impose much shorter custodial sentences. Further, cases heard in the children’s courts of the States and Territories or even if the cases are heard in courts which deal with adult criminal trials, the trials of children are not “according to law” but rather according to what are often called “juvenile justice principles”.
- Fourth, State and Territory sentencing options may not be available where the Crimes Act has exhaustively provided for the same subject matter.
- Finally, s 19AG of the Crimes Act may have the effect of cutting off the sentencing options otherwise available under s 20AB.

Major differences

In my view it is one thing to have minor discrepancies in federal sentencing based upon different State and Territory laws and procedures, but major discrepancies call for explanation and substantial justification; as a matter of principle, such major discrepancies are likely to be wrong. As was said by the plurality of the High Court in *R v Pham* (2015) 256 CLR 550:

24. ... a federal offence is, in effect, an offence against the whole Australian community and so the offence is the same for every offender throughout the Commonwealth. Hence, in the absence of a clear statutory indication of a different purpose or other justification, the approach to the sentencing of offenders convicted of such a crime needs to be largely the same throughout the Commonwealth. Further, as Gleeson CJ stated in Wong, the administration of criminal justice functions as a system which is intended to be fair, and systematic fairness necessitates reasonable consistency.

At a policy level, the community would have a legitimate sense of grievance if it thought that essentially the same conduct which constituted a federal terrorism offence could result in a very different sentencing outcome simply based on where the proceeding is conducted around Australia; equally a co-offender or a person convicted of the same offence based on similar conduct who received a markedly different sentence would also have a legitimate sense of grievance, and perhaps, a good ground of appeal.

I will therefore be recommending that there be much greater consistency throughout Australia regardless of where the matter is prosecuted: the precise detail of this is a matter for further debate and thought. This is consistent with the Prime Minister’s referral letter to me which relevantly states:

“... [G]iven the procedures regarding the prosecution of children for terrorism offences are different in each state and territory, the

Commonwealth should consider whether to implement arrangements to ensure a consistent approach to the prosecution of children for Commonwealth terrorism offences.”

Certainty

Another fundamental issue is even working out precisely which mixture of federal and surrogate federal law applies. As the CDPP supplementary submission frankly sets out, in many instances it is simply unclear what state laws are in fact picked up and applied as surrogate federal laws because the Commonwealth has not indicated explicitly its intention to cover, or not cover, the field, or otherwise to prevail over state or territory laws.

For example, the supplementary submission indicates uncertainty as to which orders short of imprisonment, which can be made in the exercise of State or Territory jurisdiction by the respective children’s courts of the State or Territory, may be equally available as surrogate federal laws. I share these doubts. Yet these are matters of real consequence for both prosecution and defence and of course for advising the accused.

Federal criminal law is a specialised field in any event and the subset of federal juvenile criminal law is even more specialised. It is simply unsatisfactory that competent lawyers are unable to say with any certainty when advising their respective clients what result might occur as a matter of the powers of the court. This does not reflect on the CDPP and other submitters, who are deservedly recognised as experts in the field. Rather, it reflects poorly on our system of laws as a body of law that ought to be accessible – to advisers and to the public.

These are matters which currently arise in practice, and are not matters of mere academic concern: in a recent case in New South Wales for a federal juvenile terrorist offender, a Supreme Court judge twice asked that the sentence hearing be relisted for further argument because the applicable law and consequences were so unclear. I will thus be recommending reforms to clarify the law as it is fundamental that the law should be reasonably easy to ascertain.

The role of children’s courts

There are different jurisdictions and approaches in the eight separate children’s courts: let me be clear, these courts, which are at the frontline in juvenile justice, do important work in often difficult conditions and, with respect, I have only praise for that work. On the other hand, the experience in England may be instructive, even bearing in mind the unique aspects of Australian federalism, so as to suggest a Supreme Court or District court judge and jury should hear all or almost all terrorism cases.

In England and Wales all terrorism trials are case managed centrally, initially by the Presiding Terrorism Judge sitting at the Old Bailey in London; the trials are heard either by that judge or a cohort of 20 of the most senior judges chosen by the judiciary themselves. The reason for the involvement of such senior judges was explained to me as follows.

- First, there is a public interest in prompt, case managed terrorism cases by the most experienced judges so as to avoid if at all possible

error leading to mistrial or retrial, and so that the public have extra confidence in the conduct of the trial and the appropriateness of any sentences passed.

- Second, terrorism cases stand apart from “normal” crime because of their exceptional seriousness to society as a whole, after all, an element of most terrorism offences is that the offender sought to intimidate a government or the public or a section of the public and to this extent the concept of the federal offence being against the Australian community as a whole is particularly apt.
- Third, very often these cases will involve national security material or personnel thereby requiring exceptional orders to close the court for a period of the trial and make orders ensuring that national security material or information is not inadvertently released.
- Fourth, it is quite often the case that there is a vast amount of material discovered by the prosecution which as one judge put to me is beyond the capacity of a single human brain to analyse and therefore requires search by computer (often complicated because the material may be encrypted or in a foreign language) but which therefore requires at an early stage the active involvement of the case managing judge to ensure the search terms used by the Crown at the request of the defence are apt.

For all of those reasons, I expect to recommend that most if not all terrorism cases should be tried by experienced judges in Supreme, County or District Courts, with a jury as s 80 of the Constitution requires for all trials on indictment. It will be a matter for the Court, of course, to decide which Judges to allocate.

Because we are talking about courts invested with federal jurisdiction, there is no conceptual or constitutional problem with the Parliament amending the *Judiciary Act 1903* (Cth) to provide, for example, that for certain offences involving children, only certain courts have jurisdiction. Already NSW and Victoria have passed their own laws which mean that most terrorism cases cannot be heard by their respective children’s courts. Where to draw the line nationally will not be easy; but the mechanism might be threefold:

- a. All terrorism offences with maximum penalties of more than a certain amount must be heard with judge and jury in Supreme, District or County Courts – NSW and Victoria have already taken some steps in this regard;
- b. For all remaining matters the children’s court retains jurisdiction, whether it exercises it should be determined by applying further tests, eg, is the matter proceeding summarily with consent of both the prosecution and accused – if so it might remain; is there an adult co-accused – if so it should be sent to the higher court, and otherwise to ask, as it was in England, whether, taking the Crown case at its highest at the beginning of the case, is it likely that there will be a conviction which would result in a sentence of detention or imprisonment of more than a certain period: say one or two years? If so, then only a

State or Territory Court which is capable of awarding a higher penalty should have jurisdiction under the Judiciary Act to hear and determine that federal juvenile terrorism case.

- c. That would also mean that the child would have the benefit of the constitutional guarantee of trial by jury in section 80 of the *Constitution*, which except in Queensland's Children's court is not available as all other such courts hear matters summarily without a jury.

These and other matters will be discussed today and considered as part of the review in the coming months.

A copy of these remarks is now available along with the summary to members of the media. And I now invite opening remarks from the agencies starting with the Acting Director-General of ASIO.