25 July 2018

Dr James Renwick S.C.
Independent National Security Legislation Monitor
PO Box 6500
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By email: INSLM@pmc.gov.au

Dear Dr Renwick

Re: Review of the prosecution and sentencing of children for Commonwealth terrorist offences

I refer to your meeting with Stephen Keim S.C. of the Bar Association of Queensland's ('the Association') Criminal Law Committee on 21 June 2018 ('the meeting').

Thank you for subsequently inviting the Association's views on the Independent National Security Legislation Monitor's ('the INSLM') review of the prosecution and sentencing of children for Commonwealth terrorist offences in the context of the *Crimes Act 1914* (Cth) ('the Crimes Act').

Sentencing – s. 19AG of the Crimes Act

Section 19AG of the Crimes Act provides, relevantly, if a person is convicted of, and sentenced for, a *'minimum non-parole offence'*,[1] the Court must fix a single non-parole period[2] of at least three-quarters of the sentence for that offence.[3] This applies also to individuals convicted of inchoate terrorism offences[4] and, with no express provision indicating otherwise, children convicted of terrorism offences.

The Association has strongly, and consistently, opposed mandatory sentencing including mandatory non-parole periods. There are many reasons why the Association considers that mandatory sentencing and non-parole periods are not appropriate restrictions to impose upon the criminal justice system. They range from the inefficiencies they produce to the long term negative consequences that flow from the erosion of judicial independence by restricting judicial discretion. Generally, the ultimate result is that the criminal justice system is left with harsh, unjust and disproportionate sentences undermining the community's confidence in the system.

[1] Defined as an offence against s 14AA of the *Crimes Act 1914* (Cth); a terrorism offence; or an offence against Division 80 or 91 of the *Criminal Code Act 1995* (Cth).
[2] *Crimes Act 1914* (Cth) s 16(1) defines 'non-parole period' as: *in relation to a sentence or sentences of imprisonment, means that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole, whether that part of the period is fixed or recommended by a court or fixed by operation of law.*
[3] *Crimes Act 1914* (Cth) s 19AG(2)(a). *Crimes Act 1914* (cth) s 19AG(2)(b) provides that in the situation of two or more sentences imposed for minimum non-parole offences, the Court must fix a non-parole period of at least three-quarters of the aggregate of those sentences.
[4] *Fattal v The Queen* [2013] VSCA 276. See also *The Queen v MHK* [2016] VSC 742.

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The inappropriateness of mandatory sentencing and non-parole periods extends to terrorism offences. The Association does not accept the premise of special sentencing rules for terrorism offences (as opposed, say, to special manifestations of attempt as a preventative measure). Terrorism is no different from other criminal activity in the sense that, as with other types of behaviour, there is a significant spectrum of seriousness with terrorism offences and Courts should have the greatest flexibility to fashion the appropriate sentence based on particular matters relevant to the individual cases. The lack of discretion with regard to these matters has the potential for significant sentencing injustice.

A mandatory non-parole period is particularly unsuitable in the case of children, where the interests of the child and, therefore, rehabilitative considerations, must be uppermost. For example, in *The Queen v M H K* [2016] VSC 742, his Honour Justice Lasry was *'impressed with the change that has begun to occur'* in a young offender's rehabilitation in custody.[5] However, in sentencing the offender (emphasis added):

> *I direct, as I am required to do, that you serve at least a minimum period of 75% of the head sentence. I fix that period as five years and three months before being eligible for release on parole. Having determined that seven years' imprisonment is an appropriate head sentence, had I been permitted to do so, I would have fixed a minimum term of four years, which would have better enabled your supervision and rehabilitation.*[6]

Any perceived general deterrent effect of the mandatory non-parole period must be less important in the case of child offenders in that the best interests of the child must be a primary consideration in all actions concerning the child. This is recognised as part of Australia's obligations under the *Convention on the Rights of a Child* ('the CRC')[7] which makes express provision to that effect.[8]

A lengthy period of imprisonment where there is no incentive to participate in rehabilitative programs (due to a mandatory non-parole period) is not in a child's best interests. Imprisonment is generally less effective in reducing recidivism amongst children and may even have the effect of disengaging them further from society. It is important that children within the justice system be frequently and consistently exposed to the wider community in a prosocial context. Reduced prison time, in favour of community based supervision orders, will provide a child the ability to maximise personal and professional growth opportunities, by enabling them to develop resilience and useful skills, engage existing support networks and grow new support networks within the community. This is particularly important in light of the risk for radicalisation which the prison environment poses.[9]

The Association strongly recommends that the fixed proportion of parole be expressed not to apply to children.

At the same time, the Association urges that s. 19AG lay down principles that, in the sentencing of children for terrorism offences, the emphasis in sentencing should be on rehabilitation and that imprisonment should be used only as a last resort and, when

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[5] *The Queen v M H K* [2016] VSC 742 [73]
[6] Ibid [78].
[7] *Convention on the Rights of a Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[8] Ibid article 3.1.
[9] See Elizabeth Mulcahy, Shannon Merrington and Peter Bell, 'The Radicalisation of Prison Inmates: Exploring Recruitment, Religion and Prisoner Vulnerability' (2013) 9(1) *Journal of Human Security* 4-14; Nathan Thompson, 'Australian Correctional Management Practices for Terrorist Prisoners' (2018) 6(1) *Salus Journal* 44.

used, should be utilised to the minimum amount and that rehabilitative community based orders will be used in preference to, or in conjunction with, imprisonment, whenever feasible.

Bail – s. 15AA of the Crimes Act

Queensland's *Bail Act 1980* (Qld) ('the Bail Act') presumes an entitlement to bail for individuals charged with criminal offences,[10] including children.[11] This presumption may only be rebutted if the Court is satisfied that there is an *'unacceptable risk'* associated with an individual's release on bail.[12] This provision of the Bail Act was considered by Chief Justice French of the High Court (as he then was) in *Kuczborski v Queensland* (2014) 314 ALR 528 in the context of a Constitutional challenge to amendments to the Bail Act made by the *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld):[13]

> *Prior to the amendment, s 16 relevantly mandated refusal of bail only if there was an unacceptable risk that the defendant, if released on bail, would not appear and surrender into custody, or would, while released on bail, commit an offence, endanger the safety or welfare of an alleged victim or anyone else, or interfere with witnesses or otherwise obstruct the course of justice.*[14]

In contrast to Queensland's (and the Commonwealth's) default position, s. 15AA of the Crimes Act provides that bail must not be granted to an individual charged with, *inter alia,* a terrorism offence, unless the bail authority is satisfied that *'exceptional circumstances'* exist to justify bail. The Association notes the INSLM's 'Background Paper' states that, based on a review of the case law, the threshold for satisfying the *'exceptional circumstances'* is high.[15]

The Association is concerned that s. 15AA of the Crimes Act does not strike the appropriate balance between protecting victims and upholding the presumption of innocence for individuals charged with terrorism offences. The presumption that bail will be granted in the absence of unacceptable risk is based upon an understanding of the importance of the presumption of innocence. Its denial represents a fundamental undermining of that presumption. The Association is opposed to any attempt to erode or curtail a principle as fundamental to the criminal justice system as the presumption of innocence or any attempt to undermine the importance of the right to liberty in the absence of a criminal conviction.

In terms of Australia's international obligations, s. 15AA of the Crimes Act may be considered inconsistent with the *International Covenant on Civil and Political Rights* ('the ICCPR'), article 9 of which provides:[16]

> *... It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial ...*

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[10] *Bail Act 1980* (Qld) s 9.
[11] *Youth Justice Act 1992* (Qld) s 47.
[12] *Bail Act 1980* (Qld) s 16(1)(a).
[13] Note: the relevant provisions of the *Bail Act 1980* (Qld) considered in this Constitutional challenge have been repealed by the *Serious and Organised Crime Legislation Amendment Act 2016* (Qld) s 7.
[14] *Kuczborski v Queensland* (2014) 314 ALR 528 [31].
[15] The threshold was met in the 2007 case of Dr. Mohamed Haneef. Magistrate Jacqui Payne set a surety of $10,000. See http://www.abc.net.au/worldtoday/content/2007/s1979473.htm (accessed 9 July 2018)
[16] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

The United Nations Human Rights Committee has stated the following in respect of the impact of s. 15AA of the Crimes Act on Australia's compliance with the ICCPR (emphasis added):[17]

> *The Committee is particularly concerned at ... the fact that "exceptional circumstances", to rebut the presumption of bail relating to terrorism offences, are not defined in the Crimes Act ... The State party should ensure that its counter-terrorism legislation and practices are in full conformity with the Covenant... The State party should in particular ... ensure that the notion of "exceptional circumstances" does not create an automatic obstacle to release a bail.*

Further, the Association is concerned that the application of s. 15AA of the Crimes Act to children is inconsistent with Australia's obligations under the CRC, which specifically requires the best interests of the child to be a primary consideration in all actions concerning the child.[18]

The Association recommends that, while the exceptional circumstances requirement remains in s. 15AA, that its application to children should be expressly excluded.

If this were not done, the Association recommends s. 15AA of the Crimes Act be amended to include *'the best interests of the child'* as a factor which may constitute *'exceptional circumstances'*. This would have the effect of legislating the following statements of Justice Hall in *R v NK* [2016] NSWSC 498:[19]

> *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.*
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> *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 15AA exist.*

In any event, the legislation should provide that the best interests of the child must be treated as a primary consideration in any decision made concerning whether a child defendant is granted bail.

Prosecution of children – s. 20C of the Crimes Act

Section 20C(1) of the Crimes Act provides that a child may be tried and punished for a terrorism offence as if it were an offence against a law of the relevant State or Territory.

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[17] United Nations Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Australia,* 7 May 2009, CCPR/C/AUS/CO/5, 3.

[18] *Convention on the Rights of a Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) article 3.1.

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

In Queensland, an offender under the age of 18 must be dealt with under the *Youth Justice Act 1992* (Qld), which contains a number of options for children, including trial in the Children's Court. However, the Children's Court does not have jurisdiction to try a child charged with an indictable offence with a maximum penalty of more than 20 years.[20] As a consequence, the Supreme Court must try children charged with a number of the terrorism offences in division 101 of the *Criminal Code Act 1995* (Cth).[21]

Regardless of the Court, the quality of judging in Queensland Courts is very high and effective and, therefore, that should not be a reason for not applying s. 20C(1) of the Crimes Act.

Further, the Association is of the view that a child being tried for a terrorism offence should always be given the right to choose, at committal stage, between a summary trial or trial on indictment with a jury. However, a child should not sacrifice their right to be sentenced as a child by electing such jury trial.

The principles suggested above that, in the sentencing of children for terrorism offences, the emphasis in sentencing should be on rehabilitation and that imprisonment should be used only as a last resort and, when used, should be utilised to the minimum amount and that rehabilitative community based orders will be used in preference to, or in conjunction with, imprisonment, should apply to the sentencing of a child for terrorism offences whether that conviction occurs as a result of a summary proceeding in the Children's Court or a proceedings on indictment in the Supreme Court.

Other matters raised

I understand you raised the issue of questioning children suspected of committing terrorism offences in the meeting and referred to the recommendation of the Royal Commission that all police officers involved in youth engagement *'be encouraged to hold or gain specialist qualifications in youth justice and receive ongoing professional development in youth justice'*.[22]

The Association does not have any specific expertise to discuss the merits or otherwise of applying this recommendation to terrorism offences. For further comment on this recommendation, it is recommended that the INSLM contact a youth advocacy organisation in Queensland with specific expertise in the needs of children, such as the Youth Advocacy Centre. However, the Association does consider it important for a child to have independent representation and to be properly advised, during police questioning, noting that a child's parent/s may not always be appropriate for these important roles.

I also understand you raised the role of the Public Interest Monitor in the meeting. The Association does not have any specific comment with regard to the Public Interest Monitor's role in the context of the INSLM's review of the prosecution and sentencing of children for Commonwealth terrorist offences.

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[20] *Youth Justice Act 1992* (Qld) Sch 4; *District Court of Queensland Act 1967* (Qld) s 61(1).
[21] *Youth Justice Act 1992* (Qld) s 95.
[22] Commonwealth, Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory, *Findings and Recommendations* (2017) 40.

However, the Association supports the significant and crucial role which independent third parties play in scrutinising Australia's justice system. An example of a third party's important role in uncovering injustices can be seen in the recent Human Rights Watch report into *Abuse and Neglect of Prisoners with Disabilities,*[23] which indicates that Queensland prisons are completely failing the 50% of their population who suffer from disabilities and that harsh punishments including solitary confinement are being used in circumstances where treatment and support is appropriate and punishment is not appropriate.

Conclusion

Thank you for the opportunity for the Association to provide input into the INSLM's review of the prosecution and sentencing of children for Commonwealth terrorist offences.

The Association would be pleased to provide further feedback, or answer any queries you may have on this matter.

Yours faithfully

G A Thompson QC
President

[23] See https://www.hrw.org/report/2018/02/06/i-needed-help-instead-i-was-punished/abuse-and-neglect-prisoners-disabilities.