

INSLM REVIEW OF THE PROSECUTION AND SENTENCING OF CHILDREN FOR COMMONWEALTH TERRORIST OFFENCES

SUBMISSION FROM MALCOLM STEWART, RULE OF LAW INSTITUTE

- 1 It has been the hallmark of the legal systems in Australia, since well before Federation, that the punishment for a criminal offence should be proportional to the gravity of the crime.
- 2 This principle originates in clause 20 of the Magna Carta 1215.

For a trivial offence, a free man shall be fined only in proportion to the degree of his offence, and for a serious offence correspondingly, but not so heavily as to deprive him of his livelihood. In the same way, a merchant shall be spared his merchandise, and a villein the implements of his husbandry, if they fall upon the mercy of a royal court. None of these fines shall be imposed except by the assessment on oath of reputable men of the neighbourhood.

- 3 The principle has been adopted throughout those countries which are based on the English legal system. This is however only a principle of general application.
- 4 The rule of law includes three principles that arise from the Magna Carta, the other two are the independence of the judiciary (cl 45) and that no person shall be seized or imprisoned or stripped of his rights or possessions or outlawed or exiled or deprived of his standing in anyway nor will he be proceeded against with force except by the law of the land (c 39).
- 5 The Australian legal system is made up of three components. The Commonwealth Parliament, Commonwealth Executive (including the AFP, ACC and ASIO) and the Federal Courts. Most serious Federal offences are however tried in state Supreme Courts given their experience in handling criminal trials.
- 6 In Australian Courts the punishment (sentence and minimum non-parole period) is usually determined by a presiding Judge or Magistrate. This has been the role of the Judges for one reason alone, and that is because the judge is in the best position to determine and consider the gravity and circumstances of the crime for which the defendant has been found guilty, or has entered a guilty plea. The Executive, usually in the form of the CDPP, will assist in this process by providing evidence and legal submissions concerning these matters.
- 7 However it does not follow that Parliament has no role to play in the sentence or minimum non-parole period given to a convicted defendant. All statutory offences provide for the maximum penalty (as determined by Parliament) that a judge or magistrate may impose.
- 8 There may be unusual or rare circumstances where Parliament sees fit to also require a minimum sentence or minimum non-parole period for certain crimes ie mandatory minimum sentencing. That may occur for example to ensure that Court imposed sentences or jail time for a particular type of criminal offence reflect community attitudes.
- 9 While a judge is concerned in sentencing with the severity and circumstances of a particular crime, Parliament may look at the wider implications that a particular type of crime might have on the greater community.
- 10 To what extent a sentence or non-parole period should, if any, extend beyond the mandatory period is still a question for the court.
- 11 The public policy reason as to why federal parliament may adopt mandatory sentencing is that parliament may genuinely take the view that sentences for particular offences imposed by Courts are too lenient and seek to impose a minimum sentence or a minimum non-parole period. The personal safety of Australians should be of paramount concern.
- 12 A mandatory sentence or a minimum non-parole period does not necessarily, but may in its application to a particular case, infringe the rule of law. That will occur in circumstances

where the minimum mandatory sentence or minimum non-parole period exceeds that which is proportional to the gravity of the particular offence.

- 13 In circumstances involving children ie between the age of 10 and 17 years, there is a greater risk that the minimum mandatory sentence or minimum non-parole period will exceed the sentence which is proportional to the gravity of the crime committed.
- 14 It should be self-evident that minors are in a different category to adults in sentencing offenders. For example, children are generally more likely to be influenced by others, than an adult. No doubt other submissions will address this issue in detail.
- 15 If such factors would reduce a sentence or minimum non-parole period for a child below the mandatory minimum, then by imposing a mandatory minimum sentence, a significant and relevant factor that would otherwise reduce the time spent incarcerated is rendered nugatory. The punishment will then exceed the gravity of the crime.
- 16 Section 19AG of the *Crimes Act 1914* (Cth) should be amended to remove the requirement for a mandatory non-parole period for children convicted of Commonwealth terrorism offences.
- 17 In making this submission to amend section 19AG, we point out that Parliament must carefully consider what impact it will have on the personal safety of Australians. In our view there are two relevant considerations that Parliament may wish to adopt.
- 18 First, it should be made clear in the explanatory memoranda to any amending Bill, that the amendment is not intended to create a different system of sentencing for children. There may well be circumstances that warrant a child in particular circumstances, receiving a sentence or non-parole period equal to or greater than the mandatory minimum.
- 19 Second, to the extent that Federal Parliament may be concerned that a court, in determining a non-parole period sentence for the terrorism offence committed by a child, may not take into account the wider implications that a particular terrorism offence might have on the greater community, the Act could be further amended to require the court tasked with imposing a sentence to give this, or other factors, appropriate consideration.

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