STARY NORTON HALPHEN | CRIMINAL LAW SPECIALISTS

icj International Commission of Jurists Victoria

Submission to the Independent National Security Legislation Monitor

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Endorsed by the International Commission of Jurists, Victoria.

Contents

A. BACKGROUND

1. The following question has been referred to the INSLM for review:

   ***In relation to sentencing**: Section 19AG of the Crimes Act 1914 (Cth) 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.*

2. The rule in s 19AG of the *Crimes Act 1914 (Cth)* will be referred to as 'the ¾ rule.'

3. These submissions are organised in the following way. **Part B** sets out the history of section 19AG. **Part C** discusses Australia's obligations under international law. These obligations were briefly flagged in the Senate in opposition to the passage of section 19AG. **Part D** considers mandatory sentencing regimes in Australia, of which section 19AG is the most austere. **Part E** deals with structural barriers to the rehabilitation of child terrorist offenders within the criminal justice system, of which the ¾ rule forms part. **Part F** considers the case *R v MHK*, a client of our firm and the first child in Australia to plead guilty to a terrorism offence. **Part G** canvasses the sentencing of children for terrorism offences in international jurisdictions. **Part H** maps the way forward.[1]

4. The position in this submission is that s 19AG of the *Crimes Act (Cth)* is not appropriate or adapted to the purposes of parole outlined in the *Crimes Act* or common law when applied to children. Further, the ¾ rule is inconsistent with the ultimate objective of criminal justice intervention for young offenders in that it is counterproductive for rehabilitation and reintegration. Finally, it violates international human rights law, as well as fundamental principles of the independence of the judiciary. This rule applied to young offenders convicted of terrorism offences is simply a punitive measure grounded in a political response to a perceived threat.

B. HISTORY OF SECTION 19AG

The purpose of parole

5. The objectives of parole are set out at section 19AKA of the *Crimes Act 1914* (Cth). They are the protection of the community, the rehabilitation of the offender and the re-integration of the offender.

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[1] Stary Norton Halphen would like to acknowledge the research assistance of Ms Alana Reader.

6. According to Corrections Victoria the main purpose of parole is to enhance community safety by ensuring that persons released from prison are released under supervision.[2] This allows for a period of supported reintegration, with the goal being presumably to reduce rates of reoffending post-release.

7. According to Victorian Court of Appeal and High Court jurisprudence, the main purpose in setting a non-parole period is the rehabilitative potential of the offender. The High Court has stated that the purpose of fixing a non-parole period in sentencing is "to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence."[3]

8. Citing the High Court, Batt JA in the authoritative 1998 case of *VZ*[4] further states that "No mechanistic or formulaic approach is, in my view, to be taken to the fixing or reviewing of a non-parole period."[5]

9. Referring to *VZ*, Redlich JA stated in *Detenemo*[6] (with which Maxwell P and Warren CJ agreed): "As a matter of principle, the determination of a non-parole period requires discrete consideration of the factors which bear upon whether the confinement of an offender should be mitigated in favour of his or her rehabilitation. Maxwell P [in *R v Tokava*] has recently emphasised that the rehabilitation of offenders is very much a matter in which the public has a strong interest."[7]

10. The reference to Maxwell P's judgment in *R v Tokava*[8] is worth quoting at length, as it refers in some detail to the effects of incarceration on a young person:

> [22] Mr Priest also drew attention to what was said, now long ago, by Fox, J. in the Supreme Court of the Australian Capital Territory in *R. v. Dixon*, and he referred in particular to the following passages:
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> > "In general, but by no means always, persons convicted of serious crime are the maladjusted people of the community, and some will have developed serious behavioural problems. ... Unfortunately, gaol may well make their anti-social tendencies worse. This is not always the case; sometimes the experience of gaol effects a real improvement. Nevertheless, I think it is well accepted that it is so in most cases; at least where the sentences are at all long. The reasons are obvious enough: the prisoners are kept in unnatural, isolated conditions, their every

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2 Corrections, Prisons & Parole <http://www.corrections.vic.gov.au/home/parole/>.

3 *Power v R* (1974) 131 CLR 623 at p.629; *Deakin v R* (1984) 58 ALJR 367, *Bugmy v R* (1990) 169 CLR 525, 531, 536 and 538.

4 *R v V Z* [1998] VSCA 32 (3 September 1998).

5 Ibid [22].

6 *R v Detenemo* [2007] VSCA 160 (23 August 2007).

7 Footnotes omitted. *R v Detenemo* [2007] VSCA 60 [27] citing *R v Tokova* [2006] VSCA 156 [20]-[21]

8 *R v Tokava* [2006] VSCA 156 (27 July 2006).

> activity is so strictly regulated and supervised that they have no opportunity to develop a sense of individual responsibility, they are deprived of any real opportunity to learn to live as members of society, their only companions are other criminals, some of whom are bound to be quite vicious, their sex life must be unnatural, scope for psychiatric treatment is very limited, if not non-existent, and employment is limited and stereotyped. To many this must seem one of the most absurd aspects of the whole matter. They may well ask why the system has to be so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation, and who are not so dangerous that they have to be kept in strict confinement, are given a real opportunity for self-improvement. The irony is that prison authorities are among the strongest advocates of reform.
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> ...
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> When, therefore, a court has to consider whether to send a young person to gaol for the first time, it has to take into account the likely adverse effects of a gaol sentence. A distinct possibility, particularly if the sentence is a long one, is that the person sent to gaol will come out more vicious, and distinctly more anti-social in thoughts and deed than when he went in. His own personality may well be permanently impaired in a serious degree. If he could be kept in gaol for the rest of his life, it might be possible to ignore the consequences to society, but he will re-enter society and often while still quite young. His new-found propensities then have to be reckoned with. A substantial minority of persons who serve medium or long gaol sentences soon offend again."

> [23] These passages set out a view held in 1975 of the likely effect of gaol. As I remarked in the course of argument, my impression is that almost everything which his Honour said then is still true 30 years later, despite the best efforts of many people. The community would still ask today, as his Honour suggested then, why the prison system has to be "so anti-social in operation, why it cannot be improved so that people for whom there is a prospect of reformation are given a real opportunity for self-improvement".

11. As these authorities make clear, it is the perspective of the Victorian courts that setting an appropriate parole period is an important aspect of sentencing. It recognises the rehabilitative purpose of sentencing, as opposed to merely the punitive.

12. The Court of Appeal has specified that setting a parole period at 75% of the head sentence should be reserved only for the “worst category of cases”. In *Gray v R*[9], Nettle J held,

> although there is no legal requirement for a set ratio between head sentence and non-parole period (other than, of course, that the non-parole period be at least six months

[9] [2010] VSCA 312.

less that the head sentence), current sentencing practice is generally to set a non-parole period at between 60 and 66 per cent, increasing to 75 per cent in the 'worst category of case'.[10]

13. Setting a statutory non-parole period at the highest end of the range undermines the rehabilitative purpose of sentencing. Further, it entrenches a political assumption that all convictions for terrorism offences—most of which capture pre-inchoate, possession or status offences—necessarily reflect the gravest kind of criminal conduct.

Introduction of Section 19AG

14. Section 19AG was introduced into the *Crimes Act 1914* (Cth) by the *Anti-Terrorism Bill 2004* (Cth) (***the Bill***). The draft bill did not contain section 19AG nor any other reference to parole. On 31 March 2004, the bill was read for the first time and referred to the Senate Legal and Constitutional Legislation Committee (***the Committee***). The Committee report furnished on 11 May 2004 makes no reference to parole, nor does the debate which ensued in the House over the following two days.

15. By the time the legislation was introduced to the senate on 15 June 2004 the government had prepared a revised bill. However, Senate Hansard on this date makes no reference to parole. On 16 June 2004 a Supplementary Explanatory Memorandum (***the Supplementary EM***) was circulated in the chamber.[11] This Supplementary EM introduced and explained the proposed introduction of 19AG for the first time:

> "The Australian Government is concerned that sentences for convicted terrorists should **reflect community concern about terrorism**. The significant period of time served out in the community, on parole (which is in most cases **necessary to reintegrate prisoners back into the community**) **is not warranted in the case of terrorists and does not reflect community concern about their crimes**. The significant proportion of the overall head sentence that is often devoted to release on parole has the potential to **undermine confidence in the criminal justice system**, given that **dealing with terrorism cases is often costly and difficult**."[12] (emphasis added)

16. Debate commenced on section 19AG on 17 June 2004. It appears that Senators only had one day to prepare for discussion.

Justification for the ¾ rule in the Supplementary EM.

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10 Ibid [21]. Footnotes omitted.

11 Commonwealth, *Parliamentary Debates,* Senate*,* 17 June 2004, 24193 (Christopher Ellison).

12 Supplementary Explanatory Memorandum, *Anti- Terrorism Bill 2004*, 3.

17. There are several different justifications for the ¾ rule: that the existing parole discretion is 'not warranted'; 'do[es] not reflect community concern'; and would 'undermine confidence in the criminal justice system' due to the expense of the proceedings. None of these justifications expressly address or challenge the objectives of parole set out in s 19AKA. No evidence was proffered as to why political violence differs from private crime.

18. *The existing parole discretion is not warranted in the case of terrorists.*

    What 'not warranted' means is unclear. It may refer to:

    - a view that convicted terrorist accused are impossible to reintegrate or rehabilitate. These issues are addressed in Part D and E.

    - a view that convicted terrorist accused pose a risk to the public. However, the decision to grant parole rests with the Attorney-General.[13] Offenders who are assessed as dangerous will not be released. This debate therefore concerns the length of time approved offenders will spend in the community. The question of risk is not relevant to this issue.

    - a view that there ought to be additional penalties for terrorism because of the serious nature of the offending. Note that the vast majority of offences that have proceeded through Australian courts involve early preparatory activity. Most have not occasioned harm. The decision to characterise political crime as more serious than other offences such as murder is arbitrary.

19. *The existing parole discretion does not reflect community concern about their crimes.*

    The basis for this 'community concern' is unclear as no submissions on this point were received by the Committee.

20. *The existing parole discretion has the potential to undermine confidence in the criminal justice system, given that dealing with terrorism cases is often costly and difficult*.

    The position here is that the expense and complexity of proceedings should determine penalty. This is an arbitrary position, otherwise unknown to the criminal law. The cost and difficulty associated with terrorism prosecutions varies dramatically and is often determined by the complexity of legal regimes introduced by parliament and the volume of evidence adduced by the prosecution. Indeed, the complaint made by the Attorney-General is not that an accused is at fault.

    The common law takes a very different approach, imposing a more lenient sentence where delay is occasioned by no fault of the accused.[14] Further, the common law does not penalise

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13 *Crimes Act 1914* (Cth) s 19AL.

14 *Chandler v The Queen* [2010] VSCA 338.

offenders for exercising their right to a fair trial even if this incurs expense. At most, an accused will not benefit from the plea discount should the matter proceed to trial.

Parliamentary deliberation

21. As noted above, the Supplementary EM was circulated on 16 June 2004 and proceeded for debate on 17 June 2004.

    - **Labor** Senator Ludwig indicated that the opposition was supportive of the amendments. The Senator referenced the case of *Roche*.[15] He stated that the need to ensure offenders spent lengthy periods in custody was consistent with 'community expectations'.[16] Again, the basis of these expectations is unclear. The Court of Appeal in Roche's case did not disrupt the initial sentence imposed. The trial judge found that he had good prospects for rehabilitation, had cooperated and had been in the community between the offence and arrest for some 2 years.[17] Had the ¾ rule been in place, it would have resulted in an increase of 2.25 years to his non-parole period.

    - **The Greens** opposed section 19AG on the basis that it attacked 'judicial independence, the importance of discretion of the judiciary to decide important matters such as…an appropriate length of sentence based on the individual and particular circumstances of the crime and the defendant.' [18] The Greens suggested that these provisions could breach of the *International Covenant on Civil and Political Rights and the Convention on the Rights of the Child* (**the *ICCPR***).[19] Senator Nettle stated:

      "It is a disgrace that the government is trying to rush through these draconian amendments to… bring in mandatory minimum parole periods with no inquiry into what is being proposed and with virtually no public discussion. It appears that Labor also believes it is acceptable not to have public debate on this move in Australian law which is unprecedented except, as I mentioned, for mandatory sentencing in the Northern Territory and Western Australia."[20]

    - **The Democrats** opposed for similar reasons. Senator Greig noted that by introducing minimum non-parole period:

      "The government is attempting to fetter the discretion of the courts during the sentencing process. There is a wealth of legal authority to assist judges in fixing

15 *R v Roche* [2005] WASCA 4.

16 Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24169, (Joseph Ludwig).

17 *R v Roche* [2005] WASCA 4, at 21, 44.

18 Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24176 (Kerry Nettle).

19 Ibid.

20 Ibid.

suitable sentences. The sentencing of individuals should take into account all relevant factors on a case-by-case basis."[21]

- **The Coalition** asserted that Office of International Law had advised that the section 19AG was in compliance with international conventions. [22] The Coalition declined to table this advice.

22. The following day the Law Council of Australia issued a press release which was read into the Committee of the Whole by Greens Senator Nettle:

> "We are concerned that mandatory minimum sentencing provisions of this kind will discourage suspects from cooperating with law enforcement authorities as the judicial discretion to take into account such cooperation will have been removed. The new provisions may also lead to shorter overall sentences for convicted terrorists, because they may persuade a judge to deliver a lighter sentence in view of the extra time an offender will serve in custody. This approach means that offenders will be under community supervision—whether in custody or on parole—for shorter periods after their conviction, which is not in the community's interest."

23. Section 19AG was not put before the Legal and Constitutional Committee, allowing for community consultation or careful parliamentary deliberation. Instead it was rushed before the Senate, removing the opportunity for meaningful review.

24. The ¾ rule is not appropriate or adapted to the purposes of parole outlined in the *Crimes Act* or common law. It is simply a punitive measure grounded in the emotional response to terrorist activity.

C. HUMAN RIGHTS OF JUVENILE OFFENDERS.

The ¾ rule applied to child offenders breaches Australia's obligations under the *International Covenant of Civil and Political Rights* (**ICCPR**),[23] the *Convention on the Rights of the Child* (**CRC**)[24] and other international human rights rules and principles. The primary focus of youth justice should be rehabilitation of the offender. Setting a fixed parole period at the highest range of acceptable periods and eliminating judicial discretion to make a determination appropriate to each individual is inconsistent with international legal obligations to promote rehabilitation of child offenders.

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21 Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24192 (Brian Greig).

22 Senator Ellison, Senate, *Committee of the Whole*, 18 June 2004.

23 Ratified by Australia in 1980.

24 Ratified by Australia in 1990.

25. Article 9 of the ICCPR protects the right to liberty and art 10 protects the right of all persons deprived of their liberty to be treated with humanity and dignity. General Comment No 35[25] of the Human Rights Committee states that "Children may be deprived of liberty only as a measure of last resort and for the shortest appropriate period of time, taking into account their best interests as a primary consideration with regard to the duration and conditions of detention."[26]

26. Article 14 protects the right to a fair trial generally. Article 14(4) states that "In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation".

27. The United Nations Rules for the Protection of Juveniles Deprived of their Liberty[27] codifies the principles to be applied to juveniles in punitive detention. The Rules state:

> [1] The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort.
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> [2] … Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial authority, without precluding the possibility of his or her early release.

28. Article 3 of the CRC provides that in all actions undertaken by a court, the best interests of the child shall be a primary consideration, and art 40 requires states to promote the rehabilitation and reintegration of child offenders. Article 37 relates to the detention of children, and arguably proscribes laws which are arbitrary in application:

> **Article 37**
>
> **…**
>
> (b) No child shall be **deprived of his or her liberty unlawfully or arbitrarily**. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time
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> (c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances

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25 Human Rights Committee, General Comment no 35, Article 9 (Liberty and security of persons) UN Doc CCPR/C/GC/35 (16 December 2014).

26 GC 35 [21] citing 1069/2002, Bakhtiyari v. Australia, paras. 9.3, 9.7; 1050/2002, D. & E. v. Australia, para. 7.2; 794/1998, Jalloh v. Netherlands, para. 8.2; see also *Convention on the Rights of the Child*, art. 37(b).

27 Adopted by General Assembly resolution 45/113 of 14 December 1990.

29. While parole subject to the ¾ rule is 'lawful' it may nevertheless be 'arbitrary'. The Human Rights Committee holds that "The notion of "arbitrariness" is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability, and due process of law, as well as elements of reasonableness, necessity, and proportionality".[28]

30. A statutory minimum non-parole period limits the judicial discretion to determine an appropriate and proportionate non-parole period. This runs a real risk that a non-parole period that is set at ¾ of the head sentence would lead to a period of incarceration that is unreasonable, unnecessary and disproportionate. It fails to allow for recognition of the rehabilitative potential of the offender and it limits a sentencing judge in their capacity to impose a sentence that balances the need to protect the community (in the determination of a head sentence) and with the need to protect the best interests of the child.

31. Further, in its communications with the Committee, Australia has conceded that all laws must be based on reasonable and objective criteria and must be proportionate to the purpose for which they are adopted.[29]

32. In the case of ¾ rule, there is a complete absence of reasonable and objective criteria provided in the Supplementary EM. The immediate purpose for which this section was adopted remains unclear. Further, while s 19AG amends parole laws, it is not tailored to the legislated objectives of parole. It is not otherwise consistent with the aims and objectives of the ICCPR or the CRC. The adoption of the ¾ rule is **arbitrary** and therefore contrary to international law.

33. There has been no human rights oversight of this legislation at the international or domestic level. These issues have not been addressed in the periodic reporting to the treaty bodies. In addition, the CRC and ICCPR are not formally incorporated into Australian law. Finally, the amendments have not been considered by parliamentary oversight mechanisms.

D. MANDATORY SENTENCING IN AUSTRALIA

34. Mandatory sentencing has been criticised as inconsistent with the rule of law and Australia's international human rights obligations. It is an unacceptable fetter on judicial independence, often resulting in arbitrary and disproportionate sentences. Mandatory sentencing can also

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[28] General Comment 35 [12].
Human Rights Committee, *Views: Communication No. 488/1992*, (50th sess) UN Doc CCPR/C/50/D/488/1992 (31 March 1994) [6.4] '(*Toonen v Australia')* In *Toonen*, laws banning homosexual intercourse in Tasmania were for the claimed purpose of preserving 'morality' and to prevent the spread of HIV. Australia conceded that the laws were not based on reasonable and objective criteria and were not proportionate for the purposes put forward. The laws were therefore considered arbitrary and in contravention of international law. They were subsequently repealed.

deter pleas of guilty and incur significant cost. The broader objections to mandatory regimes have been discussed in detail elsewhere.[30]

35. There are several kinds of mandatory sentences in Australia.[31] Some regimes are confined to aggravated examples of an offence deemed worthy of condign punishment.[32] In this context they can attach to a discrete offence or arise upon judicial assessment of the features of a case.[33] Some mandatory sentencing regimes set 'yardsticks' for sentencing (a maximum and minimum penalty) but otherwise do not restrain judicial discretion.[34] Others create a 'presumptive' minimum sentence or a 'standard' which can be displaced, or otherwise contain exemptions in special circumstances.[35] Most of these mandatory sentencing regimes do not apply to child offenders, even when children are sentenced as adults for the most serious crimes. [36]

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30 For example, Law Council of Australia *Policy Discussion Paper on Mandatory Sentencing* (May 2014) ; Law Institute of Victoria, Submission to Attorney General, Robert Clark, *Mandatory Minimum Sentencing,* 30 June 2011; Queensland Law Society, *Mandatory Sentencing Laws Policy Position';* International Commission of Jurists Victoria 'Press Release – Mandatory Sentencing' (Press Release, 12 April 2017); Nicholas Cowdery AM QC, 'Mandatory Sentencing' (Speech delivered at the Sydney Law School Distinguished Speakers Program, 15 May 2014)

31 Freiberg sets out a helpful classification in *Fox & Freiberg's Sentencing: State and Federal Law in Victoria* (3rd Ed) 733-739

32 For example, the offence of 'assault causing death while intoxicated' in NSW. This is an aggravated form of manslaughter which attracts a mandatory 8 year term of imprisonment for adults in NSW (see s 25A and s 25B of the *Crimes Act 1900* (NSW)).

33 For example, in Queensland there is the capacity for the judge to assess whether an offender should be deemed a serious violent offender attracting an 80% non-parole period (see *Penalties and Sentences Act 1992* (QLD) s 161B(3)).

34 For example, the offence of 'aggravated people smuggling'(see *Migration Act* 1958 (Cth) ss 233B and 236B(3)), see also *Magaming v The Queen* [2013] HCA 40.

35 For example, in **Victoria** a term of imprisonment must be imposed for category 1 offences, however this does not apply to children and the Court is otherwise at large to impose sentence (see *Sentencing Act 1991* (Vic) ss 9A-10AE). A term of imprisonment must also be imposed in relation to category 2 offences, however the court retains a discretion (see *Sentencing Act 1991* (Vic) ss 5(2H) and 5(2I)). Several offences contain minimum non-parole periods, however the courts retain a discretion (see *Sentencing Act 1991* (Vic) s 10A).

36 In **Western Australia** mandatory sentences do not automatically apply to child offenders, except in the context of a burglary. As a result, the following offences committed during a burglary will attract a mandatory 3 year term: murder, manslaughter, assault causing death, attempted murder, intending to cause grievous bodily harm, grievous bodily harm, and some sexual offences (see *Criminal Code Act Compilation Act* 1913 (WA) ss 279(6A), s 280(3), s 281(4), s 283(3), s294(3), s297(6) s 218(2)). A mandatory 3 month term also attaches to the assault of a 'public officer' (*Criminal Code Act Compilation Act* 1913 (WA)). In the **Northern Territory**, mandatory minimum sentences for serious violent offences do not apply to juveniles, however it appears some term of imprisonment must be imposed when the matter is uplifted to the Supreme Court. This could be until the rising of the court (1 day) (see *Sentencing Act 2018* (NT) ss 78 (DG), (DH), (DI)). In **Queensland,** only children who receive a life sentence attract a mandatory non-parole period of 15 years (*Youth Justice Act 1992* (QLD) ss 232-233 and *Corrective Services Act 2006* (QLD) s 181(2)(d)). NSW, SA and Victoria do not currently retain mandatory sentencing for children.

36. Section 19AG is another form of mandatory sentence. It mandates a percentage non-parole period with no scope for judicial discretion.[37] This legislative technique is relatively uncommon. It has been introduced in South Australia, Queensland and the Northern Territory, but does not extend to child offenders.[38]

37. It appears that section 19AG is the only mandatory sentencing regime in Australia that applies 'across the board' to any offender regardless of age, and regardless of the objective gravity of the offence or the subjective circumstances of the offender. It applies without exemption or qualification.

38. Section 19AG applies to most 'terrorism' offences in the Criminal Code.[39] However there is a marked difference between the objective seriousness of these offences. At one end, there are offences such as 'association with a terrorist organisation' (maximum 3 years) or providing resources to a foreign fighter,[40] and at the other the completion of a terrorist act killing multiple civilians. In addition, the definition of terrorism is so broad that it arguably captures all non-state armed groups in a conflict zone. It extends to overseas self-determination

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[37] Victoria has recently introduced 'standard sentencing' which provides a percentage non-parole period for 12 offences, however judges retain a discretion. See *Sentencing Act 1991* (Vic) s 11A(4).

[38] In **Queensland**, serious violent offenders who receive more than 10 years' imprisonment must receive a non-parole period of 80% of the head sentence (*Penalties and Sentences Act 1992* (QLD) s 161B(3)), however section 155 of the *Youth Justice Act 1992* (QLD) prohibits the application of mandatory sentences to children. In **South Australia** there has been a recent change in legislation. There are several percentage non-parole periods for 'serious offences' in the repealed and new legislation (c.f s 32(5)(ba) of the *Criminal Law (Sentencing) Act 1988* (SA) and section 47(5)(c) and (d) of the *Sentencing Act 2017* (SA)), however the courts retain a discretion (c.f, section S 32A of the *Criminal Law (Sentencing) Act 1988* (SA) and s 47(5)(e) of the *Sentencing Act 2017* (SA)). The availability of a discretion makes this regime closer to the 'standard sentencing' legislation in Victoria and NSW. The repealed provisions did apply to children sentenced as adults (see *Criminal Law (Sentencing) Act* 1998 (SA) s 31A) however the position was moderated at common law (see *R v A D* (2011) 109 SASR 197 at 72). The provisions do not apply to children when sentenced as adults under the new laws (see *Sentencing Act 2017* (SA) s 46). In the **Northern Territory** any sentence over 12 months must receive a non-parole period of 50% (see *Sentencing Act 2018* (NT) S 54(1)). However, judges retain a discretion (see *Sentencing Act 2018* (NT) S 54(3)). Some sexual and drug offences also attract a 70% non-parole period (see *Sentencing Act 2018* (NT) ss 55(1) and 55A), however the court retains a discretion (*Sentencing Act 2018* (NT) ss 55(2) and 55(A)). These provisions do not apply to children (see *Youth Justice Act* (NT) s(83) and *Sentencing Ac* (NT) ss 78 (DG), (DH), (DI)).

[39] By virtue of s 3 of the *Crimes Act 1914 (Cth)*, s 19AG applies to: an offence against Subdivision A of Division 72 of the Criminal Code (International terrorist activities using explosive or lethal devices), Subdivision B of Division 80 of the Criminal Code (Treason), Part 5.3 of the code (Terrorism offences, including offences relating to terrorist acts, terrorist organisations and terrorist financing) or 5.5 of the Criminal Code (Foreign Incursion offences) and offences contrary to the *Charter of the United Nations Act 1945* (Cth).

[40] Ms Fatima Elomar received a non-custodial sentence for providing clothing and other items to her husband who was a foreign fighter; 'Terrorist's wife gets suspended jail term' *News.com.au* (online) 1 July 2016 <http://www.news.com.au/national/terrorists-wife-gets-suspended-jail-term/news-story/d528a9fc73b609a8fe926e8378d2d5e7> (case not published).

movements that pose no risk to domestic interests and are otherwise compliant with international law.[41] It also extends to several Australian allies. Query whether such a broad range of conduct and political interests should attract the same condign punishment.

39. Section 19AG also applies to the spectrum of culpability within individual terrorism offences. For example, preparatory offences are designed to intervene early and capture a wide range of conduct. The ¾ rule applies regardless of the stage of preparation and the sophistication of the enterprise.

40. Finally, section 19AG applies despite the individual circumstances of an accused. It makes no allowance for maturity, cognitive function, mental health or the capacity for rehabilitation, de-radicalisation and re-integration.

E. STRUCTURAL BARRIERS TO THE REHABILITATION OF CHILD OFFENDERS

41. The following sets out the broader structural barriers to the rehabilitation of child offenders, of which section 19AG forms a central part.

42. There are no pre-sentence programs in Australia relevant to terrorist accused. The only coordinated approach to rehabilitation for terrorism offenders is post-sentence. A sentencing court therefore has no body of evidence from which to assess risk. Judges currently proceed without sophisticated evidentiary tools through which to analyse and evaluate dangerousness.

43. The absence of programs also poses the following problems:

    - Those who are acquitted of terrorism offences may continue to pose a danger.
    - Those isolated in custody may become more hard-core without intervention, and can become symbols of defiance to the outside community.
    - Those who are convicted may be unresponsive to intervention having spent 18months – 4 years on remand without support and often in isolation.

44. In the absence of programs, the common law has come to rely on the oral renunciation of ideology by an offender. An accused is expected to do so during their plea and be cross-examined.[42] In the absence of forensic disengagement programs to assist terrorist accused, no accused in Australian history (until *MHK* described below) had ever renounced ideology.

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41 For example, the prosecution of the Tamil Tigers (LTTE) and the Kurdistan Worker's Party (PKK).

42 *Lodhi v R* [2017] NSWCCA 360 at 83; *R v Besim* [2016] VSC 537 at 133.

45. Compounding these issues is the fixed and arbitrary nature of section 19AG which does not allow courts give effect to the rehabilitative potential of a child or encourage reform. While programs are sorely needed, their introduction would need to be paired with the repeal of the ¾ rule.

46. In response to these structural barriers our firm created an *ad hoc* disengagement program for a child offender. The case of *MHK* is described below.

F. CASE STUDY: DPP (Cth) v MHK

47. The case of *R v MHK* is illustrative of the deficiencies of the ¾ rule. On 29 January 2016 MHK pleaded guilty to a charge of doing an act in preparation for or planning a terrorist act. The offence period was 25 April to 8 May 2015 and MHK was 17 years old. He is the first child to plead guilty to a terrorist offence in Australia.

48. MHK was born in Australia to a family of Syrian heritage. His family were observant, but not strict Muslims. MHK suffered from social anxiety and was increasingly socially isolated and smoked cannabis.[43] It appears he commenced the radicalisation process online, where he absorbed ISIS videos and movies about Muslim suffering.[44] He then connected online with Junaid Hussein, considered the most senior British ISIS operative and recruiter.[45] Mr Hussein instructed MHK about how to build a pressure cooker and pipe bomb, and sent him instructional material.[46] MHK proceeded to assemble two bombs.

49. The sentencing judge heard a plea over two days. MHK gave evidence and was cross -examined by the Commonwealth Director of Public Prosecutions. His Honour also received evidence from a team that had been assembled to facilitate MHK's de-radicalisation over 18 months. This included the Principal of Parkville College, a mentor from the Islamic Council of Victoria, a psychologist, prison management and Youth Justice. For the first time, a criminal court was able to admit evidence relevant to de-radicalisation. This only occurred because of the ad-hoc disengagement program created by his legal team in custody.

50. Some salient aspects of the evidence are below:

    - "He entered prison angry and defiant. Entering prison was almost a badge of honor for him. He is only a shadow of this having transformed into a maturing and humble young man looking to make good the error of his previous ways." – **Muslim mentor**

    - "The difference between [MHK]'s demeanour and general attitude towards me as a female teacher between his arrival and today is dramatic. On arrival, and in the first

43 *R v MHK* [2016] VSC 742 [42].

44 Ibid [43] and [44].

45 Ibid [15].

46 Ibid [19].

few months of getting to know [MHK], he would barely look at me, avoided eye contact, used one-word answers and seemed in a constant state of discomfort, especially with me. Conversations were very limited, and were always initiated by me. In class he would only read the Koran, was uninterested in any other material and would barely interact with other students or staff….

At the beginning of this year, [MHK]'s general demeanour changed significantly. He seemed more positive and open to forming relationships with more people. Our conversations shifted from stilted and one-sided to engaging discussions around topics as diverse as family, politics, science, movies, history, philosophy, religion, current affairs and personal experiences. His whole presence has changed. Whereas once he had his head down and avoided looking at me, he now stands tall, is often smiling and laughing and maintains consistent eye contact. He makes jokes with me, asks questions that are both personal and theoretical, is curious about the lives of others and the world around him and is often quite expressive about his opinion...

We regularly engage in theological debates about the meaning of life, the role of women in society, what makes a good person and whether morality is fixed or malleable, often over a game of table tennis. During these conversations [MHK] not only presents logical and well supported arguments but is open to other ideas and opinions, and often thinks about them only to return to a discussion days later with new insights. He has leant me things to read that we use to direct debates, and has read texts I have provided with enthusiasm. He once said to me that "This place has changed me, I never could have been told I was wrong before but now I listen to what others, especially my father, say." - **Campus Principal at Parkville College**

- "He is very bright and has a lot of potential as a student, and as a member of the community. He is very understanding of the learning difficulties and backgrounds of his peers in Parkville and patient with their behaviors. He is always thankful of my assistance and tutoring him always lifts my mood. – **Mathematics tutor**

- "I focused mostly on going through Philosophy Unit 2 with [MHK], which he really enjoyed. He showed a deep understanding of philosophical dilemmas, specifically around the topic of morality. He is always very respectful in class and enjoyed being in an educational environment, especially when other students wanted to join in. [MHK] has been exceptionally level-headed within a difficult unit."- **Philosophy teacher**

51. The formal renunciation of violence took place as follows in this exchange with the sentencing Judge:

    - "---I reject IS. I declare the innocence of Islam from them. They don't represent the religion, they don't represent my faith or me or anyone else. I think that they're very

brutal and they have no value, don't have any value for human life."

Q: And was there a particular thing that you spoke to God about during this period?

---Yeah. So before I was arrested I wasn't - I was confused about what I was doing and I needed guidance. I prayed, I prayed a prayer that we pray called Attahiyat which is seeking guidance from God about a certain decision that you want to make and you weren't sure about what the right one was, so I prayed that for - after I started speaking to Junaid.

Q: And did you feel you got an answer to that prayer?

---It took me a couple - some time in here and reflection to know, to think that, yeah, that God did answer my prayer by bringing me in here and not letting anyone get hurt.

52. His Honour acknowledged that this was an extremely serious offence. His Honour sentenced MHK on basis that the only reason the bombs were not fully completed and not activated was because the police intervened and arrested MHK.[47] On the other hand, His Honour also emphasised that some progress had been made with de-radicalisation and that the prospects for rehabilitation were 'good.' His Honour noted that there was some distance still to travel.

53. After hearing the evidence His Honour indicated that he wanted to impose a flexible sentence, but was constrained by the ¾ rule:

"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 7 years imprisonment is an appropriate head sentence, had I been permitted to do so, I would have fixed a minimum term of 4 years, which would have better enabled your supervision and rehabilitation given your youth**.

54. The case of MHK was successfully appealed by the Director on the grounds of manifest inadequacy. While the Court of Appeal acknowledged that there had been 'partial reformation,' this was given less weight.[48] Greater emphasis was placed on general deterrence and denunciation.[49] The sentence was increased to 11 years, with a non-parole period of 8 years and 3 months.

55. It is striking to observe the different rehabilitative paths taken by *MHK* and *Besim,* a sentencing hearing at the same time. *MHK* entered juvenile custody at 17 and had access to programs and made significant inroads into his disengagement from violence. *Besim* entered adult custody

47 Ibid [35].

48 Ibid [55] and [67].

49 Ibid [73].

aged 18 and continued to erect ISIS flags in his cell late into his remand.[50]

G. OVERSEAS JURISDICTIONS

56. The US, the UK and Canada all have more flexible sentencing options for child terrorist offenders.

UK

57. In the UK courts are bound by the *Terrorism Offences Definitive Guideline* when sentencing adult offenders unless the court is satisfied that it would be contrary to the interests of justice to do so.[51] The Guideline does not apply to child offenders.[52]

58. Where sentencing child offenders, the courts must follow the *Sentencing Children and Young People Definitive Guideline* unless it is in the interests of justice not to do so.[53] The Guideline emphasises the importance of individualised sentencing for child offenders.[54] Where a child is classified as a dangerous offender and sentenced to an extended detention or detention for life the court must set a minimum term, which is at its discretion.[55]

59. Even where sentencing child terrorist offenders to life imprisonment, UK courts have set relatively low non-parole periods. In 2015 a Manchester Crown Court sentenced a 14-year old, convicted of inciting terrorism, to life imprisonment with a minimum term of 5 years.[56] This boy was related to the *Besim* matter, providing instruction to Besim in relation to the proposed ANZAC day attack.[57]

60. Earlier this year, 17-year-old Lloyd Gunton was sentenced to life imprisonment with a minimum non-parole period of 11 years for planning a terrorist attack and uploading terror related social media posts.[58]

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50 *R v Besim* [2016] VSC 537 at 135.

51 Sentencing Council, *Terrorism Offences Definitive Guideline,* effective from 27 April 2018 ('*Terrorism Offences Guideline*'); in accordance with *Coroners and Justice Act 2009* (UK) c. 25 s 120; *Coroners and Justice Act 2009 (UK)* s 125(1)
See *Terrorism Offences Guideline*, 4: 'The guidelines apply to all offenders aged 18 and older, who are sentenced on or after 27 April 2018, regardless of the date of the offence'.

53 *Coroners and Justice Act 2009* (UK) c. 25, s 125(1) ('*Coroners and Justice Act 2009'*).

54 Sentencing Council, *Sentencing Children and Young People Definitive Guideline,* effective from 1 June 2017 4 [1.2], 15 [4.3.] and 22 [6.10].

55 Ibid 31 [6.57] – [6.59].

56 Jessica Elgot, 'Anzac day terror plot: British teenager given life sentence' *The Guardian* (online) .

57 *R v Besim* [2016] VSC 537

58 Gunton researched security for a Justin Bieber concert and wrote a "martyrdom letter". Police found a claw hammer and a gutting knife in his school rucksack on the day of the concert. Gunton was found guilty of one charge of engaging in the preparation of a terrorist act, two charges of encouraging terrorism, and a further two charges of possessing terrorist information; Steven Morris, 'Teenager given life sentence for planned Justin Bieber gig attack' *The Guardian* (online) 3 March 2018

United States

61. In the US, persons convicted of federal offences are not eligible for parole. However sentences can be reduced by 15% on account of good behaviour.[59] US courts must follow the United *States Sentencing Commission Guidelines Manual* (***the Guidelines Manual***) where sentencing adult offenders. The Guidelines Manual sets an upper and lower sentencing limit for various offences including terrorism related offences.[60] The Supreme Court banned mandatory life sentences without parole for all children in 2012.[61] The *Guidelines Manual* does not apply to children.[62]

62. A court may sentence an offender to a term less than the minimum guidelines range where the offender provides substantial assistance to the government at the time of sentencing.[63] Abdullahi Yusuf, aged 18, was arrested while boarding a flight to Syria to join ISIS.[64] Yusuf agreed to give evidence against three other co-accused. Michael J Davis, the federal judge who presided over the case, launched the *District of Minnesota's Terrorism Disengagement and Deradicalization Program* in March 2016, the first government initiative of its kind in the US. Mr Daniel Koehler from the German *Institute on Radicalization and De-radicalization Studies* was enlisted to run the program. He sentenced Yusuf to a year in a halfway house, followed by two decades of supervised release.[65] The co-accused received significant penalties.

Canada

63. The penalty provisions in the terrorism chapter of Canada's *Criminal Code* are silent on parole

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<https://www.theguardian.com/uk-news/2018/mar/02/teenager-lloyd-gunton-jailed-cardiff- pop-concert-terrorist-attack-plot> (case not published)

59 *Sentencing Reform Act* of *1984* (USA).

60 See for example United States Sentencing Commission, *Guidelines Manual* (Nov 2016) § 2M5.2 - Financial Transactions with Countries Supporting International Terrorism; § 2M5.3 - Providing Material Support or Resources to Designated Foreign Terrorist Organizations or Specially Designated Global Terrorists, or For a Terrorist Purpose; § 2M6.1 Provisions of nuclear weapons/material, chemical weapons, biological agents, toxins and weapons of mass destruction.

61 *Miller v Alabama* 567 US, 1 (2012)

62 Guidelines Manual §1B1.12; A "juvenile" is anyone under the age of 18, or for the purpose of proceedings for an alleged act of juvenile delinquency, is under the age of 21. "Juvenile delinquency" is the violation of a law of the United States committed by a juvenile which would have been a crime if committed by an adult (see *Federal Juvenile Delinquency Act of 1938 18 U.S.C* §§ 5031–5042)

63 Guidelines Manual, s1B1.10.

64 Brendan Koerner, 'Can you turn a terrorist back into a citizen' 24 January 2017 (online) https://www.wired.com/2017/01/can-you-turn-terrorist-back-into-citizen/
Koehler interviewed all co-accused at length in May 2016 and assessed their potential to be rehabilitated. He also gave evidence at a pre-sentence hearing. Justice Davis indicated he would give Koehler's recommendations weight. Koehler was pessimistic about the chances of the co-accused being deradicalised. The co-accused Warsame was sentenced to 30 months in prison. The remaining 7 co-accused were sentenced to terms ranging from 10 to 35 years.

eligibility.[66] With the exception of murder, Canadian courts must impose a minimum non-parole period of the lesser of one third of the head sentence or seven years for adult offenders.[67] However, the Canadian judiciary generally maintain full discretion where determining non-parole periods for child offenders.[68]

64. In 2016, a 15-year-old was charged with attempting to leave Canada to participate in activity of terrorist group and attempting to leave Canada for purpose of committing murder in terrorist activity outside Canada. He was sentenced to three years for both charges, serving 16 months in youth detention, followed by eight months of community service and one year of probation.[69]

H. MOVING FORWARD

65. Conflict in Iraq and Syria has resonated with young people in Australia. Several children have been charged with, or committed, politically motivated terrorist activity and murder.

66. While children will receive heavy sentences, they will likely emerge from prison in their late 20s or early 30s. This underscores the need to remove structural barriers to rehabilitation to ensure they do not pose a risk upon release.

67. Our firm gave evidence before Victorian Government's Expert Panel on Terrorism and Violent Extremism, convened by The Hon Justice Harper AM QC and Mr Ken Lay AO. The Panel have adopted our firm's recommendation for pre-sentence programs and a suite of statutory protections to enable this process. In particular see the Final Report recommendation 10 and 11, with discussion at chapter 2, paragraph 2.2.2, 2.3.2.[70]

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66 See *Criminal Code*, RSC, 1985, c. C-46, Part II. 1 ('*Criminal Code*')

67 s 120 (1) *Correction and Conditional Release Act 1992;* The court also has the discretionary power to make an order that an offender sentenced to two years or more imprisonment is not eligible for parole until having served half their sentence or after 10 years, whichever is less (*Criminal Code* s 743.6(1)). This suggests that even the most serious of terrorism cases (short of where a murder conviction is obtained), the parole ineligibility period will be no longer than 10 years. Death caused by a terrorist offender while committing or attempting an offence constituted as terrorist activity, is classified as first degree murder, which carries an automatic life sentence with a minimum non-parole period of 25 years (*Criminal Code* s 6.01).

68 *Correction and Conditional Release Act 1992,* SC 1992, c 20, s 119.

69 'Montreal teen sentenced to 3 years for terror-related charges' *CBC News* (online) <http://www.cbc.ca/news/canada/montreal/montreal-teen-terrorism-charges-sentencing-1.3523166>; the offence of leaving Canada to participate in activity of terrorist group carries a maximum term of 10 years imprisonment (*Criminal Code* s83.181); attempting to leave Canada for purpose of committing murder in terrorist activity outside Canada carries a maximum term of 14 years imprisonment (*Criminal Code* s 83.202).

70 Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers, 'Report 2'. Access here: https://www.vic.gov.au/system/user_files/Documents/CounterTerrorism/Expert_Panel_on_Terrorism-_report_2.pdf

68. While a Victorian State government might forge ahead with justice innovation in this area, the rehabilitative potential of children will not be achieved if the ¾ rule is maintained. This arbitrary rule removes the incentive to rehabilitate and prevents judges from crafting sentences that promote ongoing disengagement from violence.