



CDPP

Australia's Federal Prosecution Service



INSLM review of the prosecution and sentencing of children for Commonwealth terrorism offences

Submission by the Commonwealth Director of Public Prosecutions

Introduction

1. The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecution service established by Commonwealth Parliament to prosecute offences against Commonwealth law, including Commonwealth terrorism offences.
2. The CDPP aims to provide an effective and efficient independent prosecution service that contributes to a fair, safe and just Australia, where Commonwealth laws are respected, offenders are brought to justice and potential offenders are deterred.
3. The CDPP thanks the Independent National Security Legislation Monitor for the opportunity to provide information to assist the review into the prosecution and sentencing of children for Commonwealth terrorism offences.

Background

4. Since 2014, eight persons aged under 18 have been charged with Commonwealth terrorism offences. This represents approximately 11% of offenders charged with Commonwealth terrorism offences¹ since 2014. The status of each of those prosecutions is as follows:
 - a) Five prosecutions have concluded with the juvenile convicted of a terrorism offence.
 - b) One prosecution has concluded with the terrorism charge withdrawn and the juvenile convicted of a different offence.
 - c) Two prosecutions are currently before the courts.
5. A further 17 persons aged between 18 and 21 have been charged with Commonwealth terrorism offences since 2014. This represents approximately 25% of all offenders charged with terrorism offences in this period.

Overview

6. The CDPP has addressed the following matters in this submission:
 - a) Section 20C of the *Crimes Act 1914*, including:
 - o The definition of 'child or young person'
 - o State and territory provisions concerning the committal of matters involving juveniles to higher courts
 - b) Section 15AA of the *Crimes Act 1914*; and

¹Includes offences covered by the definition of 'terrorism offence' pursuant to s3 of the *Crimes Act 1914* (Cth) and offences contrary to the *Crimes (Foreign Incursion and Recruitment) Act 1978* (Cth).

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- c) Section 19AG of the *Crimes Act 1914*.

Section 20C of the *Crimes Act 1914*

7. Pursuant to s20C(1) of the *Crimes Act 1914*, “a child or young person who, in a State or Territory, is charged with or convicted of an offence against a law of the Commonwealth may be tried, punished or otherwise dealt with as if the offence were an offence against a law of the State or Territory”.
8. The effect of s20C(1) is that sentencing options and other provisions under the law of the State or Territory may be picked up and applied as “surrogate” federal laws in relation to the prosecution and sentencing of children or young people.
9. The CDPP considers that the use of the phrase “may be tried, punished or dealt with” (emphasis added) demonstrates that s20C of the *Crimes Act 1914* is intended to operate permissively and not so as to exclude or override other provisions of Part IB of the *Crimes Act 1914* which apply to the sentencing of federal offenders.
10. The CDPP’s view is that s20C of the *Crimes Act 1914* allows sentencing options under the State or Territory law to be available to courts sentencing juveniles offenders for federal crimes in addition to those sentencing options provided under the *Crimes Act 1914*. Such an interpretation is supported by the following:
 - a. The Second Reading Speech for the Bill introducing s20C into the *Crimes Act 1914* referred to the provision as “merely enabling”, which is consistent with the provision being facilitative rather than mandatory. Courts have also characterised the provision as enabling.²
 - b. Section 19B of the *Crimes Act 1914*, which permits the sentencing disposition of a discharge without conviction, was inserted by the same section of the amending act which inserted s20C. There is nothing in the words of s20C of the *Crimes Act 1914* which demonstrates an intention that s19B would not be an available sentencing option for children or young people charged with federal crimes. It is contended that these provisions can be read together.
 - c. Section 20C of the *Crimes Act 1914* is silent as to the operation of other Commonwealth laws and other provisions in Part IB of the *Crimes Act 1914* are not expressed to be subject to s 20C. Arguably, there would be an express reference to the operation of other laws had it been intended s20C of the *Crimes Act 1914* would operate to exclude the operation of other provisions.
11. The CDPP considers that State and Territory provisions concerning the prosecution and sentencing of juveniles operate alongside the sentencing provisions of the *Crimes Act 1914*, to the extent that they are not inconsistent with the *Crimes Act 1914*, or where the *Crimes Act 1914* has not otherwise exhaustively provided for the same subject matter.³
12. While this principle appears relatively straightforward in theory, there can be complexity in its application. For example, where a juvenile federal offender is sentenced under the relevant State or Territory legislation, the CDPP considers that the sentencing principles set out in juvenile offender

² *Newman v A (A Child)* (1992) 9 WAR 14 18; *R v Lovi* [2012] QCA 24 [21].

³ *Hili v The Queen* (2010) 242 CLR 520 at [22]; *Putland v R* (2004) 218 CLR 184 at [7], citing *The Queen v Gee* (2003) 212 CLR 230 at [62]: [A State law] would not be picked up and applied by s 68 if a Commonwealth law expressly or by implication made contrary provision, or if there were a Commonwealth legislative scheme relating to the sentencing of the appellant which was “complete upon its face” and can “be seen to have left no room” for the operation of [the State law]. See also *R v Pham* (2015) 256 CLR 550, [22].

legislation (which vary across the jurisdictions) can be applied where permitted by the respective acts⁴ and where those principles are not inconsistent with s16A of the *Crimes Act 1914*.⁵ However, in some circumstances, a state or territory principle may be irreconcilable with the *Crimes Act 1914*.⁶ Further, where the state or territory juvenile sentencing principles operate as a self-contained code, directed exclusively at consideration of the effect of the proposed sentence on the child, this in itself may be inconsistent with s16A, which requires consideration of a much wider range of matters. The CDPP notes that applying s16A of the *Crimes Act 1914* may not have a significant practical difference because, in determining the weight to be given to such matters as general and specific deterrence and rehabilitation, the sentencing court would take the age of the offender into account,⁷ as well as any common law sentencing principles concerning the sentencing of children and young persons.⁸

13. There may also be a degree of uncertainty around the availability of sentencing options set out in the State or Territory legislation applicable to juveniles. For example, s20C of the *Crimes Act 1914* applies to a child or young person who is “*convicted or charged against a law of the Commonwealth*”. Pre-charge diversionary options therefore appear not to be picked up by s20C of the *Crimes Act 1914*. The CDPP considers that post-charge diversionary options are picked up by the phrase “*punished or otherwise dealt with*”, although there may be some difficulties if the sentencing option involves the exercise of judicial power by bodies that are not Chapter III Courts under the Constitution.⁹
14. Further, in circumstances where the State or Territory sentencing option is already comprehensively covered by a sentencing option under the *Crimes Act 1914*, the CDPP considers it likely that a court would find the State or Territory option was not available as the *Crimes Act 1914* has exhaustively provided for the same subject matter. Sentencing options for juveniles convicted of Commonwealth terrorism offences are further discussed in **Annexure A**.
15. The CDPP considers that there is potential benefit in using the sentencing options of the *Crimes Act 1914* where they are appropriate. Not only may the applications of these laws achieve greater consistency in the application of sentencing principles, the application of these laws may facilitate more effective and consistent enforcement of the sentence imposed. Section 20C of the *Crimes Act 1914* does not, in terms, apply State laws for the enforcement of State and Territory sentencing options. Therefore, if a juvenile offender fails to comply with the sentence imposed, it is questionable whether the State and Territory mechanisms available to enforce the sentence will be available.

Definition of ‘child or young person’

16. There is no applicable definition of child or young person for the purpose of s20C of the *Crimes Act 1914*.¹⁰ In the absence of such a definition, the CDPP has generally relied on the definition from the respective State or Territory legislation to assess whether an accused is a ‘child or young person’. In all states and territories, the definition of a child or youth is someone currently under the age of 18.¹¹

⁴ For example, in Victoria s362 of the *Children, Youth and Families Act 2005* does not apply where the Supreme or County Court sentences an offender on indictment as the provision only applies to the “the Court” which is defined in s3(1) as “The Children’s Court of Victoria”, see *Fuller (a Pseudonym) v R* [2013] VSCA 186 at [34].

⁵ *R v Pham* (2015) 256 CLR 550, [22].

⁶ For example some State provisions specify that in sentencing a child or young person under legislation applicable to juvenile offenders, the court must not have regard to general or specific deterrence (see, for example, *R v QTV* (2003) 87 SASR 378, [47]-[58]; *CNK v R* (2011) 32 VR 641).

⁷ *Crimes Act 1914* (Cth), s16A(2)(m).

⁸ See for example *KT v R* (2008) 182 A Crim R 571 [22]-[26].

⁹ *Newman v A (A Child)* (1992) 9 WAR 14.

¹⁰ Inferences as to the intended definition can also potentially be drawn from s20C(2) which refers to a “person under the age of 18”. “Child” is defined in ss 3(1) and 15YA of the *Crimes Act 1914*, but neither of those definitions is applicable to the term as it is used in s 20C(1).

¹¹ See *Children and Young People Act 2008* (ACT) s 12 (“young person”) and *Legislation Act 2001* (ACT) dictionary; *Children (Criminal Proceedings) Act 1987* (NSW) s 3 (“child”); *Youth Justice Act 2005* (NT) s 6 (“youth”); *Acts Interpretation Act 1954* (Qld) sch 1; *Young Offenders Act 1993* (SA) s 4 (“youth”); *Youth Justice Act 1997* (Tas) s 3 (“youth”); *Children, Youth and Families Act 2005* (Vic) s 3 (“child”); *Children’s Court of Western Australia Act 1988* (WA) s3 (“child”) *Young Offenders Act 1994* (WA) s 3 and 4 (“young person”).

However, a number of states and territories also make special provisions which apply to persons under the age of 19 or the age of 21 at the time of sentence.¹²

17. Section 20C(1) applies the relevant state or territory law to a child or young person who is "charged with or convicted of an offence". Therefore, the accused must be a "child or young person" when charged or convicted for s20C of the *Crimes Act 1914* have application.¹³ While this approach is largely consistent with state and territory law, in some jurisdictions the relevant age for youth proceedings is the age of the person at the time of the offending, allowing an offender to be sentenced as a "child" regardless of their age at the time of charge.¹⁴ The CDPP considers it unlikely that s20C of the *Crimes Act 1914* would operate to apply the State or Territory laws if the offender is not a "child or young person" within the meaning of s20C of the *Crimes Act 1914* at the time of their charge or conviction.
18. The CDPP considers there would be benefit in adopting a consistent definition of 'child or young person' for the purposes of prosecuting and sentencing of juveniles for federal offences.

State and territory provisions concerning the committal of matters involving children to higher courts

19. The range of sentencing options available for a young offender will be affected by the jurisdiction in which the matter is heard and determined. State or territory courts with specialist jurisdiction in relation to children and young offenders often have no power, or very limited power, to sentence an offender to imprisonment. Yet in many terrorism matters, the only appropriate sentencing option will be a lengthy term of imprisonment. It is desirable that an offender be dealt with in a court that has the ability to impose an appropriate sentence in the circumstances of the matter. It is also desirable that the approach to the sentencing of children and young persons for federal crimes be reasonably consistent across Australia.
20. The CDPP notes the comparison between the position in NSW and Victoria as set out in the Joint Submission of the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation at p23-24. Further details of the approach in other states is set out below.

Queensland

21. In Queensland, matters carrying a maximum penalty of more than 20 years cannot be finalised in the Children's Court and will be committed to the Supreme Court of Queensland.¹⁵ Offences with a maximum penalty of more than 14 years will have a committal proceeding,¹⁶ but will be committed for trial or sentence before a Children's Court Judge in the Children's Court.¹⁷

¹² For example, in NSW a person who was a children at the time of committing the offence and under the age of 21 when sentenced can access additional sentencing options pursuant to Division 4 of the *Children (Criminal Proceedings) Act 1987* (NSW). In Queensland, children who have turned 19 in the course of proceedings may, and in some cases *must*, be treated as adults under ss140 and 141 of the *Youth Justice Act 1992* (Qld). In Victoria, s3 of the *Children, Youth and Families Act 2005* (Vic) requires the child to be under the age of 19 when proceedings against them commence, though a person under the age of 21 at the time of sentence is a "young offender" for the purpose of ss3 and 32 of the *Sentencing Act 1991* (VIC) and can access certain sentencing options.

¹³ As noted in the INSLM Background Paper at [28], in the case of *R v Lovi* [2012] QCA 24, the Crown submitted s20C is concerned with the age of an offender at the time of charge or conviction rather than at the time of their offence, though the Queensland Court of Appeal did not decide the point in that case.

¹⁴ *Children's Court of Western Australia Act 1988* (WA) s19 (but see s50B of *Young Offenders Act 1994* (WA) for sentencing options); *Youth Offenders Act 1993* (SA) s16; *Youth Justice Act* (NT) s52.

¹⁵ *Youth Justice Act 1992* (QLD) ss91, 95 and 99 provisions concerning a "supreme court offence" which is defined as "an offence for which the District Court does not have jurisdiction to try an adult because of the District Court of Queensland Act 1967, section 61" (Sch 4). Section 61 states the District Court generally does not have jurisdiction to try a person charged with an offence with a maximum penalty greater than 20 years.

¹⁶ *Youth Justice Act 1992* (QLD) s81.

¹⁷ *Youth Justice Act 1992* (QLD) s92, 96; s99.

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22. In relation to all other indictable offences, a child may elect whether to have the matter conducted as a committal proceeding, or disposed of summarily.¹⁸ However, the Children’s Court Magistrate must not hear a matter summarily unless the magistrate is satisfied that the charge can be adequately dealt with summarily by the Court.¹⁹
23. The *Youth Justice Act 1992* (QLD) provides maximum periods of detention linked to the maximum penalty of the offence. These provisions apply to all courts sentencing juvenile offenders in Queensland.²⁰

South Australia

24. In South Australia, a charge laid against a youth in the Youth Court can be committed to the District or Supreme Court in the circumstances set out in s17(3) of the *Young Offenders Act 1993* (SA). Relevantly, a federal terrorism offence could therefore proceed by way of committal where requested by the young person after obtaining legal advice, or where the Youth Court or Supreme Court determines, on application of the DPP, that “*the youth should be dealt with in the same way as an adult because of the gravity of the offence, or because the offence is part of a pattern of repeated offending*”.
25. There is also an option for the DPP to lay charges against a youth in the Magistrates’ Court where the offence is a “major indictable offence”.²¹ At the conclusion of committal proceedings, such a youth may be committed to the Supreme or District Court, if the Magistrates’ Court is “*of the opinion that the youth poses an appreciable risk to the safety of the community*”.²² Otherwise the youth may be committed to the Youth Court for trial or sentence.

Western Australia

26. In Western Australia, there is no procedure to allow the court to commit a matter involving a juvenile offender to a higher court, contrary to the wishes of the offender.²³ A child may elect to have a more serious offence dealt with in the relevant superior court or the Court may transfer a matter involving an indictable offence if the offender has attained the age of 18.²⁴ Otherwise, the Children’s Court can deal with any offence alleged to have been committed by a child. The Children’s Court in Western Australia is able to impose a range of penalties on sentence, including full time imprisonment.

Tasmania

27. In Tasmania, the Youth Justice Division of the Magistrates’ Court has jurisdiction to deal with all matters, other than certain prescribed State offences. As Commonwealth terrorism offences are not prescribed offences under the *Youth Justice Act 1997* (Tas), it appears that these matters are within the jurisdiction of the Youth Justice Division of the Magistrates’ Court unless the child or their guardian objects.²⁵ The maximum penalty that can be imposed where the offender is a child at the time of sentence is 2 years’ detention.²⁶

¹⁸ *Youth Justice Act 1992* (QLD) ss83-86.

¹⁹ *Youth Justice Act 1992* (QLD) s77(2).

²⁰ *Youth Justice Act 1992* (QLD) ss149, 175 176.

²¹ *Young Offenders Act 1993* (SA) s16(2). In general terms, a “major indictable offence” is an offence punishable by more than 5 years’ imprisonment, other than an offence specified in s5(3)(a)(iii) of the *Criminal Procedure Act 1921* (SA).

²² *Young Offenders Act 1993* (SA) s17A.

²³ *Children’s Court Act 1988* (WA), s19B.

²⁴ *Children’s Court Act 1988* (WA), s19D.

²⁵ *Youth Justice Act 1997* (Tas) ss3 and 161.

²⁶ *Youth Justice Act 1997* (Tas) s81.

ACT

28. In the ACT, the Magistrates' Court sitting as the Children's Court has jurisdiction to hear criminal proceedings other than those which are punishable by imprisonment for life.²⁷ Section 288(2) of the *Magistrates Court Act 1930* (ACT) imports a further qualification that section 375 of the *Crimes Act 1900* (ACT) applies to the Children's Court.²⁸ That section provides a mechanism for summary disposal of any offence before the Children's Court, where the child consents and the Children's Court determines the case can be properly disposed of summarily.²⁹

Summary

29. What emerges from the information set out above is that there are varying procedures in each jurisdiction to deal with the criminal prosecution of juvenile offenders.
30. Different jurisdictions automatically exclude different types of matters from children's or youth courts, and for those offences that may be committed to a higher court, there are differing approaches as to the circumstances in which that may occur. In Tasmania and Western Australia, there does not appear to be any procedure to allow a matter involving a Commonwealth terrorism offence to be committed to a higher court, however the penalties available to those courts vary significantly.³⁰ The scheme in Queensland removes imprisonment as a sentencing option, and imposes maximum periods of detention which are linked to, but significantly lower than the maximum penalty of the offence, regardless of the court in which the offender is sentenced.
31. The CDPP considers that there would be benefit in measures aimed at achieving greater consistency in terms of the jurisdiction of courts able to deal with federal juvenile terrorism offenders. There is also a need to ensure that the full range of sanctions laid down by Parliament for federal terrorism offences can be imposed as appropriate.

Section 15AA of the *Crimes Act 1914*

32. Section 15AA of the *Crimes Act 1914* provides that a bail authority cannot grant bail to a person charged with or convicted of a terrorism offence (other than an offence against s102.8 of the *Criminal Code* (Cth)) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.³¹
33. As noted in the CDPP's earlier response to the INSLM's request for information, where a juvenile is charged with a terrorism offence, s15AA of the *Crimes Act 1914* operates to fix the test for bail. However, the respective state and territory laws concerning bail and bail procedure will otherwise apply.
34. For example, in New South Wales, a court dealing with a child charged with a terrorism offence will first consider whether the accused has discharged the onus of establishing exceptional circumstances to justify bail pursuant to s15AA of the *Crimes Act 1914*. Should exceptional circumstances be established, the court will then consider whether there is an unacceptable risk in granting bail pursuant to s19 of the

²⁷ *Magistrates Court Act 1930* (ACT) s288(1)(b).

²⁸ Applies to offences punishable by a term of imprisonment not exceeding 10 years (s375(1)(b)(ii)).

²⁹ *Crimes Act 1900* (ACT) ss374(4) and (10)-(11). The jurisdiction of the Children's Court is limited to offences which can be heard summarily pursuant to s291E of the *Magistrates' Court Act 1930* (ACT). While s288(2) of the *Magistrates' Court Act 1930* (ACT) and s374 of *Crimes Act 1914* do appear to create a mechanism by which any offence before a Children's Court can be dealt with summarily, there is potential uncertainty around the interaction of these provisions with s4J of the *Crimes Act 1914*. Most federal terrorism offences carry a maximum penalty of 10 years' imprisonment or more and are therefore incapable of being heard summarily under s4J of the *Crimes Act 1914*.

³⁰ The Children's Court in Western Australia can impose a sentence of full time imprisonment on a child offender whereas the Youth Justice Division of the Magistrates Court can impose a maximum sentence of 2 years detention.

³¹ *Crimes Act 1914* s3 defines a "terrorism offence" as an offence against Subdivision A of Division 72 of the *Criminal Code*, Subdivision B of Division 80 of the *Criminal Code*, Part 5.3 or 5.5 of the *Criminal Code* or Part 4 and Part 5 (to the extent that it relates to the Charter of the United Nations) of the *Charter of the United Nations Act 1945* (Cth).

Bail Act 2013 (NSW). “Unacceptable risk” is defined as an unacceptable risk that the accused person, if released from custody, will fail to appear, commit a serious offence, endanger victims, individuals or the community or interfere with witnesses or evidence.

35. The CDPP is able to appeal a decision to grant bail pursuant to s15AA(3A) of the *Crimes Act 1914*. Where the bail authority is notified of the intention to appeal immediately after the decision is made, the decision to grant bail will be stayed.³² The stay of the bail decision can only operate for a maximum of 72 hours.³³

Exceptional circumstances

36. While the term “exceptional circumstances” is not defined in the *Crimes Act 1914*, a body of case law considering the meaning of that expression has developed. The test places an onus upon the applicant to satisfy the court that exceptional circumstances exist.³⁴ The applicant must show that there is a situation which is out of the ordinary or unusual in some respect to satisfy the court that exceptional circumstances exist.³⁵ A wide range of matters may be considered by the court in determining whether exceptional circumstances exist, and a range of factors may in combination constitute exceptional circumstances.³⁶ While the test does not prevent bail being granted in all circumstances, it is a very high hurdle for the applicant to meet.³⁷
37. The test for bail in s15AA of the *Crimes Act 1914* applies to both adult and juvenile offenders. Case law suggests that an offender’s youth alone will likely not constitute exceptional circumstances, but will be a relevant factor, perhaps in combination with other matters, which might establish exceptional circumstances.³⁸ Matters relevant to the accused’s youth may also be taken into account, for example the fact that the accused was involved in the offending by adults.³⁹
38. The CDPP has not observed any difficulties with the operation of s15AA of the *Crimes Act 1914* in prosecuting terrorism offences to date, including in matters involving child offenders.
39. The exceptional circumstances test recognizes the serious nature of terrorism offences and the threat that this kind of offending can pose to the community. Terrorism investigations are often lengthy and complex, with large volumes of evidence and the need to obtain evidence from overseas. A bail application will often be made soon after arrest and whilst evidence is still being gathered and analysed. Given the seriousness of terrorism offending and the potential for significant harm to the community, the CDPP consider that the exceptional test in s15AA of the *Crimes Act 1914* strikes an appropriate balance, even in matters involving the prosecution of children and young persons.
40. Whilst the exceptional circumstances test sets a high bar, it is not uncommon for bail to be granted to persons charged with non-terrorism offences for which an exceptional circumstances test also applies. The bail authority maintains the ultimate discretion to grant bail in appropriate cases having regard to all of the relevant circumstances. As noted in the CDPP’s previous response, two children charged with terrorism offences were granted bail in the Supreme Court of NSW.⁴⁰ This demonstrates that the

³² *Crimes Act 1914*, s15AA(3C).

³³ *Crimes Act 1914*, s15AA(3D)(c).

³⁴ *Hammoud v DPP* [2006] VSC 516, [2]; *R v NK* [2016] NSWSC 498, [26](3).

³⁵ *R v NK* [2016] NSWSC 498, [26](5).

³⁶ *R v NK* [2016] NSWSC 498 [26], *Haddara v CDPP* (2006) 159 A Crim R 489 [5] cited with approval in *R v Cheikho* (unreported NSWSC, 15 May 2006 per Studdert J), [4].

³⁷ *R v Mulahaliovic* (unreported, NSWSC, 1 August 2006 per Rothman J) at 2; *R v NK* [2016] NSWSC 498, [26](2,4); *R v Cheikho* (unreported NSWSC, 15 May 2006 per Studdert J), [16].

³⁸ *R v NK* [2016] NSWSC 498.

³⁹ *R v NK* [2016] NSWSC 498.

⁴⁰ In another matter, the Court found that exceptional circumstances had been established pursuant to s15AA of the *Crimes Act 1914* (Cth), but found there was an unacceptable risk of the offender committing a serious offence and endangering the safety of the community such that bail was refused, see *AB v DPP (Cth)* [2016] NSWSC 1042 and *AB v R* [2016] NSWCCA 191.

exceptional circumstances test is not a bar to bail being granted where the court considers it to be appropriate.

Section 19AG of the *Crimes Act 1914*

41. Section 19AG of the *Crimes Act 1914* states that where a person is convicted of a minimum non-parole offence and the court imposes a sentence, the court must fix a single non-parole period of at least $\frac{3}{4}$ of the sentence imposed for that offence (the “three-quarter rule”). Terrorism offences, as defined in s3(1) of the *Crimes Act 1914*, are minimum non-parole offences for the purposes of s19AG. The term “sentence” in Part IB of the *Crimes Act 1914*, which also includes s19AG, is defined to mean “a sentence of imprisonment”.⁴¹
42. As the provision is presently framed, the CDPP is of the view that s19AG of the *Crimes Act 1914* applies to all persons sentenced to a period of imprisonment for a terrorism offence, including children.⁴² However, the CDPP considers that the wording of s19AG of the *Crimes Act 1914* limits the application of the three-quarter rule to “imprisonment” and it will not apply if an offender is sentenced to detention under youth justice legislation.
43. The CDPP acknowledges that particular considerations apply when sentencing a child for criminal offences. Such a process will involve balancing the desirability of rehabilitation with the need for deterrence and community protection. In this context, the CDPP notes judicial comment suggesting s19AG may restrict the court’s discretion to craft a sentence which is appropriate in the circumstances of terrorism offences committed by a child.⁴³
44. The CDPP also notes, by way of comparison, the approach taken in the United Kingdom to the sentencing of a 15 year old offender who pleaded guilty to inciting the terrorism offence committed by Sevdet Besim,⁴⁴ an 18 year old Australian convicted of a terrorism offence in 2016. In the UK matter, the offender was sentenced to life imprisonment, to be released after serving 5 years.

Impact of s19AG on sentencing options

45. In addition to imposing a minimum non-parole period, s19AG of the *Crimes Act 1914* also impacts upon the availability of other sentencing options under the *Crimes Act 1914*.
46. Section 20(1)(b) of the *Crimes Act 1914* allows a court to sentence an offender to imprisonment but direct that the person be released on a recognizance, either forthwith or after a period of imprisonment has been served.⁴⁵ This sentencing option is not available for terrorism offences, as s20(6) of the *Crimes Act 1914* provides that s20(1)(b) “does not apply in relation to a minimum non-parole offence mentioned in section 19AG, or offences that include one or more such minimum non-parole offences.”
47. Section 19AG also impacts upon the availability of alternative sentencing options under s20AB of the *Crimes Act 1914*. Section 20AB picks up certain sentencing alternatives available under state or territory legislation for federal offenders, such as intensive correction orders or community service orders. However, the operation of this provision for an offender who has committed a terrorism offence is limited by s20AB(6) of the *Crimes Act 1914* which states that s20AB(1) “does not permit a court (including a federal court) to pass a sentence, or make an order, that involves detention or imprisonment, in respect

⁴¹ *Crimes Act 1914*, s16(1).

⁴² The three quarter rule has been applied in all matters involving child terrorism offenders where a sentence of imprisonment has been imposed.

⁴³ See *DPP v MHK* [2016] VSC 742, [78]. Similar comments were made by a judicial officer in another matter which is subject to reporting restrictions.

⁴⁴ Besim was sentenced to 10 years’ imprisonment with a non-parole period of 5 years and 3 months’, which was increased on appeal to 14 years, with a non-parole period of 10 years and 6 months.

⁴⁵ This is a sentencing option analogous to a partially or wholly suspended sentence.

of the conviction of a person before the court of a minimum non-parole offence mentioned in section 19AG”.

48. The CDPP considers that the effect of s20AB(6), s19AG and s3 of the *Crimes Act 1914* is that any sentencing option under s20AB *Crimes Act 1914* which involves “detention or imprisonment” is unavailable for an offender convicted of terrorism offence. So, for example in NSW, home detention and intensive corrections orders are only available where the court has determined the offender should be sentenced to a term of imprisonment. As these sentencing options involve “*detention or imprisonment*”, the CDPP considers these options are not available due to the operation of s20AB(6) and 19AG of the *Crimes Act 1914*. The CDPP considers that s20AB(6) only applies to options available under s20AB and the provision does not curtail the sentencing options made applicable by s20C of the *Crimes Act 1914*.

Annexure A – Sentencing options for juvenile offenders convicted of Commonwealth terrorism offences

1. The CDPP has been requested by the INSLM’s office to provide a table of sentencing options available for a child convicted of a terrorism offence in each state or territory of Australia.
2. The CDPP notes that there is little case law regarding the operation of s20C of the *Crimes Act 1914*. Whilst the CDPP has recently prosecuted a small number of juveniles for terrorism offences in NSW and Victoria, some of these matters were so serious as to only warrant consideration of a sentence of imprisonment. In preparing this document, the CDPP has relied on input from Federal Prosecutors working in every State and Territory, as well as Federal sentencing principles. Whilst every effort has been made to accurately describe the sentencing options for juvenile offenders convicted of Commonwealth terrorism offences in each jurisdiction, the CDPP acknowledges that the extent to which s20C of the *Crimes Act 1914* operates to make some State and Territory sentencing options available is uncertain.
3. Given the seriousness of terrorism offences, in many cases a sentence of full time imprisonment will be the only appropriate sentencing option. However, it is foreseeable that in certain circumstances a non-custodial option may be considered or imposed by a court.
4. Where a juvenile federal offender is convicted of a terrorism offence, the following sentencing options may be available:
 - Sentencing options under Part IB of the *Crimes Act 1914*;
 - State or territory sentencing options available for children; and
 - State or territory sentencing options available for adults, which may be available to child offenders in certain circumstances.
5. For the purpose of the table of sentencing options, the CDPP has used the example of a juvenile offender convicted of a terrorism offence punishable by a maximum penalty of 15 years’ imprisonment. The CDPP has attempted to identify the options that would be available to the sentencing court where the matter proceeds on indictment either in a higher court or via a similar procedure in the Children’s Court (which can occur in certain jurisdictions).¹ Where the available sentencing options may differ based on the maximum penalty, the offender’s age or if the matter is dealt with summarily, the CDPP has attempted to set out some of those differences in the submissions below.
6. In the submissions below, the CDPP has identified potential issues arising from the interaction of the *Crimes Act 1914* provisions and state and territory laws. This exercise highlights the complexity which can arise in determining what state or territory sentencing options are picked up as surrogate federal law by s20C of the *Crimes Act 1914*.

Sentencing options under the Crimes Act 1914

7. The sentencing options available under the *Crimes Act 1914* are set out in the sentencing options table. The CDPP considers that these sentencing options will be available for a juvenile offender

¹ For example in Western Australia and Queensland.

sentenced for a terrorism offence in most states or territories,² in addition to the state or territory options picked up by s20C of the *Crimes Act 1914*. Some potential exceptions are discussed below in relation to the jurisdictions of Queensland and Western Australia.

8. As noted in the CDDP's submission at paragraph [47], the combined effect of s19AG, s20(6) and s3 of the *Crimes Act 1914* means that it is not open to the court to fully or partially suspend a period of imprisonment for a federal offender convicted of a terrorism offence. This Commonwealth sentencing option is therefore unavailable for juvenile terrorism offenders.
9. Certain prescribed state and territory sentencing options for adults are picked up by s20AB of the *Crimes Act 1914*. These may also be available to juvenile offenders in certain circumstances depending on state or territory laws (see further discussion below). As discussed in the CDDP's submissions at paragraph [48], section 20AB(6) limits the availability of these options for offenders convicted of a terrorism offence where they involve a sentence of 'detention or imprisonment'.

Interaction of state and federal laws concerning sentencing options

10. As noted in the CDDP's submission, the CDDP considers that state and territory provisions concerning the prosecution and sentencing of juveniles can generally be used alongside the sentencing provisions of the *Crimes Act 1914*, provided they are not inconsistent with the *Crimes Act 1914*, or where the *Crimes Act 1914* has not otherwise exhaustively provided for the same subject matter.³
11. In some instances, there may be uncertainty about whether a sentencing option is inconsistent with the *Crimes Act 1914*, or whether the *Crimes Act 1914* has exhaustively provided for the same subject matter.
12. For example, the CDDP considers that any state or territory sentencing provisions that would allow a juvenile to be sentenced to a term of imprisonment or to a fine would not be picked up by s20C or s68 of the *Judiciary Act 1903* as these sentencing options are comprehensively covered by the options set out in the *Crimes Act 1914*.⁴ However, the CDDP considers provisions for other forms of juvenile detention under state or territory law (including suspended juvenile detention options) are capable of being applied by s20C.
13. The position with regards to other non-custodial sentencing options can be more complex. For example, the CDDP considers that a court may find that *Crimes Act 1914* provisions concerning dismissals and good behaviour bonds (s19B and s20) prevail over the equivalent provisions in the state or territory juvenile legislation. However, this will turn on the specific provisions governing each state or territory option as compared to its *Crimes Act 1914* counterpart.

² Subject to the jurisdiction of the court imposing the sentencing options, per s39(2) of the *Judiciary Act 1903*. For example, a Children's Court limited to imposing a maximum penalty of 2 years' detention would be unable to impose a term of imprisonment under the *Crimes Act 1914*.

³ *Putland v R* (2004) 218 CLR 184 at [7], citing *The Queen v Gee* (2003) 212 CLR 230 at [62]; *Hili v The Queen* (2010) 242 CLR 520 at [22].

⁴ *Hili v R* (2010) 242 CLR 520; *Atanackovic v The Queen* [2015] VSCA 136 [81]-[87]. The position may be more complex where the state legislation effectively sets out exclusive provisions by which juvenile offenders can be sentenced. In such circumstances, it is not clear that *Crimes Act 1914* sentencing options will be available (see discussion of position in Queensland and Western Australia below).

14. In the absence of clear authority on the operation of s20C, the CDPP considers it is difficult to form a concluded view on the availability of certain sentencing options. For the purposes of this exercise, the CDPP has therefore included all potentially available sentencing options in the table below. Where the CDPP considers there may be some uncertainty as to the availability of a sentencing option, this has been denoted by marking the option in italicised blue text.

Sentencing options in NSW

15. A terrorism offence punishable by a maximum penalty of 25 years' or life imprisonment is a "serious children's indictable offence".⁵ A child offender sentenced for these offences in NSW must be dealt with in a higher court at law,⁶ and not under the *Children (Criminal Proceedings) Act 1987* (NSW) (CCPA).
16. A juvenile offender charged with a terrorism offence punishable by less than 25 years' imprisonment may be committed to a higher court for trial or sentence if the Children's Court finds the offence may not be properly disposed of in a summary manner.⁷ If committed to a higher court, the court must then make a determination about whether the offender is dealt with at law or under Division 4 of Part 3 of the CCPA, based on factors such as the seriousness and nature of the offence, as well as the age and maturity of the offender.⁸
17. For a terrorism offence punishable by a maximum penalty of less than 25 years' imprisonment, the NSW District or Supreme Court would therefore have the option of sentencing the juvenile offender under the *Crimes Act 1914* or under Division 4 of Part 3 of the CCPA.
18. As noted above, prescribed state and territory sentencing options picked up by s20AB of the *Crimes Act 1914* may be available for federal juvenile offenders in certain circumstances. In NSW, a federal juvenile offender could potentially be sentenced to home detention⁹ or an intensive correction order¹⁰ if the Court determined the offender should be dealt with 'at law'. However, if a juvenile is being sentenced in relation to a terrorism offence, these options are unavailable due to s20AB(6) of the *Crimes Act 1914* which prevents a court from passing a sentence of "detention or imprisonment" in respect of the conviction of a person of a minimum non-parole offence mentioned in s19AG.
19. The CDPP notes that s20AB(6) only applies a limitation on sentencing options covered by s20AB(1AA). The CDPP considers the provision does not operate to exclude sentencing options such as juvenile detention, which are separately picked up by s20C of the *Crimes Act 1914*.

⁵ A "serious children's indictable offence" includes any offence punishable by imprisonment for life or 25 years, s3(1) *Children (Criminal Proceedings) Act 1987* (NSW).

⁶ *Children (Criminal Proceedings) Act 1987* (NSW), s17.

⁷ *Children (Criminal Proceedings) Act 1987* (NSW), s31(5).

⁸ *Children (Criminal Proceedings) Act 1987* (NSW), s18.

⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s6.

¹⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s6. Note that community service orders under s8 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) cannot apply to an offender to whom the *Children (Community Service Orders) Act 1987* applies pursuant to s8(3) of that Act, however they are available for juvenile offenders pursuant to the *Children (Community Service Orders) Act 1987* (NSW).

20. If a matter involving a terrorism offence punishable by less than 25 years' imprisonment was finalised in the NSW Children's Court, the most serious penalty available to the court would be two years' detention (three years for multiple offences).¹¹ The CDPP also considers the Children's Court would be able to impose sentence options under the *Crimes Act 1914* that are within the jurisdiction of the Children's Court,¹² but would be unable to impose a term of imprisonment.

Sentencing options in Victoria

21. In Victoria, the Supreme or County Court may exercise the powers of the Children's Court in imposing sentence on a child.¹³ Therefore a higher court will have the option of sentencing a juvenile terrorism offender to a sentencing option available under the *Children, Youth and Families Act 2005* (Vic) or a youth justice/youth residential order pursuant to s32 of the *Sentencing Act 1991* (Vic),¹⁴ in addition to the available Commonwealth sentencing options.
22. Recent amendments to the *Sentencing Act 1991* (Vic) require a court to find exceptional circumstances to justify the imposition of a Youth Residential Centre Order or Youth Justice Centre Order where the child is convicted of an offence contrary to Division 101 of the *Criminal Code* (Cth).¹⁵ There are no equivalent provisions for other Commonwealth terrorism offences.
23. In Victoria, a community corrections order (CCO) is available as a sentencing option pursuant to s20AB of the *Crimes Act 1914*,¹⁶ however a conviction must be imposed and the order cannot be combined with a term of imprisonment under the *Sentencing Act 1991* (Vic).¹⁷ Given a CCO cannot be combined with imprisonment in federal matters, the CDPP considers that this is not a sentence or order that involves "detention or imprisonment" and therefore this option is not excluded by s20AB(6). It would therefore be available to a federal juvenile offender sentenced for a terrorism offence.
24. If a matter involving a terrorism offence was not committed to a higher court but was finalised in the Victorian Children's Court, the most serious penalty available to the court would be detention in a youth justice centre for a period of three years (four years for multiple offences).¹⁸

Sentencing options in Queensland

25. As noted in the CDPP's submissions at [21]-[22], indictable matters in Queensland may potentially be dealt with in the Supreme Court, in the Children's Court before a judge or summarily in the Children's Court, with the jurisdiction linked to the maximum penalty for the offence.

¹¹ *Children (Criminal Proceedings) Act 1987* (NSW), s33(1)(g).

¹² As a general principle, when federal jurisdiction is invested in a state or territory court, it is invested subject to any limits on the jurisdiction of that court, as set out in s39(2) of the *Judiciary Act 1903*.

¹³ *Children, Youth and Families Act 2005* (Vic), s586; *Sentencing Act 1991* (Vic) s32.

¹⁴ These orders are available to the Children's Court under the *Children, Youth and Families Act 2005* (Vic) but can only be imposed by the County or Supreme Court pursuant to the *Sentencing Act 1991* (Vic).

¹⁵ *Sentencing Act 1991* (Vic), s32(2C).

¹⁶ *Crimes Act 1914* (Cth), s20AB and *Crimes Regulations 1900* (Cth), Reg 6.

¹⁷ *Atanackovic v The Queen* (2015) 45 VR 179 at [82] – [87].

¹⁸ *Children, Youth and Families Act 2005* (Vic), ss412, 413.

26. Section 149 of the *Youth Justice Act 1992* (Cth) (YJA) provides, “a court that sentences a child for an offence must sentence the child under this part” (referring to Part 7 of the YJA).¹⁹ Part 7 applies to all courts that sentence a child in Queensland and is intended to operate as a code.²⁰ Under Part 7 of the YJA, a court in Queensland has no power to sentence a child to imprisonment, only detention.
27. Section 39(2) of the *Judiciary Act 1903* confers federal jurisdiction on state courts “within the limits of their several jurisdictions, whether such limits are as to locality, subject-matter or otherwise”. While s149 of the YJA is headed “Jurisdiction to sentence child exclusive”, the term ‘jurisdiction’ is not used in s149 and it is arguable that this provision is a limit on powers, not jurisdiction, as meant by the *Judiciary Act 1903*.
28. In any event, even if s149 is not found to be a jurisdiction-limiting provision, the CDPP considers that ss149, 175 and 176 of the YJA will be picked up and applied via s20C of the *Crimes Act 1914* and/or s68 of the *Judiciary Act 1903*, unless the Commonwealth has expressly or by implication made a contrary provision.²¹
29. As a result, the maximum period of detention that could be imposed on a juvenile offender charged with a terrorism offence in any Queensland court is as follows:
- a) For a terrorism offence punishable by a maximum penalty of less than 14 years’ imprisonment:
 - 1 years’ detention if the Children’s Court is not constituted by a judge; or
 - the shorter of half the maximum penalty or 5 years’ imprisonment where the court is constituted by a judge;²²
 - b) For a terrorism offence punishable by more than 14 years’ imprisonment but less than life – 7 years’ detention;²³
 - c) For a terrorism offence punishable by life imprisonment – 10 years’ detention, unless the offence involved the commission of violence and the court “*considers the offence to be a particularly heinous offence having regard to all the circumstances*”, which would allow detention up to life imprisonment to be imposed.²⁴
30. As the sentence of detention would be imposed under state law, not the *Crimes Act 1914*, Commonwealth provisions concerning non-parole periods, currency and cumulation and release on parole would not be applicable.
31. The CDPP considers it arguable that the scheme of Commonwealth law cannot accommodate the application of a state law which would preclude all courts in the state from sentencing an offender in a particular class to a term of imprisonment, in all circumstances. Where the Commonwealth Parliament has provided that an offence is punishable by imprisonment, a state law which would

¹⁹ Section 60 provides “This Act does not affect the jurisdiction a court has apart from this Act in relation to a child charged with an offence, unless this Act otherwise provides.”

²⁰ *Youth Justice Act 1992* (Qld), s2; *R v MBQ; ex parte A-G (Qld)* [2012] QCA 20.

²¹ *Putland v R* (2004) 218 CLR 184, [7].

²² *Youth Justice Act 1992* (Qld), s175(1)(g).

²³ *Youth Justice Act 1992* (Qld), s176(2).

²⁴ *Youth Justice Act 1992* (Qld), s176(3). The CDPP queries whether a preparatory terrorist offence would constitute a matter that “involves the commission of violence against a person”.

prevent all courts in the state from imposing a sentence of imprisonment would arguably be inconsistent with the scheme of Commonwealth law.

32. Section 16A of the *Crimes Act 1914* requires a court sentencing a federal offender to impose a sentence of a severity appropriate in all the circumstances, and that the court must take into account (amongst other things) the need for the offender to be adequately punished, and the need for specific and general deterrence. It could be argued that a state law that would effectively preclude all Queensland courts applying s16A in any circumstance could be regarded as inconsistent with that provision. However, in the absence of any authority, the position remains uncertain.
33. The CDPP considers that the situation in Queensland provides a key example of a potential inconsistency between states which could arise in dealing with juvenile terrorism offenders.

Section 20AB options

34. The CDPP notes for completeness that options available for adult offenders which would be picked up by s20AB of the *Crimes Act 1914*, such as community service order and intensive correction order, are not available for juvenile federal offenders in Queensland as the *Penalties and Sentences Act 1992* (Qld) does not apply to children.²⁵

Sentencing options in Western Australia

35. In Western Australia, there is no procedure to allow the court to commit a matter involving a juvenile offender to a higher court, contrary to the wishes of the offender.²⁶ A child may elect to have a more serious offence dealt with in the relevant superior court or the Court may transfer a matter involving an indictable offence if the offender has attained the age of 18.²⁷ Otherwise, the Children's Court can deal with any offence alleged to be committed by a child.
36. An indictable offence which remains in the Children's Court does not proceed on indictment and is not before a jury, but will attract indictable procedures and penalties.²⁸ The Children's Court is able to impose a range of penalties up to full time imprisonment.²⁹
37. Section 50 of the *Young Offenders Act 1994* (WA) (YOA) provides that where the Children's Court sentences an offender under the age of 17, the court must dispose of the matter "*in one of the ways provided for in this Part*". Sentencing options are similarly prescribed for offenders aged between 17 and 18 (s50A). This approach is similar in some respects to the approach in Queensland, where the Act purports to exclusively provide for the manner in which a child may be sentenced. This is in contrast to other jurisdictions, where a higher court retains its power to deal with a child as an adult in some circumstances.³⁰

²⁵ *Penalties and Sentences Act 1992* (Qld), s6.

²⁶ *Children's Court Act 1988* (WA), s19B.

²⁷ *Children's Court Act 1988* (WA), s19D.

²⁸ *Children's Court Act 1988* (WA), s19B(4). The matter will proceed "*as if the prosecution notice were an indictment, and the hearing were a trial on indictment*", s19B(4)(c).

²⁹ *Young Offenders Act 1994* (WA), s118.

³⁰ *Children (Criminal Proceedings) Act 1987* (NSW), s17 and 18; *Young Offenders Act 1993* (SA), s29; *Children, Youth and Families Act 2005* (Vic), s586; *Youth Justice Act* (NT), s82, s83(5).

38. While the Children’s Court in Western Australia can impose a sentence of imprisonment pursuant to s118 of YOA, the provision refers specifically to imprisonment imposed under Part 13 of the *Sentencing Act 1995* (WA).³¹ In light of these provisions, and the provisions stipulating the sentencing options available for young people (ss50 and 50A), the CDPP considers there is some doubt as to whether *Crimes Act 1914* sentencing options would be available for a juvenile offender sentenced in Western Australia. However, unlike the position in Queensland, the Children’s Court in Western Australia can impose a term of imprisonment and there is no limitation on the period of imprisonment that can be imposed.³²

Sentencing options in South Australia

39. As noted in the CDPP’s submission at [24]-[25] charges against a juvenile offender can be committed to a higher court where the Youth Court determines the youth should be dealt with as an adult. Charges laid against a juvenile offender for a ‘major indictable offence’ in the Magistrates’ Court can also be committed to a higher court in certain circumstances. Therefore a Commonwealth terrorism offence committed by a juvenile in South Australia could potentially be dealt with in the Youth Court, District Court or Supreme Court.
40. Where a juvenile offender is sentenced in the District Court or Supreme Court in South Australia, the court may deal with the youth as an adult, exercise the powers of the Youth Court to sentence, or remand the youth to the Youth Court for sentencing.³³
41. If a matter involving a Commonwealth terrorism offence was finalised in the Youth Court, the court would have the same powers to sentence the youth as the District Court,³⁴ subject to certain limitations which are set out in the *Young Offenders Act 1993* (SA) (YOA). For example, s23 precludes the Youth Court from imposing a sentence of imprisonment,³⁵ and imposes maximum durations on the periods of detention in a training centre or home detention (s23(2) and (3)). The maximum penalty which can be imposed by the Youth Court is detention in a training centre for three years, although in some circumstances, part or the whole of that sentence may or must be served in a prison.³⁶

Home detention and intensive corrections orders in South Australia

42. The YOA allows the Youth Court to sentence a youth to home detention or a community service order, with limitations on the length of the order or amount of hours that can be imposed.³⁷ These limitations would appear to not apply to a youth being sentenced as an adult in the District or Supreme Court.³⁸ Where a youth is sentenced by the District or Supreme Court, s20AB of the *Crimes Act 1914* will make certain state sentencing options available for federal juvenile offender, including community service, home detention and intensive correction orders.

³¹ *Young Offenders Act 1994* (WA), s118.

³² *Young Offenders Act 1994* (WA), s118.

³³ *Young Offenders Act 1993* (SA), s29.

³⁴ *Young Offenders Act 1993* (SA), s22.

³⁵ *Young Offenders Act 1993* (SA), s23(1), unless they child is already in prison, previously served a sentence in prison or the sentence of detention would extend beyond the child’s 21st birthday.

³⁶ *Young Offenders Act 1993* (SA), s23(6).

³⁷ *Young Offenders Act 1993* (SA), s23(2) and 25.

³⁸ *Young Offenders Act 1993* (SA), s4 define “the Court” as the Youth Court of South Australia.

43. However, pursuant to the *Sentencing Act 2017* (SA), home detention and intensive corrections orders can only be imposed where the court imposes a sentence of imprisonment.³⁹ As noted above, s20AB(6) of the *Crimes Act 1914* prevents a court from passing a sentence or making an order involving “detention or imprisonment” in respect of the conviction of a person of a minimum non-parole offence in s19AG. Therefore the CDP considers that these sentencing options would not be available when a juvenile federal offender is sentenced as an adult by the District Court or Supreme Court in South Australia for terrorism offences due to the combined effect of s20AB(6) and 19AG of the *Crimes Act 1914*. Section 70 of the *Sentencing Act 2017* (SA) also makes home detention unavailable for a defendant who is being sentenced for “an offence involving a terrorist act”, as defined in the *Terrorism (Commonwealth Powers) Act 2002* (SA).
44. The option of home detention may remain available however if the youth is sentenced under s23(2)(b) of the YOA on the basis that this option is picked up by s20C and not subject to the limitation in s20AB(6). Section 70 of the *Sentencing Act 2017* (SA) would also appear not to apply to a sentence of home detention imposed under the YOA.⁴⁰

Sentencing options in Tasmania

45. In Tasmania, the Youth Justice Division of the Magistrates’ Court has jurisdiction to deal with all matters other than certain prescribed state offences. As Commonwealth terrorism offences are not prescribed offences under the *Youth Justice Act 1997* (Tas) (YJA), these matters are within the jurisdiction of the Youth Justice Division of the Magistrates’ Court unless the child or their guardian objects.⁴¹ The maximum penalty that can be imposed by the Youth Justice Division where the offender is a child at the time of sentence is two years detention.⁴²
46. If the youth is over 18 at the time of sentence, s161A of the YJA⁴³ allows the Youth Court to exercise the powers of the Court of Petty Sessions under the *Sentencing Act 1997* (Tas). The maximum term of imprisonment that can be imposed by the Court of Petty Sessions is 12 months’ imprisonment for the first offence and five years for the second or subsequent offence,⁴⁴ where the offence is a “crime triable summarily”. Part VIII of the *Justices Act 1959* (Tas) sets out a number of Tasmanian offences which are triable summarily. There are no Commonwealth offences listed, so it is unclear whether s4J of the *Crimes Act 1914* might have application, or whether the Commonwealth matter would be deemed a summary offence by virtue of s161(2B) of the *Youth Justice Act 1997* (Tas).⁴⁵

³⁹ *Sentencing Act 2017* (SA), s71 and 81.

⁴⁰ Section 70 restricts the exercise of powers under Division 7, subdivision 1 of the *Sentencing Act 2017* (Cth).

⁴¹ *Youth Justice Act 1997* (Tas), s3 and s161.

⁴² *Youth Justice Act 1997* (Tas), s81. The CDP considers that an ex officio indictment would likely be available, however notes the potential difficulties with this approach as outlined in its response to questions.

⁴³ Read in conjunction with ss103 and 47(ha) of the *Youth Justice Act 1997* (Tas).

⁴⁴ *Sentencing Act 1997* (Tas), s13.

⁴⁵ “If a youth referred to in subsection (2) is willing to be tried by the Court and the youth’s guardian, if present, does not object to the youth being so tried, the section creating the offence is taken to have created a simple offence and the Court must proceed to hear and determine the charge.”

Sentencing options for juvenile terrorism offenders in the ACT

47. In the ACT, the juvenile sentencing options are sourced from the same legislation that applies to adult offenders, being the *Crimes (Sentencing) Act 2005 (ACT) (CSA)*. The CSA set out some additional provisions which modify the sentencing options for young offenders.⁴⁶
48. The CSA places restrictions on the availability of sentencing options for a ‘young offender’,⁴⁷ depending on the court imposing sentence. The Children’s Court in the ACT cannot impose a term of imprisonment longer than two years⁴⁸ and the Supreme Court cannot sentence a young offender to imprisonment for life.⁴⁹ Certain sentencing options are also unavailable for ‘young offenders’; for example, intensive corrections orders are only available for adult offenders.⁵⁰
49. If a matter involving a juvenile terrorism offender was dealt with in the ACT Supreme Court, the CDPP considers the court could impose a sentence option under the *Crimes Act 1914* or *Crimes (Sentencing) Act 2005 (ACT)*, where that option was not inconsistent with or exhaustively covered by a *Crimes Act 1914* option.
50. The CSA only uses the term “imprisonment” to describe the custodial option for young offenders, as distinct from “detention”, which is used in many other jurisdictions.⁵¹ As noted above at paragraph [12], the CDPP considers that imprisonment is exhaustively covered by the Commonwealth sentencing laws. It appears likely therefore that a young offender in the ACT would need to be sentenced to imprisonment under the *Crimes Act 1914*⁵² rather than under s10 of the *Crimes (Sentencing) Act 2005 (ACT)*. If this were the case, s19AG would apply, in addition to other provisions in Part IB relating to fixing terms of imprisonment. The CDPP considers that any contrary territory law, such as s133G(4), which prevents a court setting a non-parole period, could not apply.⁵³

Sentencing options for juvenile terrorism offenders in Northern Territory

51. In the Northern Territory, offences punishable by life imprisonment cannot be dealt with in the Youth Justice Court and must be committed to the Supreme Court for trial or sentence. The Youth Justice Court may also commit any indictable matter to the Supreme Court where it determines it is not appropriate to determine the matter summarily⁵⁴ or the accused does not consent to being dealt with summarily.⁵⁵ Therefore a terrorism offence punishable by a term of less than life imprisonment could potentially be dealt with in either the NT Supreme Court or the Youth Justice Court.

⁴⁶ *Crimes (Sentencing) Act 2005 (ACT)*, s133A.

⁴⁷ A young offender under the *Crimes Sentencing Act 2005 (ACT)* is a person who was under 18 when the offence was committed, s133B.

⁴⁸ *Crimes Act 1900 (ACT)*, s375(16)(a).

⁴⁹ *Crimes (Sentencing Act) 2005 (ACT)*, s133G(4).

⁵⁰ *Crimes (Sentencing Act) 2005 (ACT)*, s11

⁵¹ If a young offenders is under 21 when sentence is imposed, the sentence of imprisonment must be served by “full-time detention at a detention place”.

⁵² The length of imprisonment that could be imposed would remain subject to the jurisdiction of the court imposing sentence.

⁵³ *Hili v R* (2010) 242 CLR 520 [52].

⁵⁴ *Youth Justice Act (NT)*, s56.

⁵⁵ *Youth Justice Act (NT)*, s55.

52. The Supreme Court, in sentencing a youth, may exercise in addition to its powers, the powers of the Youth Justice Court.⁵⁶ A juvenile terrorism offender sentenced in the Supreme Court could therefore be sentenced to a penalty under the *Youth Justice Act* (NT) or a penalty under Part IB of the *Crimes Act 1914*, including any relevant sentencing options available under s20AB of the *Crimes Act 1914*.
53. In the Northern Territory, the following options are available via s20AB of the *Crimes Act 1914*: community work orders, community based orders, home detention orders and community custody orders. Home detention and community custody orders can only be imposed where an offender is sentenced to a term of imprisonment,⁵⁷ therefore they would be sentences involving 'detention or imprisonment' and thus unavailable due to the combined effect of s19AG and s20AB(6) of the *Crimes Act 1914*. Community work orders and community based orders would therefore be the only additional options available for a juvenile terrorism offender sentenced in the NT Supreme Court.
54. If a matter involving a terrorism offence was not committed to the NT Supreme Court and was finalised in the Youth Justice Court, the maximum penalty that could be imposed is dependent on the age of the offender. The Youth Justice Court is unable to impose imprisonment on a child under the age of 15. A maximum period of 12 months' detention can be imposed on a child under 15. A period of two years' detention or imprisonment can be imposed on a child older than 15.⁵⁸

⁵⁶ *Youth Justice Act* (NT), ss82, 83(5).

⁵⁷ *Sentencing Act* (NT), ss44 and 48A(1)(b).

⁵⁸ *Youth Justice Act* (NT), s83(2).

Sentencing options for a juvenile convicted of a terrorism offence with a maximum penalty of 15 years' imprisonment

Commonwealth - sentencing options			
Act	Section	Sentencing option	Notes
Crimes Act 1914 (Cth)	s 19B	Dismissal of charge	
	s 19B	Bond without conviction	Maximum period of three years
	ss 4B + 4D	Fine with conviction	
	s 20(1)(a)	Bond with conviction	Maximum period of five years
	s 19AB, 19AG	Imprisonment with non parole period	
NSW - sentencing options			
Act	Section	Sentencing option	Notes
Children (Criminal Proceedings) Act 1987 (NSW)	<i>s 33(1)(a)</i>	<i>Discharge without conviction, optionally with caution or good behaviour bond⁵⁹</i>	
	<i>s 33(1)(b)</i>	<i>Good behaviour bond</i>	Maximum period of 2 years
	<i>s 33(1)(c)</i>	<i>Fine</i>	
	<i>S 33(1)(d)</i>	<i>Fine and good behaviour bond</i>	
	s 33(1)(c2)	Adjournment to assess person's capacity and prospects for rehabilitation, to allow person to demonstrate rehabilitation, or for other appropriate purpose	
	s 33(1)(e), (e1), (f1)	Probation, with or without fine and/or community service	Maximum period of 2 years
	s 33(1)(f)	Community service order	Pursuant to s 5 of <i>Children (Community Service Orders) Act 1987 (NSW)</i> . Hours depend on the age of the offender.
	s 33(1B)	Suspended custodial order with good behaviour bond	

⁵⁹ Sentencing options in italicised blue text are those which the CDPP has identified as potentially unavailable due to the option being covered by or inconsistent with an existing *Crimes Act 1914 (Cth)* sentencing provision.

	s33(1)(g)	Full time custodial order in a detention centre	Maximum period of detention that can be imposed is 2 years (3 years if cumulating, s33A(5); s33AA(5))
Victorian - sentencing options			
Act	Section	Sentencing option	Notes
<i>Children, Youth and Families Act 2005 (VIC)</i>	<i>s360(1)(a)</i>	<i>Dismissal</i>	
	<i>ss360(1)(b), 363</i>	<i>Non-accountable Undertaking</i>	
	<i>ss 360(1)(c), 365</i>	<i>Accountable Undertaking</i>	
	<i>ss 360(1)(d), 367, 368</i>	<i>Good Behaviour Bond</i>	
	<i>ss 360(1)(e), 373</i>	<i>Fine</i>	
	<i>ss 360(1)(f), 380</i>	Probation	
	<i>ss 360(1)(g), 387</i>	Youth Supervision Order	
	<i>ss 360(1)(h), 397</i>	Youth Attendance Order	
	<i>ss 360(1)(ha), 409B</i>	Youth Control Order	
<i>Sentencing Act 1991 (VIC)</i>	s 32	Detention in Youth Residential Centre	Maximum period is 4 years when sentenced in a higher court (s32(3)(b)) If the offender is convicted of an offence contrary to Division 101 <i>Criminal Code</i> (Cth), the court can only impose this option where satisfied exceptional circumstances exist
	s 32	Detention in Youth Justice Centre	
<i>Sentencing Act 1991 (Vic) and Crimes Act 1914 (Cth)</i>	Part 3A and 3C and S20AB	Community Corrections Order	

Queensland - sentencing options ⁶⁰			
Act	Section	Sentencing option	Notes
Youth Justice Act 1992 (Qld)	s 175(1)(a)	Reprimand	
	<i>ss 175(1)(b), 188</i>	<i>Good behaviour order</i>	Maximum of 1 year
	<i>ss 175(1)(c), 190-192</i>	<i>Fine</i>	
	ss 175(1)(d), 193	Probation	Where offence punishable by a maximum penalty of more than 14 years, maximum term of probation is 3 years (s176(1)(a))
	ss 162, 164, 175(da), (db), 192B	Restorative justice order	
	ss 175(e), 195, 196	Community service order	Hours that can be imposed are dependent on age at the time of sentence
	ss 175(f), 203, 204	Intensive supervision order	Only available if offender is under 13 at the time of sentence
	ss 175(g), 176, 220, 221	Detention and/or Conditional release order	Maximum period of detention that can be imposed is 7 years (s176(2)) where maximum penalty greater than 14 years but less than life
Western Australia - sentencing options ⁶¹			
Act	Section(s)	Sentencing option	Notes
Young Offenders Act 1994 (WA)	s24-34	Referral to Juvenile Justice team by court after charge	
	inherent power to adjourn	Court conferencing	
	s66	<i>Refrain from punishment</i>	

⁶⁰ As outlined in [14] of this Annexure, the CDPP considers there may be some uncertainty as to the availability of a sentencing option denoted in italicised blue text insofar as they are options exhaustively covered by the *Crimes Act 1914*. However, as discussed at [26]-[30], as *Youth Justice Act 1992 (Qld)* appears to operate as a code it is possible that *Crimes Act 1914* sentencing options are excluded in which case all state options would be available.

⁶¹ As discussed at [37] of this Annexure, it is possible that the *Young Offenders Act 1994 (WA)* excludes *Crimes Act 1914* sentencing options making all state options available.

	s67-68	<i>Refrain from punishment subject to undertaking</i>	
	s69	<i>Recognisance for good behaviour</i>	Up to 1 year
	s70	Refrain from punishment on security by responsible adult	
	s71	<i>Fine</i>	Maximum amount \$2000
	s73-101	Youth Community Based Order (YCBO) with or without sentence of detention (if with detention, is known as a conditional release order 'CRO')	
	s98	Intensive Youth Supervision Order (IYSO)	
	s118	Sentence of detention or sentence of imprisonment under Part 13 of the <i>Sentencing Act 1995</i>	Cannot impose suspended or conditional suspended imprisonment
<i>Sentencing Act 1995 (WA)</i>	61-67	Community based order	Must be over 17 but under 18 at the time of sentence (s50A of the <i>Young Offenders Act 1994</i>)
	68-75	Intensive supervision order	
South Australia - sentencing options			
Act	Section	Sentencing option	Notes
<i>Young Offenders Act 1993 (SA)</i>	s 26(2)	Enter into an 'obligation'	
	s 25	Community service	Up to 500 hrs
	s 24	<i>Fine</i>	Up to \$2,500
	s 23(2)(b)	Home detention	
	s 23(2)(c)	Detention and home detention	Detention maximum 2 years, home detention maximum 12 months
	s 23 (2)(a)	Detention in training centre	Maximum 3 years.
	<i>Pt 2, Div 3</i>	<i>Family Conference</i> ⁶²	
	s 23	<i>Discharge without penalty</i>	

⁶² The availability of this option may be impacted by the decision in *Newman v A* (1992) 9 WAR 14.

Sentencing Act 2017 (SA)	s 24	Imposition of penalty without conviction	
	Part 5	Fine	
	s 29	Deferral of sentence for rehabilitation and other purposes	
	Part 4, Div 2	Community service order	
	Part 4, Div 1	Discharge of defendant on entering bond	
	Part 4, Div 1	Suspended sentence upon entering bond	
	Part 3, Div 1	Imprisonment	
Tasmania - sentencing options			
Act	Section	Sentencing option	Notes
Youth Justice Act 1997 (Tas)	Division 4	Community Conference ⁶³	
	s47a	Dismiss the charge and impose no further sentence	
	s47b	Dismiss the charge and reprimand	
	s47c, Div 6	Dismiss the charge and require undertaking of good behaviour	
	s47d, Div 7	Release youth and adjourn proceedings on condition	
	s47e, Div 8	Fine	
	s47f, Div 9	Probation order	Maximum period 2 years
	s47g, Div 10	Community Service	Maximum hours based on age – 70 up to 15 years; 210 hours if over 16 (s72(1))
	s47 (ha)	Order under s161A	Applies where youth is over 18 and allows court to exercise powers of court of petty sessions and sentence under the <i>Sentencing Act 1997</i> (Tas)

⁶³ The availability of this option may be impacted by the decision in *Newman v A* (1992) 9 WAR 14.

	s47j	Adjourn proceedings, grant bail and defer sentence until a date specified	
	S47(2), Div 12	Suspended detention order	
	s47(h), Div 11	Detention order	Maximum period 2 years where a child at the time of sentence
ACT - sentencing options			
Act	Section	Sentencing option	Notes
Crimes (Sentencing) Act 2005 (ACT)	s17	<i>Non-conviction order, with or without a good behaviour order</i>	Maximum 3 years
	s23, s133I	Place restriction or non-association orders	Up to 12 months for juvenile offenders
	s133Y	Accommodation Order	
	s14	<i>Fine</i>	
	s13, s133M	<i>Good behaviour order, without community service or rehabilitation condition.</i>	
	s13, pt 6.1/6.2, s133L	Good behaviour order, with community service or rehabilitation condition.	
	s12	<i>Suspended sentence with good behaviour bond.</i>	
	s10, s133G, s133H	<i>Full time custody</i>	To be served in a detention centre where offender under 21
	s29	<i>Combination sentences</i>	
NT - sentencing options			
Act	Section	Sentencing option	Notes
Youth Justice Act (NT)	s83(1)(a)	<i>Dismiss the charge</i>	
	s83(1)(b)	<i>Discharge without penalty</i>	
	s83(1)(c)	Adjourn for not exceeding 6 months then if no further offending, discharge without penalty	
	s83(1)(d)	Adjourn for not more than 12 months from finding of guilt on bail for the purposes of assessing capacity and prospects of rehabilitation, demonstrated rehabilitation or any other purpose	

	s83(1)(e)	Order to participate in program approved by Minister with or without conviction	
	s83(1)(f)	<i>Release on security not exceeding 2 years to be of good behaviour and observe conditions</i>	
	s83(1)(g)	<i>Fine</i>	
	s83(1)(h)	Community work order	
	s83(1)(i)	Detention or imprisonment, which may be suspended wholly or partly	Maximum period of detention is 12 months for a youth who is less than 15 years old or 2 years detention or imprisonment for a youth who is over 15. Imprisonment is not available for a youth under 15.
	s83(1)(j)	Detention or imprisonment, suspended on the youth entering into an alternative detention order	
	s83(1)(k)	Detention or imprisonment to be served periodically under a periodic detention order	
	s83(1)(l)	Detention or imprisonment	
	s83(1)(m)	Any other order in respect of the youth that another court could make if the youth were an adult convicted of that offence other than a community based order or community custody order under the <i>Sentencing Act</i>	
<i>Sentencing Act (NT)</i>	Division 4A of Part 3	Community based order	Cannot be imposed in relation to a violent offence (s39A(1)(b))
	Division 4 of Part 3	Community work order	