Law Council
OF AUSTRALIA

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

Independent National Security Legislation Monitor

27 June 2018

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About the Law Council of Australia

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The Law Council advises governments, courts and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world.

The Law Council was established in 1933, and represents 16 Australian State and Territory law societies and bar associations and the Law Firms Australia, which are known collectively as the Council's Constituent Bodies. The Law Council's Constituent Bodies are:

- Australian Capital Territory Bar Association
- Australian Capital Territory Law Society
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar
- Law Firms Australia
- The Victorian Bar Inc
- Western Australian Bar Association

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The Secretariat serves the Law Council nationally and is based in Canberra.

Acknowledgement

The Law Council is grateful for the assistance of its National Criminal Law Committee, National Human Rights Committee, the New South Wales Bar Association and the Law Society of New South Wales in the preparation of this submission.

Executive Summary

1. The Law Council is pleased to participate in the Independent National Security Legislation Monitor's (**INSLM**) review of the prosecution and sentencing of children for Commonwealth terrorist offences (**the Review**), including:

    - the prosecution of children under section 20C of the *Crimes Act 1914* (Cth) (**Crimes Act**);
    - the presumption against bail for those charged with particular offences relating to terrorism, including children, under section 15AA of the Crimes Act; and
    - the sentencing of children under section 19AG of the Crimes Act.

2. The Law Council welcomes the Review as consistent with its recommendation to the Parliamentary Joint Committee on Intelligence and Security Inquiry into the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017.[1]

3. This submission seeks to provide the Law Council's views in relation to a number of questions that the INSLM has raised with the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation (**the Australian Government agencies**) to assist the INSLM's review.[2] It also supplements these views where required on other matters relevant to the Review. The Law Council is grateful for the opportunity to consider the Australian Government agencies' submissions and the INSLM's Background Papers in preparation of this submission.

4. The key recommendations of this submission include:

    - the outstanding Australian Law Reform Commission (**ALRC**) recommendations should be implemented, particularly the development of best practice guidelines for juvenile justice which include federal minimum standards that reflect the purposes, principles and factors stated in the juvenile justice legislation of the states or territories, together with the principles that the well-being of the young person shall be a guiding consideration, and detention should be used as a measure of last resort, and only for the shortest appropriate period;
    - the Victorian Government's Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers recommendations that rehabilitation and reintegration programs should be developed and funded across the States and Territories and offered as alternatives to imprisonment, to an accused person on remand or bail, and/or during the period they serve their sentence in custody;
    - there should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal, particularly in the case of children;
    - section 15AA should be amended to provide that the requirement for exceptional circumstances imposed by the section does not apply to a child charged with any of the offences to which the section 15AA applies;

[1] Law Council of Australia Submission No 5 to the Parliamentary Joint Committee on Intelligence and Security, *Review of the National Security Legislation Amendment (Espionage and Foreign Interference) Bill 2017* (22 January 2018), 15.

[2] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, submission to the Independent National Security Legislation Monitor Review of the prosecution and sentencing of children for Commonwealth terrorist offences (June 2018).

- section 15AA should also provide that, when bail is being considered for a child charged with a Commonwealth offence, the best interests of the child shall be a primary consideration;
- the INSLM find that section 19AG of the Crimes Act should be repealed on the basis that it:
    (a) is an attenuated form of mandatory sentencing which interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime; and
    (b) may be inconsistent with Australia's international human rights obligations;
- if section 19AG is to be retained, children should be exempted from its operation; and
- any review undertaken by the INSLM regarding when a Children's Court should have jurisdiction over federal terrorism matters should inform the development of best-practice guidelines for federal children terrorist offenders.

Context

ALRC Report 84: 'Seen and heard: priority for children in the legal process' and ALRC Report 103: 'Same Crime, Same Time: Sentencing for Federal Offenders'

5. The Law Council notes the recommendations of the ALRC in their Report No 84 *Seen and heard: priority for children in the legal process* (**the Seen and Heard Report**) and Report No 103 *Same crime, same time: sentencing for federal offenders* (**the Sentencing Federal Offenders Report**).

6. Due to the small number of young federal offenders, and the resources required to develop federal juvenile justice legislation, a federal children's court and a federal juvenile justice administration, the ALRC in the *Sentencing Federal Offenders Report* considered it would be impractical to adopt a fully federal system for the sentencing, administration and release of federal offenders.[3] The Law Council supports this position.

7. However, the ALRC was of the view that some change was required of the existing youth justice system to promote greater consistency of approach in sentencing young federal offenders.[4] In particular, they recommended that federal minimum standards could be developed to ensure the adequacy of laws and practices with respect to the sentencing, administration and release of young federal offenders. These standards would ensure the traditional role of state and territory systems of juvenile justice were maintained.[5] They recommended the standards include, among other things, the definition of young person and that the court is to apply the purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory, together with the principle that the well-being of the young person shall be a guiding consideration, and detention should be used as a measure of last resort, and only for the shortest appropriate period.[6]

8. In the *Sentencing of Federal Offenders Report*, the ALRC noted the outstanding recommendation of the previous ALRC *Seen and Heard Report* that national standards for juvenile justice be developed by the proposed federal Office for Children (**OFC**) in consultation with the relevant state and territory authorities, the legal profession, community groups, peak bodies such as juvenile justice advisory councils, and young people.[7]

9. Following a recommendation in the *Sentencing Federal Offenders Report*,[8] the Law Council notes that in 2009 the Australasian Juvenile Justice Administrators (**AJJA**), in partnership with the Australian Institute of Criminology, developed the AJJA Juvenile Justice Standards 2009. These were followed in 2014 by the Principles of Youth Justice in Australia (**the Principles**). While the Principles reflect international obligations relating to the youth justice system in Australia,[9] the Law Council notes that

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[3] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders* Report No 103 (2006), 637-638.
[4] Ibid 638.
[5] Ibid 639.
[6] Ibid 658.
[7] Australian Law Reform Commission No 84 *Seen and heard: priority for children in the legal process* (19 November 1997, 248.
[8] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders* Report No 103 (13 September 2006), 665.
[9] Australasian Juvenile Justice Administrators *Principles of Youth Justice in Australia* (October 2014) http://sharepoint.ajja.org.au/Home/PYJA/PYJ%20Brochure%20(October%202014).pdf.

they do not comprehensively reflect important purposes, principles and factors stated in the juvenile justice legislation of the relevant state or territory, together with the principles that the well-being of the young person shall be a guiding consideration; and detention should be used as a measure of last resort, and only for the shortest appropriate period, as referred to in paragraph [7] above.

10. In relation to section 20C of the Crimes Act the ALRC referenced in the *Sentencing of Federal Offenders Report* the 1991 Gibbs Committee Report which recommended that section 20C be the subject of a separate inquiry that would examine all relevant state and territory legislation in relation to the trial and punishment of young federal offenders.[10] The ALRC noted that while their report made recommendations in relation to the sentencing, administration and release of young offenders, further work needed to be carried out in relation to the pre-trial and trial aspects of the treatment of young federal offenders.[11]

Recommendation

- **the outstanding ALRC recommendations should be implemented, particularly the development of best practice guidelines for juvenile justice which include federal minimum standards that reflect the purposes, principles and factors stated in the juvenile justice legislation of the states or territories, together with the principles that the well-being of the young person shall be a guiding consideration; and detention should be used as a measure of last resort, and only for the shortest appropriate period.**

What is the relevance of the foreign fighter phenomenon to the threat posed in Australia in the commission of terrorism offences?

11. In its 2016-2017 Annual Report, the Australian Security Intelligence Organisation (**ASIO**) noted a concern about the influence of ISIL in the South-East Asian region and that in relation to Australian foreign fighters in Syria and Iraq:

> *A very small number may return to Australia voluntarily, but are unlikely to hold valid travel documents, so will find this difficult. Others may be returned through deportation. It is unlikely large numbers will return in concentrated periods, but rather small numbers periodically—this will include non-combatant women and* ***children*** [emphasis added].[12]

12. ASIO provided the statistics of foreign fighters from Australia in the Australian Government agencies' joint submission to questions from the INSLM:

> *Around 220 Australians have travelled to join conflicts in Syria and Iraq since 2012 These Australians are part of a group of over 40,000 foreign fighters who have travelled to the region since the conflict began. While it is estimated that at least 72, and possibly as many as 90 Australians have been killed in the conflict, some 110 Australians have fought for or engaged*

[10] H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) Attorney-General's Department, [12.50], [12.59] cited in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing for Federal Offenders* Report No 103 (2006), 634.
[11] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders* Report No 103 (2006) 634.
[12] Australian Security Intelligence Organisation *Annual Report 2016-17* (October 2017), 20.

with terrorist groups in Syria and Iraq and are believed to still be in that region.

Around 40 have already returned to Australia, and some of these individuals remain a significant security concern. Some of the returnees will continue to support the violent ideology of Islamic State and may seek to conduct terrorist acts or radicalise others. Those returning may have acquired a greater capability and propensity for violence from their time in conflict zones, and may also hold positions of greater standing which they could use to influence, radicalise and recruit others. The threat posed by such individuals may take some time to manifest.[13]

13. Other reports estimate that around 70 Australian children are in Syria and Iraq and are affiliated with Islamic State.[14]

14. The Australian Federal Police (**AFP**) and ASIO have identified that while the threat of mass casualty attacks has not gone away, the threat of smaller scale attacks by lone actors is increasing.[15] Similarly, the authors of the 2017 Independent Intelligence Report Mr Michael L'Estrange AO and Mr Stephen Merchant PSM stated that particular challenges emerging in Australia's national security environment include:

…the activities and networks of Australian 'foreign fighters' involved in international extremist and terrorist causes, the rise of 'lone wolf' assaults and the scope for low-technology terrorism attacks often facilitated online. The time taken between radicalisation and terrorist attack is shortening, further challenging intelligence agencies' detection and response capabilities.[16]

15. The INSLM has also acknowledged the threat of foreign fighters in his 2016-2017 Annual Report, stating that 'the flow of both foreign fighters and finance to overseas conflicts, and the return of foreign fighters to Australia… remain priority concerns for the national security and counter-terrorism authorities'.[17]

Children involved in terrorist incidents

16. In Australia, several children have been charged with or convicted of a terrorism offence. The Law Council notes that for the purposes of the Review 'children' means people between 10 and 17 years of age. This age range means any information relating to the prosecution or sentencing of children for terrorist offences is usually suppressed, and therefore unavailable to the public.[18] The inaccessibility of sentencing remarks for children is an important way to protect the privacy of a child

[13] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, submission to the Independent National Security Legislation Monitor Review of the prosecution and sentencing of children for Commonwealth terrorist offences (June 2018), 5.
[14] Richard Barrett, *Beyond the Caliphate: foreign fighters and the threat of returnees* (October 2017) The Soufan Centre, 24.
[15] Independent National Security Legislation Monitor *Control Orders and Preventative Detention Orders* (September 2017), 7-8.
[16] Michael L'Estrange AO and Stephen Merchant PSM *2017 Independent Intelligence Review* (June 2017) Department of Prime Minister and Cabinet, [1.11]-[1.16].
[17] Independent National Security Legislation Monitors *Annual Report 2016-2017* (October 2017), 8.
[18] A notable exception is *DPP (Cth) v MHK* [2017] VSCA 157.

offender.[19] However, it is subsequently difficult to adequately examine the current sentencing practices of children convicted of terrorist offences. Other cases in Australia have involved offenders aged 18 years old.[20] Although they are not children, a person aged up to 24 years is defined as a 'young person' or 'youth'.[21] This is because people aged under 24 years often have underdeveloped psychosocial capabilities.[22] Given the suppression orders often in place for children, the Law Council has also relied upon cases relating to 'youth' where the sentencing remarks are publicly available for the purposes of this submission. The Law Council notes that it is important that the privacy of young people in their court proceedings is maintained, particularly in order to promote rehabilitation. These comments should not be taken to be an argument against the maintenance of such measures.

17. Some notable cases that involve young offenders in Australia include *DPP (Cth) v MHK* (**MHK**)*,*[23] *R v Besim* (**Besim**),[24] *R v Alou (No. 3)* (**Alou**)[25] and *R v Alameddine* (**Alameddine**).[26]

18. In *MHK* the offender, who was 17 years old at the time of the offence, became a supporter of Islamic State following emotional and anxiety issues. He began planning a terrorist attack that involved making Improvised Explosive Devices, with the intention of detonating the bombs in the Central Business District of Melbourne or on a train or police station in order to kill and injure a significant number of people.[27] He was sentenced to seven years imprisonment with a non-parole period of five years, three months for doing acts in preparation for, or planning, a terrorist act contrary to section 101.6 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**). However, this sentence was increased on appeal to 11 years imprisonment with a non-parole period of eight years and three months.[28]

19. In *Besim,* the offender, who was 18 years old at the time of the offence, planned to drive his car into a police officer, selected at random, during ANZAC Day commemorations in 2015. He planned to publicly behead the victim, seize the officer's gun, and kill or seriously injure as many people as possible in the immediate vicinity until he himself was killed or seriously injured.[29] Since the age of 16, Besim had become increasingly radicalised, reaching the point of believing that violent jihad against all non-Muslims was justifiable.[30] He was charged under section 101.6 of the Criminal Code and received a sentence of 10 years imprisonment with a non-parole period of seven and a half years, which was subsequently increased on appeal to 14 years imprisonment with a non-parole period of 10 years and six months.

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[19] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 40(2)(vii).
[20] *R v Alou* [2018] NSWSC 221; *R v Besim* [2016] VSC 537 [168]; *DPP (Cth) v Besim* [2017] VSCA 158.
[21] Law Council of Australia, *The Justice Project: Children and Young People* (August 2017), 6, citing Council of Australian Governments, National Partnership Agreement on Legal Services (Commonwealth Attorney-General's Department, 2015) B1, Christine Coumarelos et al, Collaborative Planning Resource – Service Planning (CPR – SP) (Law and Justice Foundation of New South Wales, 2015) 29, 85.
[22] Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Australian Institute of Criminology, Trends and issues in crime and criminal justice*, 4.
[23] [2017] VSCA 157.
[24] [2016] VSC 537.
[25] [2018] NSWSC 221.
[26] [2018] NSWSC 681
[27] *The Queen v MHK* [2016] VSC 742, [12]-[37].
[28] *DPP (Cth) v MHK* [2017] VSCA 157.
[29] *Besim* [2017] VSCA 157, [5].
[30] Ibid [11]-[12].

20. In *Alou* the deceased co-offender, Farhad Mohammad,[31] was 15 years old at the time of the offence, and the offender, Raban Alou, was 18 years old. On 2 October 2015 Mohammad murdered police officer Curtis Cheng. The firearm used to kill Mr Cheng was supplied by Alou, who had been provided with the firearm by another co-offender Tala Alameddine. The NSW Supreme Court noted that the murder was a terrorist act, with Alou and Mohammed both radicalised supporters of Islamic State.[32] Alou pleaded guilty under subsections 11.2(1) and 101.1(1) of the Criminal Code that he did aid, abet, counsel or procure the commission of an offence against subsection 101.1(1) of the Criminal Code, namely that Farhad Mohammad did commit a terrorist act.[33] This was the first time an offence of aiding and abetting a terrorist act was prosecuted and subsequently sentenced in Australia, where a terrorist act was committed causing the death of a person.[34] Alou was sentenced to 44 years imprisonment, with a non-parole period of 33 years. Alameddine, the 22 year old offender who provided the loaded firearm to Alou, was sentenced to 17 years and eight months imprisonment, with 13 year and six month non-parole period, for an offence contrary to section 101.4(2) of the Criminal Code.[35]

Would there be any benefit to having trained independent support persons available for children or young people when they are being questioned, for example when their parents or guardians are simultaneously being questioned in relation to terrorism activity?

21. There is a requirement for the presence of an 'interview friend' under section 23K (subject to section 23L) of the Crimes Act when a suspect is believed to be under 18 years of age.[36] The interview friend may be a parent, guardian, legal practitioner, acceptable relative or friend, a listed Aboriginal or Torres Strait Islander support person or an independent person.[37]

22. There is presently no similar requirement where the child or young person being interviewed is not a suspect (e.g. being interviewed to obtain information or as a prospective witness).

23. The Law Council supports the availability of trained independent support persons for children or young people, suspects or not, whenever being questioned and when persons described as interview friends are not reasonably available in accordance with the scheme provided by section 23K.

[31] Publication of the young person's name is ordinarily forbidden by section 15A of the *Children (Criminal Proceedings) Act 1987 (NSW),* however there are exceptions where a judicial officer makes an order for publication in the case of a serious indictable offence.
[32] *R v Alou* [2018] NSWSC 221, [3]
[33] *Criminal Code Act (Cth)* 1995 s 100.1.
[34] *R v Alou* [2018] NSWSC 221, [7]
[35] *R v Alameddine (No. 3)* [2018] NSWSC 681.
[36] *Crimes Act 1914* (Cth) s 23K.
[37] Ibid s23K(3).

Countering Violent Extremism (CVE)

Are radicalised children (10-17) and young people (18-21) more or less likely to act violently on their extremist views? Are children and young people more or less susceptible than adults to radicalisation, and is there any discernible difference in the manner in which they are radicalised? In general, how are children and young people being radicalised?

24. The Law Council agrees with the Australian Government agencies' submission that the radicalisation process is unique to each person and there is minimal evidence available to understand how young people in particular may be radicalised.[38] Nevertheless, given that in Australia the majority of convicted jihadists are exclusively male, and on average are younger than the general criminal population, factors particular to the psychological characteristics of juvenile offending warrant particular consideration.[39]

25. Characteristics of juvenile offending are different from those of adult offending in several ways. The Australian Institute of Criminology explains:

> *…that research on adolescent brain development demonstrates that the second decade of life is a period of rapid change, particularly in areas of the brain associated with response inhibition, the calibration of risks and rewards, and the regulation of emotions.*[40]

26. Criminological research has found that younger men in particular are more likely to commit crimes because they value the thrill and are more impulsive and susceptible to peer group pressure.[41] Further, due to their immaturity, juveniles generally are at increased risk of psychosocial problems (such as mental health and alcohol and other drug problems) that can lead to and/or compound offending behaviour.[42]

27. These factors relating to a juvenile's maturity and development can also make them susceptible to the risks and influence associated with terrorist organisations. ISIL is noted as particularly effective at exercising power over young people due to these vulnerabilities.[43] Socioeconomic conditions such as poverty and other forms of deprivation have been listed as major factors to explain why a child is enlisted.[44] However, this does not explain how foreign children, especially adolescents, raised

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[38] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, Submission to the Independent National Security Legislation Monitor Review, *Submission to the Independent National Security Legislation Monitor Review of the prosecution and sentencing of children for Commonwealth terrorist offences* (June 2018), 10.
[39] Shandon Harris-Hogan, 'Violent extremism in Australia: an overview' (2017) 491 *Australian Institute of Criminology Trends and issues in crim and criminal justice*, 7.
[40] Kelly Richards 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Australian Institute of Criminology, Trends and issues in crime and criminal justice*, 4.
[41] David P. Farrington, 'Age and Crime' (1986) 7 *Crime and Justice* 189, 235; Adriana Galvan, Todd Hare, Henning Voss, Gary Glover and BJ Casey, 'Risk-taking and the adolescent brain: who is at risk?' (2007) 10(2) *Developmental science* 221.
[42] Kelly Richards, 'What makes juvenile offenders different from adult offenders?' (2011) 409 *Australian Institute of Criminology, Trends and issues in crime and criminal justice* 4, 7.
[43] Francesca Capone, ''Worse' than child soldiers? A critical analysis of foreign children in the ranks of ISIL' (2017) 17 *International Criminal Law Review* 161, 163.
[44] Ibid.

in middle-class families in peaceful and stable settings, are attracted to jihad.[45] The strong ideology attached to Islamic State (**IS**) entices young people who are unhappy with their social structure, available opportunities or the Government's principles and policies.[46] In turn, IS targets children due to the assumption they can be easily intimidated, manipulated and indoctrinated due to their age and immaturity, as they are incapable of fully understanding the consequences of their actions.[47] Social media represents the ideal medium to spread Islamist extremist ideology in order to target potential new recruits, and includes propaganda videos and other material that advertises the presence of young people in its ranks.[48]

28. Expert evidence given to the Coronial *Inquest into the deaths arising from the Lindt Café siege* (**Inquest**) regarding whether perpetrator Man Haron Monis was a terrorist provide important insights into the operation of lone terrorists, including children. Professor Bruce Hoffman gave evidence to the Inquiry to support the claim that Monis was a lone actor motivated by terrorist beliefs.[49] Professor Hoffman said that terrorist offenders may act on their own initiative or be guided by terrorist organisations, such as Islamic State.[50] He noted that IS's subsequent 'claiming' of the siege after it had occurred may align with IS's tactics and methods that seek to 'motivate and inspire individuals to commit acts of terrorism either directly on IS's behalf or in concert with and support of IS's ideology and broader political goals'.[51]

29. The Law Council notes that when considering the rights of children prosecuted or sentenced for terrorist offences, there is a challenge in acknowledging both the recruitment and exploitation of children by terrorist extremist groups,[52] and that children may become the perpetrators of terrorist offences. That is, children can be both a victim of grooming and a perpetrator of terrorist offences.[53]

30. It is the Law Council's view that children prosecuted for terrorist offences should not be treated solely as either perpetrators or victims. The law must recognise the complex reasons why a child may commit a terrorist offence by considering the young age of the offender, the reasons why they may have committed the offence, the extent to which the offender acted voluntarily or was recruited by a terrorist organisation and the extent to which the young person's immaturity at the time of their involvement in the offence contributed to the offending behaviour. Considering this context, sentencing a child terrorist offender must hold the offender accountable for their offence, while also paying attention to rehabilitating them from terrorist

[45] Ibid.
[46] Ibid.
[47] Ibid 177-178.
[48] Ibid.
[49] The Inquest agreed with this finding (State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café siege: findings and recommendations* (May 2017), [237]).
[50] State Coroner of New South Wales, *Inquest into the deaths arising from the Lindt Café siege: findings and recommendations* (May 2017), 234
[51] Ibid.
[52] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 19, 32, 34, 38; *United Nations Global Counter-Terrorism Strategy* GA Res 60/288 UNGA, 60th sess UN Doc A/RES/60/288 (20 September 2006); SC Res 2178, UN SCOR, 7272nd mtg, UN Doc SC/RES/2178 (24 September 2014), [4]; *Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict*, 54th sess, GA Res A/Res/54/263 UN GAOR (16 March 2001) Agenda Item 116(a).
[53] United Nations Office on Drugs and Crimes *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: the Role of the Justice System* (Vienna, 2017), 70; Cristina Martinez Squiers, 'How the law should view child soldiers: does terrorist pose a different dilemma?' (2015) 68 *SMU Law Review* 567.

ideology, to ultimately ensure they are not an unacceptable risk to community safety.[54]

Are radicalised children and young people more or less likely than adults to subsequently repudiate their extremist views?

31. The Law Council notes the importance that sentencing courts place on the extent to which the offender has expressed renunciation of their radical or extremist ideology that contributed to their offending in order to assess the weight to be given to community protection and rehabilitation.[55] However, there is little evidence to suggest why people support and commit terrorist acts,[56] and ideology alone is not an accurate predictor of terrorist activity.[57] Due to the comparative rarity of terrorist offending, with such offending committed by children even rarer,[58] there is minimal research available to understand terrorist behaviour and make accurate risk assessments.[59] There have been extremely limited empirical studies done and the Law Council is unaware of any studies done specific to ideology aligned with IS that could soundly base risk assessments, let alone in relation to child offenders or lone wolf offenders.

32. The sentencing court and appeal court acknowledged the young offender MHK had demonstrated repudiation of his extremist ideology.[60] This has been attributed to the counselling and support the offender received while on remand, which the court acknowledged must continue to prevent the offender relapsing to his previous extremist ideology.[61] The importance of rehabilitative programs for young terrorist offenders is discussed further below.

Are children and young people being radicalised in the juvenile justice system? Are children and young people more or less likely than adults to be radicalised once they are within the justice system?

33. The Law Council notes that due to the seriousness of the offending, terrorist offenders, regardless of age, are almost always going to be sentenced to a term of

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[54] Cristina Martinez Squiers, 'How the law should view child soldiers: does terrorist pose a different dilemma?' (2015) 68 *SMU Law Review* 567, 590.
[55] *R v Kahar* [2016] EWCA Crim 569 [19] cited in *R v Alou* [2018] NSWSC 221 [167]; *R v Lodhi* [2006] NSWSC 691 [82]-[83], [88]; [93]; *Benbrika v R* [2010] VSCA 281 [591] cited in *R v Alou* [2018] NSWSC 221 [168]; *R v Besim* [2017] VSCA 158.
[56] Marc Sageman, 'The stagnation in terrorism research' (2014) 26 *Terrorism and Political Violence* 563.
[57] Jesse J Norris, 'Entrapment and terrorism on the Left: An analysis of post 9/11 cases' (2016) 19 *New Criminal Law Review* 236, 269.
[58] Klausen et al found that terrorism offenders are generally older than ordinary violent criminals. The average age of offenders who committed crimes related to weapons charges, assault and homicide is 24-25 years old. By comparison, the average age of a violent terrorist offender is 29 years old, and non-violent terrorist offender (e.g. material support) is 35 years. However, the same study noted an increase in the number of young jihadists in recent years, with 68 per cent of foreign fighters since 2008 being on average 19 years old. Engagement in terrorist offences before the age of 16 is rare (Jytte Klausen, Tyler Morrill, Rosanee Libretti, 'The terrorist age-crime curve: an analysis of American Islamist terrorist offenders and age-specific propensity for participation in violent and non-violent incidents' (2016) 91:1 *Social Science Quarterly* 19).
[59] Jytte Klausen, Tyler Morrill, Rosanee Libretti, 'The terrorist age-crime curve: an analysis of American Islamist terrorist offenders and age-specific propensity for participation in violent and non-violent incidents' (2016) 91(1) *Social Science Quarterly* 19; Naomi Prince, 'Post-sentence orders for terrorism offenders' (2018) Paper presented at the National Judicial College Sentencing: New Challenges (Canberra, 3 March 2018).
[60] *DPP v MHK* [2017] VSCA 157, [27].
[61] Ibid.

imprisonment.[62] Some studies have suggested that lengthy imprisonment may 'harden terrorist defendants… and contribute to the development of entrenchment of terrorist networks,' as there is 'a correlation between prison and extremism'.[63] As such, corrective service policy in Australia has specifically classified all terrorist offenders as 'high-risk' and segregated them from other prisoners in purpose-built maximum-security facilities.[64] This isolation can impact the mental and physical health of inmates, and for terrorist offenders can negatively impact their rehabilitation and reinforce the psychology of exclusivity and 'martyrdom' that lead individuals towards terrorism.[65]

34. Even if terrorist offenders are not segregated, the prison environment may influence young terrorist offenders to 'gang together', as they may view terrorist association as status and an 'act or mode of resistance to the prison system staff'.[66] However, it is important to note that while these expressions of radical ideology 'can be aggressive and confrontational, it does not necessarily lead to violence upon release'.[67] Corrective Services of NSW (**CSNSW**) recently identified that 'of the small number of violent extremist inmates in custody in NSW, CSNSW has determined few have become radicalised to violence while in custody; it appears that most violent extremist inmates enter custody with such views'.[68] Nevertheless, the evidence that children who have experienced incarceration have a high chance of reoffending upon release,[69] even if these are not terrorist offences, means a risk to public safety may remain. CSNSW similarly recognised that 'despite there being no evidence of widespread radicalisation to violence in prison in NSW, the risk remains, and vigilance is required'.[70] They noted that recent terrorist attacks in Australia and abroad had been committed by individuals who had spent time in custody.[71]

[62] *DPP (Cth) v MHK* [2017] VSCA 157; *R v Besim* [2016] VSC 537; *R v Alou* [2018] NSWSC 221; *R v Alameddine (No. 3)* [2018] NSWSC 681.
[63] Christina Parajon Skinner, 'Punishing Crimes of Terror in Article II Courts' (2013) 31 *Yale Law and Policy Review* 309, 371, cited in Sameer Ahmed, 'Is history repeating itself? Sentencing young American Muslims in the War on Terror' (2017) 12 *The Yale Law Journal* 1520,1566.
[64] Clarke R Jones, 'Are prisons really schools for terrorism? Challenging the rhetoric of prison radicalisation' (2014) 16(1) 74, 75, 82 citing B Carlton, 'Isolation as counter-insurgency: supermax prisons and the War on Terror' (Paper presented at the 2nd Australian and New Zealand Critical Criminology Conference, University of New South Wales, 19-20 June 2008).
[65] Ibid 84 citing D Brown, 'The effect of terrorism and terrorist trials on Australian prison regimes' (Paper presented at the 2nd Australian and New Zealand Critical Criminology Conference, University of New South Wales, 19-20 June), B Carlton, 'Isolation as counter-insurgency: supermax prisons and the War on Terror' (Paper presented at the 2nd Australian and New Zealand Critical Criminology Conference, University of New South Wales, 19-20 June 2008), and J Richman, 'Individual liberty on death row: the right to suicide' (2008) 6(1) *Dartmouth Law Journal* 142.
[66] Clarke R Jones, 'Are prisons really schools for terrorism? Challenging the rhetoric of prison radicalisation' (2014) 16(1) 74, 81.
[67] Clarke R Jones, 'Are prisons really schools for terrorism? Challenging the rhetoric of prison radicalisation' (2014) 16(1) 74, 8 citing A Liebing, H Arnold and C Straub *An Exploration of Staff-Prisoner Relationships at HMP Whitemoore: 12 Years On* (London: UK Ministry of Justice National Offender Management Service 2011), 62
[68] Inspector of Custodial Services NSW, *The management of radicalised inmates in NSW* (May 2018), 8.
[69] For example, the Australian Institute of Health and Welfare found that in the 2016-2017 period, 46 per cent of young people received into detention during that year were received more than once (Australian Institute of Health and Welfare, *Youth justice in Australia 2016–17* (2018) 19).
[70] Inspector of Custodial Services NSW, *The management of radicalised inmates in NSW* (May 2018), 8.
[71] Ibid.

Are children and young people more or less likely than adults to cease offending terrorist behaviour if subject to intervention at an early stage or when engaged in only lower-level offending? Are there any known factors which may affect whether intervention is successful, for example, support of family and community?

35. The Law Council agrees with the Australian Government agencies' views that the process of radicalisation is unique to each person.[72] As there is limited evidence to accurately base risk assessments, it is difficult to determine the effectiveness of intervention programs in preventing terrorist behaviour.

36. Nevertheless, the Law Council notes the importance of diversion or alternatives to imprisonment to rehabilitate an offender. The appropriateness of these programs should be based on an assessment of the individual needs and personal circumstances of the child, rather than solely on the seriousness of the offence. The use of diversion and other alternatives to imprisonment can be effective sentencing options to ensure the rehabilitation and developmental needs of the child are met, and the offender can be successfully reintegrated into the community.[73]

37. For example, non-custodial sentences that involve close supervision by youth justice workers are available for serious offending such as terrorist offences. These include probation,[74] which involves close supervision by the relevant juvenile or youth justice department and serious penalties if breached. In Victoria, a youth supervision order,[75] youth attendance order[76] and youth control orders[77] involve more supervision than a probation order. Supervision and probation orders can include special conditions such as counselling, education, treatment and impose restrictions on where the child lives.[78] Supervision orders can also include stricter conditions such as not using social media.[79] These orders may allow for close monitoring of the child's life without interrupting their living arrangements or education activity.[80]

38. The seriousness of terrorist offences means that courts are unlikely to consider the possibility of alternatives to imprisonment. Where alternatives to imprisonment are considered inappropriate, rehabilitative programs should operate alongside criminal proceedings to facilitate rehabilitation and reintegration back into society.

39. Australian jurisdictions, in particular NSW and Victoria, have been provided with federal funding to operate initiatives that address radicalisation and extremism in

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[72] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, submission to the Independent National Security Legislation Monitor Review of the prosecution and sentencing of children for Commonwealth terrorist offences (June 2018), 10.
[73] United Nations Office on Drugs and Crimes, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: the Role of the Justice System* (Vienna, 2017), 88.
[74] *Children, Youth and Families Act 2005* (Vic) Part 5.3; *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(e); *Youth Justice Act 1992* (Qld) s 175(1)(d); *Youth Offenders Act 1994* (WA) Division 6; *Youth Offenders Act 1993* (SA) ss 23-25; *Youth Justice Act 1997* (Tas) s 47(1)(f); *Youth Justice Act 2005* (NT) s 83(1)(f).
[75] *Children, Youth and Families Act 2005* (Vic) s 387.
[76] Ibid s 397.
[77] Ibid s 409B.
[78] Ibid Part 5.3. See also *Youth Justice Act 1992* (Qld) s 204 – intensive supervision orders; *Youth Offenders Act 1994* (WA) Division 7 – intensive youth supervision order;
[79] *Children, Youth and Families Act 2005* (Vic) s 409F.
[80] United Nations Office on Drugs and Crimes, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: the Role of the Justice System* (Vienna, 2017), 96.

prisons. The Law Council notes the efforts of the Council of Australian Governments (**COAG**) to develop a *Counter Violent Extremism Intervention Framework* (**Framework**) as part of the Countering Violent Extremism Strategy (**CVE Strategy**). Broadly, the CVE Strategy emphasises prevention and early intervention through measures that involve programmes to help and support people to deradicalise and disengage from violent ideologies, working with communities so they can help prevent young people moving down the path of radicalisation, and addressing online radicalisation including through social media use by helping people develop digital skills need to critically assess terrorists' claims.[81] Although not all the programs under that Framework are publicly available, they are in place in all states and territories and the Australian Government continues to fund coordinators in each jurisdiction.[82] There has been particular mention of programs in NSW and Victoria.

40. In NSW in 2016, the Australia Government provided funding to the Proactive Integrated Support Model (**PRISM**), a program within Corrective Services NSW. This is a disengagement model aimed at targeting offenders who were at risk of radicalisation and violent extremism. In *Alameddine,* the sentencing judge acknowledged the evidence of an Acting Senior Psychologist with the PRISM program who stated that PRISM would be available to the offender on a voluntary basis after sentence was imposed.[83]

41. In Victoria, the Court Integrated Services Programs (**CISP**) received $1.6 million in federal funding between 2010 and 2016. According to former Attorney-General George Brandis this 'is a community-led and driven initiative which aims to rehabilitate imprisoned terrorists by offering a holistic approach to rehabilitation, including both pre- and post-release components'.[84] This involves engagement with religious leaders and seeks to rehabilitate radicalised convicted terrorists and prisoners.[85]

42. One of the Victorian Government's Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers' (**Expert Panel**) recommendations was that the delivery and disengagement programs to young persons be formalised within the youth justice system, including court-ordered diversion, community-based orders, in prison and on parole, and that these programs be reviewed and validated to ensure suitability and efficacy for young persons.[86] The Expert Panel identified that CISPs are unavailable for accused persons on remand or bail, during the pre-trial stage.[87] They identified that there is a need for such programs to be engaged at an early stage to reduce the risk of recidivism and promote safer communities. Further, while some support is available on remand such as access to counsellors and imams through the Muslim chaplaincy service, they are not specifically tailored to the extent provided by CISP.[88] In relation to youth specifically, the Expert Panel identified a lack of dedicated disengagement program for young offenders, from the

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[81] Parliamentary Library, *Update on Australian Government measures to counter violent extremism: a quick guide* (18 August 2017), 2.
[82] Ibid 1-2.
[83] *R v Alameddine (No. 3)* [2018] NSWSC 681 [250].
[84] Evidence to the Legal and Constitutional Affairs Legislation Committee, Commonwealth Parliament, Canberra, 18 October 2016 (Senator George Brandis).
[85] Ibid.
[86] The Victorian Government, *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers Report 2 2017,* 11.
[87] See Magistrates Court of Victoria, 'Court Integrated Services Program (CISP)'. Available online: https://www.magistratescourt.vic.gov.au/court-support-services/court-integrated-services-program-cisp.
[88] The Victorian Government, *Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers Report 2 2017*, 50.

pre-plea diversion stage through to custodial settings. These programs were important in order to prevent the radicalisation of other young offenders in the system, by young people who were already charged with terrorism offences. These programs should be tailored to address other forms of political, religious and ideological extremism; not just radicalised Islamist ideology.[89]

43. Although not specifically a CISP, the programs available to MHK while in prison demonstrate the potential for integrated rehabilitative programs within prison. While on remand and prior to sentencing, MHK received significant support from and engagement with his family, a youth engagement worker and chaplain from Islamic Council Victoria, and a case coordinator from the Department of Health and Human Services. These witnesses gave evidence that MHK had demonstrated 'substantial' changes in his attitudes towards religious and social matters and had expressed renunciation of the ideology of IS.[90] MHK also continued his education while in custody.[91] These factors assisted the sentencing judge to assess MHK's prospects of rehabilitation as 'good'.[92]

Recommendation

- **The Victorian Government's Expert Panel on Terrorism and Violent Extremism Prevention and Response Powers recommendations that rehabilitation and reintegration programs should be developed and funded across the States and Territories and offered as alternatives to imprisonment, to an accused person on remand or bail, and/or during the period they serve their sentence in custody.**

Bail – section 15AA of the Crimes Act

44. Section 15AA of the *Crimes Act* provides that if a person is charged with a terrorist offence,[93] or a Commonwealth offence resulting in the death of a person,[94] a bail authority must not grant bail to the person charged unless the bail authority is satisfied that *exceptional circumstances* exist to justify bail.

45. The Law Council notes the legislative history and judicial consideration of section 15AA as outlined in the INSLM's *Background Paper: ss 15AA, 19AG and 20C of the Crimes Act* (**Background Paper**).[95] It also notes that the INLSM's Background Paper indicates that judicial authority has determined the standard required by 'exceptional circumstances' is high.[96] The Law Council agrees with this summation.

[89] Ibid, 12.
[90] *DPP v MHK* [2017] VSCA 157 [16].
[91] *The Queen v MHK* [2016] VSC 742 [48]-[68]; *DPP v MHK* [2017] VSCA 157 [16]-[33].
[92] *The Queen v MHK* [2016] VSC 742, [74].
[93] In this section 'terrorism offence' means a terrorism offence (other than an offence against section 102.8 of the Criminal Code).
[94] A relevant Commonwealth offence causing the death of a person is described in subsection 15AA(2)(b)-(d).
[95] Independent National Security Legislation Monitor *Background Paper: Review of the Prosecution and Sentencing of Children for Terrorism Offences* (June 2018), https://www.inslm.gov.au/sites/default/files/files/INSLM%20-%20background%20paper%20-%20ss%2015AA%2C%2019AG%20and%2020C%20of%20the%20Crimes%20Act.pdf.
[96] Ibid 14.

46. The Law Council has made previous recommendations regarding section 15AA.[97] The Law Council's main concern with the introduction of section 15AA was the Government's failure to demonstrate why the reversal of the long-held presumption in favour of bail was necessary to aid in the investigation or prosecution of terrorist related offences.

Previous INSLM considerations and recommendations

47. The first INSLM, Bret Walker SC, noted in his first Annual Report that the bail and non-parole periods set out in sections 15AA and 19AG of the Crimes Act:

> *… provide special and more stringent provisions than would apply but for the terrorism element of the offences in question. Leaving aside matters of detailed differences – which involve questions of degree and matters of impression – there is the overarching issue whether Parliament or the judges are the best arbiters of these matters. There is no question at all of legislative power, but the policy and principle involved has features in common with the controversial topic of so-called mandatory sentencing.*
>
> *The INSLM will probably, resources permitting, investigate the relatively slight practical experience to date concerning bail and non-parole for terrorism offences as they compare to other offences.*[98]

48. The first INSLM did not appear to have the opportunity to consider whether non-parole and bail provisions should be stricter for terrorism offences than for others. However, in his third Annual Report he recommended that there should be consistency in approach in how bail and non-parole periods (in addition to other matters) applied to Part 3 of the UN Charter Act offences as for other terrorism offences.[99] The *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth) subsequently amended the Crimes Act, in accordance with the INSLM recommendations.[100]

49. Some parole and bail cases have also been noted in terms of legislative developments by the current INSLM.[101]

72-hour stay of bail

50. Under subsections 15AA(3C) and (3D), even where a person charged with a terrorism offence is granted bail, he or she may be detained in custody for up to three days if the prosecution notifies an intention to appeal the bail decision.

51. In the Law Council's view, this provision to automatically stay a grant of bail for up to 72 hours does not approach the denial of a person's liberty with the requisite degree of seriousness. Detention should never be the default position.

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[97] Law Council of Australia Submission to the Independent National Security Legislation Monitor *Review of the Crimes (Foreign Incursions and Recruitment) Act 1978, Part 5.3 of the Criminal Code Act 1995, Part IIIAAA of the Defence Act 1903, the Australian Passports Act 2005, and sections 15AA, 19AG and Division 3A of Part IAA and Part IC of the Crimes Act 1914* (10 February 2014), 36.
[98] Independent National Security Legislation Monitor Bret Walker SC, *Annual Report* (16 December 2011), 42.
[99] Independent National Security Legislation Monitor Bret Walker SC, *Annual Report* (7 November 2013), 55-56.
[100] *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth). See also Replacement Explanatory Memorandum, *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* (Cth), 18.
[101] Independent National Security Legislation Monitor Dr James Renwick SC, *Annual Report 2016-2017* (October 2018), 24-25.

52. If a person has successfully satisfied the bail authority that there are exceptional circumstances which warrant his or her release, he or she should not be denied the benefit of that decision, let alone for three days. The prosecution can seek a stay from the court that granted bail and then seek a longer stay from the appeal court in the individual case if they consider that the facts justify upholding the appeal.

53. The Law Council has advocated that if the Government has concerns about the capacity of bail authorities at certain levels to hear and determine bail applications in terrorism cases, the appropriate response would be to amend the legislation to be more prescriptive about the level of judicial officer to whom a bail application may be made. The Government should not confer authority on an officer to make a bail decision, but then reserve the right to have it set aside if it notifies an intention to appeal. These issues are most pertinent in the case of children, whose best interests should be a primary consideration.[102]

Recommendation

- **there should be no provision for a grant of bail to be stayed if the prosecution notifies an intention to appeal, particularly in the case of children.**

Section 15AA of the Crimes Act makes no specific provision for juveniles. What are the potential impacts of that section on juvenile defendants in particular?

54. Juvenile defendants should be separately addressed in all provisions potentially subjecting persons to penalties or disadvantages, including the refusal of bail. It is universally accepted that children and young persons are usually to be treated differently from adults to take into account their stage of development and that legal provisions should recognise and enable this to happen. By failing to differentiate between adults and juveniles, section 15AA potentially unfairly disadvantages children and young persons.

Might an offender's youth be, or contribute to, 'exceptional circumstances'?

55. In *R v NK*[103] Justice Hall considered whether the young age of the 16-year-old offender who had been charged with an offence of collecting funds for, or on behalf of, a terrorist organisation contrary to section 102.6(1) of the *Criminal Code,* was an 'exceptional circumstance' under section 15AA in order to justify granting bail. Justice Hall considered that 'exceptional circumstances' should not be 'determined by any reference to any fixed category of class of case'[104] and the phrase 'admits to a degree of flexibility'.[105] In considering the relevance of youth as an 'exceptional circumstance' Justice Hall found that it was a 'relevant circumstance' that is consistent with the recognition of the law that 'the cognitive, emotional and/or psychological immaturity of a young person' may contribute to their breach of the

[102] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 3.
[103] [2016] NSWSC 498.
[104] Ibid [30].
[105] Ibid.

law, including in relation to the influence of adults on the behaviour of the youth.[106] These factors informed the Court's decision to grant bail to the offender.[107]

56. The Law Council considers that this interpretation of 'exceptional circumstances' to include a juvenile's youth as a relevant factor is a correct statement of principle. However, the absence of any specific legislative provision for the way in which section 15AA is intended to act is an omission from the legislation. The appropriate way to correct this omission is discussed below.

Does the Law Council consider section 15AA (including arrangements for remand of juveniles in the various states and territories) is compliant with Australia's international obligations?

57. The Law Council does not consider that section 15AA, in its present form, is compliant with Australia's international obligations.

58. The Law Council's concerns in relation to section 15AA were shared by the UN Human Rights Committee in its Concluding Observations on Australia's human rights performance under the ICCPR. The UNHRC expressed particular concern that section 15AA operates to reverse the burden of proof contrary to the right to be presumed innocent and fails to define the 'exceptional circumstances', required to rebut the presumption against bail. The UNHCR recommended that Australia ensure that its counter-terrorism legislation and practices are in full conformity with the ICCPR and ensure that the notion of 'exceptional circumstances' does not create an automatic obstacle to release on bail.[108]The Law Council considers that the human rights contraventions raised by an application of section 15AA to the granting of bail for children charged with Commonwealth terrorist offences are especially acute.

Principles for evaluating laws and practices in relation to the granting of bail for children charged with Commonwealth terrorist offences (and in relation to the setting of non-parole periods for children in terrorism cases)

59. The Law Council considers that the following principles should be used to evaluate laws and practices in relation to the granting of bail for children charged with Commonwealth terrorist offences and in relation to the setting of non-parole periods for children in terrorism cases (discussed below):

- consistency with the rule of law;
- consistency with the requirements of international law concerning terrorism; and
- consistency with Australia's international human rights obligations, in particular the obligations contained in the *Convention on the Rights of the Child* (**the CRC**), the *United Nations Standard Minimum Rules for the*

[106] Ibid [34]-[35], [41].
[107] Ibid [55].
[108] UN Human Rights Committee, *Consideration of reports submitted by States parties under article 40 of the Covenant : International Covenant on Civil and Political Rights : 5th periodic report of States parties : Australia*, CCPR/C/AUS/5, (19 February 2008), [11].

Administration of Juvenile Justice (**the Beijing Rules**)[109] and the *International Covenant on Civil and Political Rights* (**the ICCPR**).

60. States' international obligations require that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is brought to justice, and that any sentence duly reflects the seriousness of such offences.[110]

61. Whilst the international human rights framework does not provide specific principles in relation to the granting of bail for children charged with terrorism offences (and for the sentencing of children who are found to have committed terrorist offences) the CRC, the Beijing Rules and the ICCPR contain important safeguards in relation to the treatment of children in the juvenile justice system, including children charged with, prosecuted for and sentenced in relation to terrorist offences.

62. The Law Council considers that any legislative change bearing upon the granting of bail for children charged with Commonwealth terrorist offences should be consistent with Australia's obligations under the CRC, including the principle of non-discrimination[111], the best interests of the child as a primary consideration[112], the obligation to ensure to the maximum extent possible the survival and development of the child[113], and the right to be heard in any proceedings affecting the child.[114]

63. Article 40(1) of the CRC recognises the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.[115] Article 37(b) requires States parties to ensure that no child is deprived of his or her liberty unlawfully or arbitrarily; and that 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.[116]

64. The Beijing Rules likewise provide that the objective of training and treatment of juveniles placed in institutions is to provide care, protection, education and vocational skills, with a view to assisting them to assume socially constructive and productive roles in society.[117]

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[109] The Committee on the Rights of the Child adopted the Beijing Rules (Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), 4. As a State party to the CRC, Australia has acknowledged the competence and authority of the Committee on the Rights of the Child (*Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 44). See also Australian Human Rights Council, *Human Rights Brief No 2: sentencing juvenile offenders* (2012) available online: https://www.humanrights.gov.au/publications/human-rights-brief-no-2.

[110] *United Nations Global Counter-Terrorism Strategy* GA Res 60/288 UNGA, 60th sess UN Doc A/RES/60/288 (20 September 2006).

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

[112] Ibid art 3.

[113] Ibid art 6.

[114] Ibid art 12.

[115] Ibid art 40(1).

[116] Ibid art 37(b).

[117] *Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 56th sess, 96th mtg, UN Doc A/RES/40/33 (29 December 1985), Rule 26.1.

65. The ICCPR requires in article 14(4) that in the case of juveniles, any criminal procedure must take into account the juvenile's age and the desirability of promoting their rehabilitation and reintegration into the community.[118]

66. Taken together, it is clear that Australia's international human rights obligations require that in all criminal procedures involving children the desirability of promoting their rehabilitation and reintegration must be taken into account, and that detention or imprisonment shall be used only as a measure of last resort and for the shortest appropriate period of time.[119]

67. An analysis of section 19AG of the Crimes Act against Australia's international human rights obligations is provided further below.

A proportionality approach to balancing rights

68. The Law Council considers that a structured proportionality analysis would assist the INSLM in considering the application of section 15AA to the granting of bail for children charged with a Commonwealth terrorism offence (and in relation to the setting of non-parole periods for children in terrorism cases). Such an analysis involves considering whether the provision, if so amended, would have a legitimate objective, be suitable and necessary to meet that objective, and whether – on balance – the public interest pursued by section 15AA, so amended, would outweigh any interference with relevant rights.

69. Courts in jurisdictions including the United Kingdom, the United States, Canada and New Zealand are frequently called upon to adjudicate cases said to involve conflicting or competing human rights.[120] The following principles have been identified as emerging from the case law in those jurisdictions:[121]

    (a) There is no hierarchy of rights. The aim must be to respect the importance of competing conflicting rights, or sets of rights, engaged by the particular circumstances of the case.[122]
    (b) The 'core' of a right is more protected than its periphery.[123]
    (c) The full context, facts and societal values at stake must be considered.[124]
    (d) The extent of the interference with each right must be considered.[125]

70. Since its establishment by the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth), the Parliamentary Joint Committee on Human Rights (**PJCHR**) has consistently applied a proportionality analysis to provisions which appear to limit

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[118] *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976) art 14(4).
[119] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 37 and 40, Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007), rule 26.1, *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976) art 14(4).
[120] George C Christie, *Philosopher Kings? The adjudication of conflicting human rights and social values* (Oxford University Press Inc, 2011).
[121] See, e.g. Australian Law Reform Commission, *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [2.64], citing G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014).
[122] See, e.g., *Dagenais v Canadian Broadcasting Corp* [1994] 3 SCR 835.
[123] See, e.g., *Bull v Hall and Preddy* [2013] UKSC 73; *Reference re Same-Sex Marriage* [2004] SCC 79 [46].
[124] See, e.g., *R v Oakes* [1986] 1 SCR 103.
[125] See, e.g., *Syndicat Northcrest v Amselem* [2004] SCC 47.

human rights.[126] Where a provision appears to limit rights, the PJCHR considers three key questions:

1. whether and how the limitation is aimed at achieving a legitimate objective;
2. whether and how there is a rational connection between the limitation and the objective; and
3. whether and how the limitation is proportionate to that objective.[127]

71. To demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective sought.[128]

72. To determine whether there is a rational connection between a limitation and its objective, the Attorney-General Department's guidance for those who have a role in Commonwealth legislation, policy and programs suggests the following questions may be useful:

- Will the limitation in fact lead to a reduction of that problem?
- Does a less restrictive alternative exist, and has it been tried?
- Is it a blanket limitation or is there sufficient flexibility to treat different cases differently?
- Has sufficient regard been paid to the rights and interests of those affected?
- Do safeguards exist against error or abuse?
- Does the limitation destroy the very essence of the right at issue?[129]

73. In considering whether a limitation on a right is proportionate to its objective, the PJCHR has identified some factors that might be relevant to include:

(a) whether there are other less restrictive ways to achieve the same aim;
(b) whether there are effective safeguards or controls over the measures, including the possibility of monitoring and access to review;

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[126] As the ALRC has observed, the concept of proportionality is commonly used by courts to test the validity of laws that limit rights protected by constitutions and statutory bills of rights: *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [2.62]. See generally Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012); G Huscroft, B Miller and G Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014). However, proportionality tests can also be a valuable tool for law makers and others to test the justification of laws that limit other important—even if not strictly constitutional—rights and principles. Huscroft, Miller and Webber provide the following formulation of the proportionality test: 1. Does the legislation (or other government action) establishing the right's limitation pursue a legitimate objective of sufficient importance to warrant limiting a right? 2. Are the means in service of the objective rationally connected (suitable) to the objective? 3. Are the means in service of the objective necessary, that is, minimally impairing of the limited right, taking into account alternative means of achieving the same objective? 4. Do the beneficial effects of the limitation on the right outweigh the deleterious effects of the limitation; in short, is there a fair balance between the public interest and the private right?".

[127] Parliamentary Joint Committee on Human Rights, *Annual Report 2012-2013* (December 2013) [1.53]; Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015) [1.15]. These are also reflected in the Law Council of Australia, *Policy statement on human rights and the legal profession: Key principles and commitments* (May 2017).

[128] Parliamentary Joint Committee on Human Rights *Guidance Note 1: Drafting statements of compatibility* (December 2014), 2.

[129] Attorney-General's Department, 'Permissible limitations' Australian Government https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx.

(c) the extent of any interference with human rights – the greater the interference the less likely it is to be considered proportionate; and

(d) whether the measure provides sufficient flexibility to treat different cases differently or whether it imposes a blanket policy without regard to the merits of an individual case.[130]

74. The United Nations Human Rights Committee has confirmed that where a State party makes any restrictions on rights under the ICCPR, it must 'demonstrate their necessity' and only take 'such measures as are proportionate to the pursuance of legitimate aims in order to ensure continuous and effective protection of Covenant rights.'[131]

75. In its 2015 report *Traditional Rights and Freedoms: Encroachment by Commonwealth Laws* (**the Freedoms Inquiry Report**), the Australian Law Reform Commission observed (emphasis added):

> *It is widely recognised that there are reasonable limits to most rights. Only a handful of rights are considered to be absolute. Limits on traditional rights are also recognised by the common law, although such limits may be regarded as part of the scope of common law rights. But how can it be determined whether a law that limits an important right is justified? Proportionality tests are now the most widely accepted tool for structuring this analysis.*
>
> *Proportionality is used to test limits on constitutional rights by the High Court and by constitutional courts and law makers around the world. This involves considering whether a given law that limits rights has a* ***legitimate objective*** *and is* ***suitable and necessary*** *to meet that objective, and whether—on balance—the public interest pursued by the law outweighs the harm done to the individual right. The use of proportionality tests suggests that important rights and freedoms should only be interfered with reluctantly—when truly necessary. In the Report, the ALRC often draws upon proportionality analyses when considering whether particular laws that limit rights are justified.*[132]

Whether the limitation is aimed at achieving a legitimate objective and whether there is a 'rational connection' between section 15AA and its objectives

76. The Law Council accepts that section 15AA is aimed at achieving the legitimate objectives of protection of the community and facilitating appearance at trial of those accused of serious criminal offences.

77. Likewise, it can be accepted that there is a connection (although not necessarily a rational one) between the restrictions on the grant of bail applied by section 15AA and achieving those objectives.

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[130] Parliamentary Joint Committee on Human Rights, Parliament of Australia, *Guide to Human Rights* (2015) [1.21].
[131] UN Human Rights Committee, *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, 2187th mtg, CCPR/C/21/Rev.1/Add.13 (26 May 2004), [6].
[132] Australian Law Reform Commission *Final Report on Traditional Rights and Freedoms – Encroachments by Commonwealth Laws*, Report No 129 (2015) [1.14]-[1.15].

78. However, the Law Council has serious concerns in relation to the proportionality of the measures required by section 15AA in its current form. Those concerns are especially acute in relation to the application of section 15AA to the granting of bail for children charged with Commonwealth terrorist offences.

Whether the application of section 15AA to the granting of bail for children is a proportionate measure

Unjustified reduction of judicial discretion

79. Beijing Rule 6.1 recognises that 'in view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceeding'.[133] The assumption underlying s 15AA is that bail authorities cannot be relied upon to weigh the factors bearing on whether an individual should be granted bail. As problematic as this is in the case of adults, in the case of children, given their special needs and vulnerabilities, the reduction of the discretion of bail authorities is unjustified and disproportionate.

Denial of effective consideration of bail

80. Beijing Rule 10.2 requires that 'a judge or other competent official or body shall, without delay, consider the issue of release.'[134] Such consideration must be real, and not merely formal. The application of section to the granting of bail for children is disproportionate in that it effectively denies the capacity of a bail authority to give proper consideration to release on the facts of each particular child charged with Commonwealth terrorist offences.

Detention as a last resort and for the shortest possible time

81. Beijing Rule 13.1 provides that 'detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.'[135] The application of section 15AA to the granting of bail for children turns the situation on its head, making detention the measure of first resort, and taking no account of the potential duration of detention.

Interference with family

82. Article 16 of the CRC provides that: 'no child shall be subjected to arbitrary or unlawful interference with his or her … family'.[136] Detention pending trial represents a profound interference with the family life of a child. The inability of a bail authority to release a child on bail other than in 'exceptional circumstances' is likely to lead to arbitrary interferences with to children's family life, disproportionate to the objectives pursued.

Best interests of the child

83. There is nothing in section 15AA requiring that in decision-making concerning the granting of bail to children) 'the best interests of the child shall be a primary

[133] *Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, UN GAOR, 56th sess, 96th mtg, UN Doc A/RES/40/33 (29 December 1985), Rule 6.1.
[134] Ibid Rule 10.2.
[135] Ibid Rule 13.1.
[136] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 16.

consideration'.[137] In its application to the granting of bail for children, this would likely lead to decisions being made without the best interests of the child being a primary consideration. This would be disproportionate, there being no evidence that the objectives of the legislation could not be met whilst also considering the best interests of the child in weighing factors relevant to deciding whether or not to release a child on bail pending trial.

Segregation of children from adult detainees and convicted persons

84. Section 15AA does not require the segregation of child detainees from adult detainees, nor their segregation from convicted children.[138] A proportionate legal regime would contain provisions to ensure these minimum standards are met.

Recommendations:

- **section 15AA should be amended to provide that the requirement for exceptional circumstances imposed by the section does not apply to a child charged with any of the offences to which the section 15AA applies;**
- **section 15AA should also provide that, when bail is being considered for a child charged with a Commonwealth offence, the best interests of the child shall be a primary consideration.**

Is the Law Council aware of any inconsistencies between states and territories relating to the conditions of remand of federal offenders denied bail, including in relation to the separation of juveniles from adults?

85. The Law Council understands that in all states and territories juveniles are separated from adults in detention. However, young adults aged between 18-21 are susceptible are transfer to adult jails and those aged between 21-24 who may still be immature in outlook and development are held in adult jails. The Law Council does not have detailed knowledge of any varying conditions of remand observed in each of the jurisdictions.

86. In NSW there is a power to remand children 16 and over to an adult correctional centre.[139] The Law Council is not aware of how many such orders are made under that power.

Are there any circumstances in which it might be desirable that a juvenile terrorist offender not be denied bail, for instance where this might interfere with the progress of de-radicalisation efforts?

87. The Law Council supports legislation that requires the relevant bail authority, in relation to both adults and juveniles, to assess each individual application for bail on its merits, taking into account all relevant circumstances and any legislated guidelines in place. The question highlights the difficulty with having an exceptional circumstances test or barrier in place before a young person may be granted bail.

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[137] Ibid art 3(1).
[138] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979), art 10.
[139] *Children (Detention Centres) Act 1987* NSW s 28A.

The Law Council accepts that there will be some cases where alleged juvenile terrorist offenders should, according to those requirements, be refused bail and some where bail should be granted. It is unhelpful to try to describe all circumstances where either should result. De-radicalisation efforts may well be a desirable circumstance in relation to which bail should be favourably viewed.

In terms of risk posed to the Australian community, particularly by juvenile offenders, are there discernible differences between particular kinds of terror offending? Is there a reasonable basis for distinguishing between those accused of less serious and more serious 'terrorism offences' (within the meaning of the Crimes Act)? Is there a reasonable basis for distinguishing between those accused of the offences listed in s 15AA and those accused of other, similar offences, for instance under Part II of the Crimes Act (other than s 24AA)?

88. The risk posed to the Australian community will depend largely upon the nature of the terror offending, whether carried out by an adult or a juvenile. The Law Council does not see any benefit in attempting to classify particular types of terror offending as more or less serious. Some are clearly less serious on their face. However, each case will turn on its own facts and circumstances, including circumstances relating to the individual. Judicial officers are experienced in assessing whether risks posed by alleged offenders are unacceptable risks that cannot be mitigated by the imposition of bail conditions.

Are there risks to the community which might be mitigated by the denial of bail which cannot be addressed through other counter-terror measures, for instance through surveillance or control orders?

89. There is an overlap in effect between conditions that may be attached to bail and measures such as surveillance and control orders. The denial of bail removes any risk from that person; surveillance and control orders against that person reduce any such risk. Risks of reoffending or of interference with the course of justice (e.g. by threatening a witness or tampering with evidence) by the person may be effectively reduced by granting bail on stringent conditions or may be unable to be met, in which case bail would be refused. The risks would need to be assessed when bail is being considered.

90. The Law Council notes however that certain conditions may be imposed on control orders available to youth offenders that may mitigate the risks of granting bail. These conditions similarly to bail conditions may include curfew or a monetary bond.[140] Additional surveillance powers are a matter for separate application and another option for mitigating risks.

[140] See Australian Institute of Health and Welfare *Youth Justice in Australia 2016-2017* https://www.aihw.gov.au/reports/youth-justice/youth-justice-in-australia-2016-17/contents/table-of-contents, 2.

Non-parole – section 19AG of the Crimes Act

91. Section 19AG of the Crimes Act requires a judge to set a minimum non-parole period for the following offences (as per subsection 19AG(1)):

    - treachery (as per section 24AA of the Crimes Act);
    - international terrorist activities using explosive or lethal devices (as per Subdivision A of Division 72 of the Criminal Code);
    - terrorism (as per Part 5.3 of the Criminal Code);
    - treason and sedition (as per Division 80 of the Criminal Code); and
    - espionage and similar activities (as per Division 91 of the Criminal Code).

92. Section 19AG applies to inchoate offences under Part 5.3 of the *Criminal Code*, including the offence of doing an act in preparation for, or planning a terrorist act, contrary to section161.6(1) of the *Criminal Code.*[141]

93. A 'non-parole period' is defined in subsection 16(1) of the Crimes Act as meaning 'that part of the period of imprisonment for that sentence or those sentences during which the person is not to be released on parole, whether that part of the period is fixed or recommended by a court or fixed by operation of law.'

94. For the offences above, including terrorism offences under Part 5.3 of the Criminal Code, a court must fix a single non-parole period of at least three-quarters of the sentence imposed for a minimum non-parole offence or the aggregate of the sentences imposed for minimum non-parole offences (subsection 19AG(2)).

95. The court may set a higher non-parole period if it considers this appropriate in the circumstances of the case.

96. A life sentence for a minimum non-parole offence is taken to be a sentence of imprisonment for 30 years[142] such that a minimum non-parole period for a life sentence would be 22 ½ years.

97. Sections 19AB, 19AC, 19AD, 19AE and 19AR that relate to the fixing of non-parole periods and the making of recognizance release orders[143] apply subject to section 19AG.[144] The effects of this include preventing a court from:

    (a) making a recognizance release order under paragraph 19AB(1)(e) or 19AB(1)(2)(e), 19AE(2)(e) or 19AR(2)(e); or
    (b) confirming (under paragraph 19AD(2)(d)) a pre-existing non-parole period; or
    (c) confirming (under paragraph 19AE(2)(d)) a recognizance release order; or
    (d) declining (under subsection 19AB(3) or 19AC(1) or 19AC(2) or paragraph 19AD(2)(f)) to fix a non-parole period.

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[141] *Fattal v The Queen* [2013] VSCA 276 [212].
[142] *Crimes Act 1914* (Cth) s 19AG(3)(a).
[143] An Australian court can impose recognizance release orders for any Commonwealth criminal offence. A 'recognizance release order' is defined in subsection 16(1) and paragraph 20(1)(b) of the Crimes Act. Such an order involves a requirement that an offender be of good behaviour for a specified period of time. If the offender complies with the order there is no further punishment. However, section 19AG prevents a court from making or confirming a recognizance release order in relation to terrorism offences.
[144] *Crimes Act 1914* (Cth) s 19AG(5).

98. The non-parole period is to be set in respect to all federal sentences the person is to serve or complete[145] and it does not matter if not all of the federal sentences are minimum non-parole offences.[146] If the person was subject to a recognizance release order, the non-parole period supersedes the order.[147]

History of section 19AG

99. Section 19AG was introduced in 2004 into the Crimes Act by the *Anti-Terrorism Act 2004* (Cth) (**the ATA 2004**). The Anti-Terrorism Bill 2004 was introduced in the House of Representatives on 31 March 2004. Following its passage in the House of Representatives on 13 May 2004, the ATA 2004 was subsequently introduced in the Senate on 15 June 2004. The ATA 2004 was passed by the Senate on 18 June 2004, indicating only three days for debate.[148]

100. The Supplementary Explanatory Memorandum for the ATA 2004 explains the objective of section 19AG:

> *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…*
>
> *A longer fixed minimum non-parole period that is determined by reference to the head sentence provides a way of increasing the time served by convicted terrorists in gaol while at the same time avoiding unnecessary arbitrariness and enabling judicial discretion when determining the head sentence for the offender…*[149]

101. Subsequent anti-terrorism legislation passed by Parliament has engaged section 19AG. The statement of compatibility in the Explanatory Memorandum for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which amended the definition of terrorism offence and therefore engages section 19AG(1)(b), noted that the policy rationale of standard non-parole periods 'is that individuals convicted of terrorism offences should not be released into the community sooner than absolutely required on the basis they have committed serious offences that have endangered public safety'.[150]

102. The Law Council notes that no consideration was given during the process of developing and implementing section 19AG to the potential impact of that section on juvenile defendants in particular.

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[145] Ibid s 19AG(2).
[146] Ibid s 19AG(3)(b)(iii).
[147] Ibid s 19AG(4).
[148] The Senate, *Business of the Senate: 1 January to 31 December 2004,* 93.
[149] Explanatory Memorandum, Anti-Terrorism Bill 2004, 3.
[150] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 19.

What is the Law Council's policy approach to the desirability of mandatory sentencing? Do different considerations apply to the desirability of a mandatory non-parole period?

103. A range of mandatory sentencing regimes exist across Australian jurisdictions.[151] They are often in relation to the most serious crimes, where there are particular aggravating circumstances, for example, murder where a burglary offence was also committed.[152] Some regimes will set a maximum and minimum penalty but do not otherwise restrain judicial discretion,[153] whereas others have a presumptive minimum sentence that can be displaced in special circumstances.[154] Minimum non-parole periods have been introduced in South Australia,[155] Queensland[156] and the Northern Territory,[157] however they notably do not apply to children unlike section 19AG.[158]

104. The Law Council notes that the Guide to Framing Commonwealth Offences advises that 'other than in rare cases, Commonwealth offences… should not carry a minimum penalty'.[159] The Law Council has consistently opposed mandatory minimum sentences on the basis they impose unacceptable restrictions on judicial discretion and independence, are inconsistent with rule of law principles and undermine confidence in the justice system.[160]

105. Section 19AG is a form of mandatory sentencing as it provides that a sentencing court cannot impose a non-parole period less than 75% of the term of the sentence. While it is expressed to apply to federal terrorism offences, the effect of this is that even if there are additional State offences where a lesser non-parole period is imposed, the mandatory non-parole period will deny an offender the benefit of the non-parole period imposed by the application of discretion taking into account all relevant circumstances. This 'mandatory minimum' precludes the sentencing court from determining a just non-parole period in the particular circumstances of not just the terrorism offence, but potentially other offences for sentence at the same time.

106. The Law Council is of the view that the well-established principle of the exercise of judicial discretion in setting non-parole periods should not be precluded solely on the basis of the nature of the offence. Although the seriousness of the offence with which a person is charged may be taken into account in determining the appropriate non-parole period, the seriousness of the offence alone should not determine an

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[151] See for example *Criminal Code Act Compilation Act* 1913 (WA) ss 279(6A), 280(3), 281(4), 283(3), 294(3), 297(6), 218(2); *Crimes Act 1900* (NSW) ss 25A and 25B; *Domestic and Family Violence Act 2009* (NT) s 121(2); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld); *Crimes Amendment (Gross Violence Offences) Act 2013* (Vic). For more information refer to the Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014), 48-55.
[152] *Criminal Code Act Compilation Act* 1913 (WA) ss 279(6A), 280(3), 281(4), 283(3), 294(3), 297(6), 218(2).
[153] *Migration Act* 1958 (Cth) ss 233B and 236B(3).
[154] *Sentencing Act 1991* (Vic) ss 5(2H) and 5(2I).
[155] See for example *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ba).
[156] *Penalties and Sentences Act 1992* (Qld) s 161B(3).
[157] *Sentencing Act 2018* (NT) s 54(1).
[158] *Sentencing Act 2017* (SA) s 46, *Youth Justice Act 1992* (Qld), s 155, *Youth Justice Act* (NT) s 83.
[159] Commonwealth Government, *A Guide to Framing Commonwealth Offences, Infringement Notice and Enforcement Powers* (September 2011), 37.
[160] Law Council of Australia, *Policy Statement on Rule of Law Principles* (March 2011) Principle 5, 4.

arbitrary figure of three-quarters the head sentence for a minimum non-parole period.[161]

107. Prescribing minimum sentences in legislation removes the ability of courts to consider relevant factors such as the offender's criminal history, individual circumstances or whether there are any mitigating factors, such as mental illness or other forms of hardship or duress. In the case of children, particular consideration should be given to the child's age and maturity. This prescription can lead to sentences that are disproportionately harsh and mean that appropriate gradations for sentences are not possible.

108. Courts are also unlikely to impose a lower head sentence to simply mitigate against any perceived injustices of the mandatory non-parole period. In *R v Lodhi*, for instance, Whealy J held that a court should not set a lower head sentence simply because of the operation of section 19AG.[162]

109. The Law Council notes that the mandatory minimum sentences currently in place for other Commonwealth criminal offences do not apply if it is established on the balance of probabilities that the offender was under 18 years old at the time the offence was committed.[163] The Law Council is of the view that should the INSLM consider that section 19AG be retained, the INSLM should consider the alternative that children be exempt from its operation.

Does the Law Council consider that ordinary Commonwealth parole processes are capable of appropriately assessing the risk to the community posed by a juvenile terrorist offender?

110. As noted above, limited evidence is available regarding risk assessment tools to predict terrorist behaviour. However, the Law Council considers that the current processes to determine parole undertaken by judicial officers and the relevant Parole Board enable appropriate assessments to the extent possible to determine and manage the risk posed by a juvenile terrorist offender.

How does the availability of parole interact with efforts to promote cooperation with authorities, prevent re-offending and/or achieve de-radicalisation?

111. The purposes of parole are narrower than general sentencing principles:[164] section 19AKA of the Crimes Act states that the purposes of parole are the protection of the community, the rehabilitation of the offender, and the reintegration of the offender

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[161] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979), art 9. Article 9 prohibits arbitrary detention, and requires consideration of principles of justice and proportionality when a penalty is imposed under law – see See Human Rights Committee, Communication No 560/1993, UN Doc CCPR/C/59/D/560/1993 (3 April 1997), [9.2].. See also Human Rights Committee, Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 (15 August 1990) [5.8] ('Van Alphen v The Netherlands'). See also Australian Human Rights Commission, Human Rights Brief No. 2, available online at https://www.humanrights.gov.au/publications/human-rights-brief-no-2

[162] *R v Lodhi* [2006] NSWSC 691 [105].

[163] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, submission to the Independent National Security Legislation Monitor Review of the prosecution and sentencing of children for Commonwealth terrorist offences (June 2018), 19.

[164] *Veen v the Queen (No 2)* (1988) 164 ALR 565 [476]; Australian Law Reform Commission, *Final Report: Same Crime, Same Time Sentencing of Federal Offenders Report*, April 2006, 133.

into the community.[165] The Law Council considers that these purposes of parole are an important part of preventing re-offending and achieving de-radicalisation.

112. The High Court in *Bugmy v The Queen*[166] explained that:

> *…rehabilitation will be relevant to the fixing of a minimum term [of imprisonment], both by way of mitigation and because the community benefits from the reformation of one of its members. Conversely, the community needs to be protected from a violent offender, especially one whose prospects for rehabilitation are bleak.*[167]

113. However, in determining the weight to be given to community protection when applying 19AG, while the High Court has found that community protection may be a relevant factor similar to fixing a minimum term of imprisonment, the longer a minimum term the less weight community protection should be given.[168] In *Bugmy,* the High Court found that because the term of 18 years, six months imprisonment was 'of such a length as to take the prospects of reoffending in this case beyond even speculation', the factor of community protection could not be given disproportionate weight.[169]

114. In light of the interrelated purposes of parole – community protection, rehabilitation and reintegration – it is important to consider the impact of lengthy terms of imprisonment in achieving these objectives for child terrorist offenders. The Law Council considers that setting a lengthy non-parole period that is three quarters of the head sentence undermines the sentencing purposes of rehabilitation and reintegration, that must be a primary consideration for children.

Is there concern that the transfer of a young terrorist offender into the adult prison population may interfere with efforts to prevent re-offending and/or achieve de-radicalisation?

115. Due to the lengthy terms of imprisonment for terrorist offenders, it is important to note the possibility that a child terrorist offender may transition to adult custody to serve the remainder of their sentence. The rehabilitative prospects of a person who transitions from child custody to adult prison are likely to be significantly reduced, as conditions of custody are more strictly regulated, more isolating and there is less opportunity to access rehabilitation programs.[170]

116. The Law Council is of the view that in light of the detrimental effects of incarceration on the rehabilitative prospects for terrorist offenders, the focus on sentencing young terrorist offenders should, where possible, be on alternatives to imprisonment with intensive rehabilitative programs in order to reduce chances of recidivism upon release from such supervision. Where imprisonment is necessary, targeted rehabilitative programs should be available to offenders while serving their sentence.

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[165] *Crimes Act 1914* (Cth) s 19AKA. See also *Power v R* (1974) 3 ALR 553 [556].
[166] (1990) 169 CLR 525 [537] ('*Bugmy*').
[167] Ibid [557] (Dawson, Toohey and Gaudron JJ).
[168] Ibid [537].
[169] Ibid [537] and [539].
[170] See for example *R v Tokava* [2006] VSCA 156 (Maxwell P) citing *R v Dixon* (1975) 22 ACTR 13, [20] (Fox J).

Does the Law Council consider that section 19AG is compliant with Australia's international obligations?

117. As above, the Law Council considers that a structured proportionality analysis would assist the INSLM in considering whether section 19AG should be amended for children convicted of Commonwealth terrorism offences. Such an analysis involves considering whether the provision, if so amended, would have a legitimate objective, be suitable and necessary to meet that objective, and whether – on balance – the public interest pursued by section 19AG, so amended, would outweigh any interference with relevant rights.

118. Section 19AG was enacted prior to the requirement in *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) Part 3 for a statement of compatibility with human rights.[171] The Explanatory Memorandum for the Anti-Terrorism Bill 2004, which introduced section 19AG, does not include an assessment of whether the Bill is compatible with human rights.

119. The Law Council considers that in the case of its potential application to children, section 19AG engages, in particular, the following rights and principles under international human rights law:

- the best interests of the child as a primary consideration;[172]
- deprivation of liberty as a measure of last resort and for the shortest appropriate period of time;[173]
- the desirability of the rehabilitation and reintegration of children in the criminal justice system;[174]
- the availability of alternatives to institutional care to ensure children are dealt with in a manner appropriate to their well-being and proportionate to their circumstances and the offence;[175]
- the right to a fair hearing heard by a competent, independent and impartial tribunal[176], and the right to appeal a sentence; and[177]
- the right to be free from racial and religious discrimination may also be indirectly engaged.[178]

120. It is clear that in relation to the question of mandatory non-parole periods for children in terrorism cases, a tension arises between the right to life and the protection of the community, and the rights of the child noted above.

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[171] *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth) Part 3.
[172] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.
[173] Ibid art 37(b); *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976) art 9.
[174] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 40(1); *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976) art 14(4).
[175] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 40(4).
[176] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979),art 14(1).
[177] Ibid art 14(5).
[178] Ibid art 26.

Constitutionality of section 19AG

121. As noted above, the first INSLM noted in relation to section 19AG that 'there is no question at all of legislative power'.[179]

122. The Law Council's Policy Discussion Paper on Mandatory Sentencing refers to the case of *Magaming v The Queen*,[180] where the High Court upheld the Constitutional validity of the mandatory sentencing provisions under the *Migration Act 1958* (Cth) (the Migration Act).

123. Mr Magaming contended before the High Court that where a prosecutor can choose between charging an offence that carries a mandatory minimum sentence and another that has no mandatory minimum sentences, the prosecutor in effect impermissibly exercises judicial authority contrary to Chapter III of the Constitution.[181] He also argued that the mandatory minimum sentence provision was incompatible with the institutional integrity of the courts and that it required the court to issue an arbitrary and non-judicial punishment.[182]

124. The High Court dismissed the appeal and held that although the prosecutor in the case had a choice as to which offence to charge, that choice did not involve the exercise of judicial power, that is, a determination of innocence or guilt and what punishment will be imposed.[183] The High Court also held that the imposition of a mandatory minimum sentence was not constitutionally invalid because it required the courts to issue an 'arbitrary and non-judicial punishment'.[184] In coming to this conclusion the Court observed that:

    - mandatory sentences are 'known forms of legislative prescription of penalty for crime';[185]
    - the discretion of a judge in sentencing matters is not unbounded and is always constrained by statutory requirements and judicial precedent;[186] and
    - mandatory sentences are but one form of a statutory requirement that limits judicial discretion on punishment matters.[187]

125. Further, 'arbitrariness', as considered by the High Court, was limited by Mr Magaming's argument that because the simple offence carried no mandatory minimum term, the imposition of the mandatory minimum penalty for the aggravated offence was arbitrary.[188] The High Court commented that '[h]ow or why that should be so was not explained'.[189]

126. The High Court also held that even if the applicant's sentence was 'too harsh' when:

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[179] Independent National Security Legislation Monitor Bret Walker SC, *Annual Report* (16 December 2011), 42.
[180] *Magaming v The Queen* [2013] HCA 40. See also Law Council of Australia, *Policy Discussion Paper on Mandatory Sentencing* (May 2014), 34, 37-38.
[181] *Magaming v The Queen* [2013] HCA 40 [11]-[12].
[182] Ibid.
[183] Ibid [26].
[184] Ibid [42].
[185] Ibid [49].
[186] Ibid [47].
[187] Ibid [47]-[49].
[188] Ibid [44].
[189] Ibid [45].

> *…measured against some standard found outside the relevantly applicable statutory provisions, that conclusion does not entail the invalidity of any of the impugned provisions.*[190]

127. The above analysis shows that the High Court's consideration of the Migration Act mandatory sentencing provision was limited to an assessment of the Constitutional validity of the provision in light of the arguments posed by Mr Magaming. That is, the High Court found that it is not beyond the power of the Commonwealth to impose mandatory sentences. The judgement was about the extent of Commonwealth power.

128. The High Court did not consider the issue of whether mandatory sentences were an appropriate form of punishment, or contrary to rule of law principles. Nor did the High Court, in the case before it, consider whether mandatory sentencing is inconsistent with Australia's international human rights obligations as it was not an issue raised in the case.

129. However, it is worth noting that at sentencing the then Chief Judge of the New South Wales District Court (NSW), Blanch J, described Mr Magaming as 'a simple Indonesian fisherman' and stated that he would have imposed a lighter sentence than that required by the mandatory sentencing provision because:

> *The seriousness of [Mr Magaming's] part in the offence therefore falls right at the bottom end of the scale. … In the ordinary course of events, normal sentencing principles would not require a sentence to be imposed as heavy as the mandatory penalties that have been imposed by Federal Parliament. However, I am constrained by the legislation to impose that sentence.*[191]

130. Other trial judges have also spoken out about the injustice of the mandatory sentencing regime and the removal of judicial discretion to pass proportionate sentences.[192]

131. While the circumstances of those persons most likely to be charged and prosecuted for offences should not necessarily absolve them of criminal responsibility, they point to a need for judges to be able to use discretion and take a range of matters into account in issuing an appropriate sentence.[193]

132. Notwithstanding the High Court's findings regarding the constitutional validity of mandatory sentencing provisions under the Migration Act, the Law Council considers that the available case law helps to demonstrate why mandatory sentencing is undesirable on a policy basis. This is discussed above.

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[190] Ibid [52].
[191] *R v Magaming* (Unreported, District Court of New South Wales, Blanch J CJDC, 9 September 2011) [1.2].
[192] See for instance: *The Queen v Tahir and Beny* (Unreported, Supreme Court of the Northern Territory, Mildren J, 28 October 2009); Transcript of Proceedings, *The Queen v Mahendra* (Supreme Court of the Northern Territory, 21041400, Blokland J, 1 September 2011).
[193] For specific cases of injustice see for instance Christine Flatley, 'Judge slams mandatory sentence for people smugglers', *Sydney Morning Herald*, 11 January 2012; *R v Ambo* [2011] NSWDC 182; *The Queen v Mahendra*, SCC 21041400, Supreme Court of the Northern Territory, 1 September 2011; Transcript of Proceedings, *The Queen v Edward Nafi* (Supreme Court of the Northern Territory, 21102367, 19 May 2011); Michael Duffy, 'Tough laws on people smuggling are a con', *Sydney Morning Herald* (online), 13 February 2012 http://www.smh.com.au/opinion/politics/tough-laws-on-people-smuggling-are-a-con-20120212-1szkp.html#ixzz1nG911yiu;

Whether the limitation is aimed at achieving a legitimate objective

133. In relation to the question whether a limitation is aimed at achieving a legitimate objective, the PJCHR has stated that a limitation must be demonstrated by reasoned and evidence-based explanations of the legitimate objective being pursued. The limitation must address a pressing or substantial concern, and not simply seek an outcome that is desirable or convenient.[194]

134. The introduction of section 19AG into the Crimes Act in 2004 was based on the view that the seriousness of terrorism and related offences alone should determine a three-quarters per cent of the head sentence non-parole period. As mentioned above, the Explanatory Memorandum for the ATA Act explained the purpose of section 19AG as follows:

> *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...*[195]

135. Thus, according to the Explanatory Memorandum, the purpose of section 19AG is to reflect community concern about terrorism.

136. The Law Council notes that when assessing whether a measure limiting a right is aimed at achieving a legitimate objective, something is not a legitimate objective 'simply because most people would agree with it'.[196] In the case of section 19AG, the Law Council does not consider community concerns alone to be a legitimate objective.

137. The statement of compatibility in the Explanatory Memorandum for the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014, which amended the definition of terrorism offence and therefore engages section 19AG(1)(b), noted that:

> *The impact of this amendment on the non-parole periods regime may also engage the limitation on the freedom from arbitrary arrest or detention. However, the non-parole periods regime is established clearly by law and does not provide decision-makers with unfettered discretion such that the application of section 19AG could be considered inappropriate, unjust or unpredictable.*
>
> *This amendment achieves the legitimate objective of* ***protecting Australia and its national security interests****. Non-parole periods are fixed only for serious crimes such as terrorism offences, treachery and offences against Divisions 80 (treason and urging violence) and 91 (offences relating to espionage and similar activities) of the Criminal Code. The policy rationale is that individuals convicted of terrorism offences should not be released into the community sooner than absolutely required on the basis they have*

[194] Parliamentary Joint Committee on Human Rights *Guidance Note 1: Drafting statements of compatibility* (December 2014), 2.
[195] Supplementary Explanatory Memorandum, Anti-Terrorism Bill 2004, 3.
[196] Attorney-General's Department, 'Permissible limitations' Australian Government, available online https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights-scrutiny/PublicSectorGuidanceSheets/Pages/Permissiblelimitations.aspx

*committed serious offences that have **endangered public safety**.*[197]
(emphasis added)

138. The Law Council accepts that section 19AG is aimed at pursuing a legitimate objective insofar as its seeks to protect public safety and national security interests.

Whether there is a 'rational connection' between section 19AG and its objectives

139. The next question is whether there is a rational connection between section 19AG and its objectives.

140. The Law Council is concerned that there has not been demonstrated any rational connection between section 19AG and its objectives.

141. As noted above, to demonstrate that a limitation is permissible, proponents of legislation must provide reasoned and evidence-based explanations as to how the measures are likely to be effective in achieving the objective sought.[198]

142. In relation to section 19AG generally, the Law Council is concerned that the Government has failed to demonstrate why non-parole provisions should be stricter for terrorist offences than for others. That is, the Government has failed to demonstrate why a restriction on judicial discretion in relation to non-parole periods is necessary to aid in the setting of appropriate penalties for terrorist related offences.

143. When section 19AG was enacted, no evidence was put forward, for example, to suggest that courts had imposed inappropriate non-parole periods for persons charged with terrorist offences.

144. Prior to the introduction of section 19AG, the normal range for a non-parole period was between 60-66 per cent of the total sentence, although existing parole provisions already provided the court with the discretion to impose a higher non-parole period, up to 75 per cent in the most serious cases.[199]

145. The Government has not sought to explain why these provisions were inadequate to guard against perceived risks to the community in terrorism cases. Rather, the provision simply assumed that a figure of three-quarters of the head sentence for non-parole is necessary and appropriate whenever a person is charged with a terrorist-related offence.

146. A more recent study by the NSW Judicial Commission found that in relation to NSW offences in 2013, the non-parole period was set at less than 50 per cent in 21.5 per cent of cases, between 50 per cent and 75 per cent in 49.4 per cent of cases and greater than 75 per cent in 29 per cent of cases.[200]

147. The Law Council considers that courts sentencing for Commonwealth offences, including terrorism offences, should also be permitted discretion to determine an

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[197] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 19.
[198] Parliamentary Joint Committee on Human Rights *Guidance Note 1: Drafting statements of compatibility* (December 2014), 2.
[199] See for instance *R v Lodhi* [2006] NSWSC 691 [105] and *R v Bernier* (1998) 102 A Crim R 44.
[200] Patrizia Poletti and Hugh Donnelly, 'Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999' (2013) 42 *Sentencing Trends & Issues: Judicial Commission of New South Wales* 1, *2*4.

appropriate non-parole period in the same way. In that context, it must also be remembered that, at the end of the non-parole period, the offender will not necessarily be released – there is only *eligibility* for release on parole.

148. The absence of statutory standard non-parole periods in other common law jurisdictions likewise points to the lack of rational connection between section 19AG and its legitimate objectives. Similar common law jurisdictions, in particular the United Kingdom, Canada and New Zealand, do not have an equivalent provision to section 19AG. By contrast, Canadian legislation allows the court to delay the eligibility of parole to either one half of the global sentence of 10 years, whichever is less, unless the court is satisfied that the sentencing purposes would be adequately served by a period of parole ineligibility.[201] This allows for a non-parole period considerably less than section 19AG and maintains judicial discretion in determining the non-parole period. In the UK, for a person convicted of a terrorist offence to be sentenced to a special custodial sentence, the Parole Board has discretionary powers to consider release between the halfway and endpoint of the custodial term.[202] However, and most importantly, this does not apply to a person aged under 18 years when the offence was committed.[203]

149. In New Zealand, section 104 of the *Sentencing Act 2002* (NZ) imposes a minimum period of imprisonment of 17 years if a murder was committed as part of a terrorist act. This has implications for the non-parole period under section 84(2), which states that the non-parole period of a sentence imposed under section 104 is the minimum term imposed. This effectively creates a minimum non-parole period of 17 years. This section is analogous to section 19AG in that it provides a minimum standard non-parole period. However, it is important to note that sections 104 and 84(2) of the *Sentencing Act 2002* (NZ) only applies to murders that were committed as part of a terrorist act. This can be distinguished from section 19AG which encompasses all of Part 5.3 'terrorism offences', without differentiation between conduct of varying levels of seriousness.

150. Further, the UK, Canada, New Zealand and Australia list a terrorist act as an aggravating factor when sentencing.[204] This explicit reference to terrorist activity in sentencing allows the court to use their discretion to award a lengthier sentence and non-parole period for these particular offences. The Law Council considers that the inclusion of a terrorist act as an aggravating sentencing factor guides the court to give appropriate weight to these offences, without compromising judicial discretion.

151. It follows that the Law Council does not consider that there has been demonstrated any rational connection between section 19AG and its objectives. This is so in relation to section 19AG as presently enacted, let alone as contemplated to be extended to children convicted of terrorist offences.

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[201] *Criminal Code,* RSC 1985 c C-46, ss 718.29(a)(v), 743.6(1.2)
[202] *Criminal Justice and Courts Act 2015* (UK) c 2, s 236A.
[203] Ibid s 236A (1)(b).
[204] *Counter-Terrorism Act 2008* (UK) c 28 s 30(4); *DPP (Cth) v Besim* [2017] VSCA 158; *Criminal Code,* RSC 1985 c C-46, s 718.29(a)(v); *Sentencing Act 2002* (NZ) s 9(1)(ha).

Whether section 19AG is a proportionate measure

152. The third question is whether a limitation on a right is proportionate to the objective being sought.[205]

153. The Law Council considers that the limitations imposed by section 19AG, as presently enacted and especially as contemplated to apply to children convicted of Commonwealth terrorism offences, are disproportionate to its objectives.

154. This is so having regard, in particular, to:

- the mandatory nature of the standard minimum non-parole period providing insufficient flexibility to treat different cases differently;
- it not allowing for less restrictive measures that would nonetheless satisfy the objectives of public safety and national security;
- there being insufficient regard to the particular rights and interests of children; and
- there being no demonstrated effect of imprisoning child terrorist offenders on reducing the possibility that the child offender will re-offend upon release.

155. As discussed earlier in this submission, principles of rehabilitation and reintegration, as articulated in the CRC and ICCPR, are important overarching considerations in assessing whether section 19AG, amended to apply to children convicted of Commonwealth terrorism offences, is a proportionate measure.

Best interests of the child should be a primary consideration

156. Section 19AG engages the obligation that in all actions concerning children, whether undertaken by courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.[206]

157. The UN Committee on the Rights of the Child (**UNCRC**) has explained that 'the expression 'primary consideration' means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child…'[207] Where the right conflicts with other interests or rights, such as public safety, they must be resolved on a case-by-case basis, balancing the interests of all to find a suitable compromise.[208] If harmonisation is not possible, the rights of others concerned must be analysed, however the right of the child to have his or her best interests taken as a primary consideration means that the child's interests must have a high priority and not just be one of several considerations.[209]

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[205] Parliamentary Joint Committee on Human Rights, *Annual Report 2012-2013* (December 2013) [1.53]; Parliamentary Joint Committee on Human Rights, *Guide to Human Rights* (June 2015) [1.15]. These are also reflected in the Law Council of Australia*, Policy statement on human rights and the legal profession: Key principles and commitments* (May 2017).
[206] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 3.
[207] UN Committee on the Rights of the Child, *General Comment No. 14*: *On the right of the child to have his or her best interests taken as a primary consideration,* 62nd sess, UN Doc CRC/C/GC/14 (29 May 2013).
[208] Ibid [39].
[209] Ibid.

158. The Attorney-General's Department notes that 'there may be circumstances in which the best interests of the child under the CRC can be outweighed by other primary considerations', including public security considerations.[210]

159. The Law Council is of the view that the application of a standard non-parole period to children convicted of terrorism offences fails to give the child's best interests the requisite high priority. Instead, other considerations such as public safety and national security are approached as the primary consideration. And this is despite a lack of evidence demonstrating that an increased period in detention will rehabilitate the offender and prevent further offending (and thereby contribute to community protection) upon release, as discussed at paragraph [33] above.

160. Further, the Law Council considers that a standard non-parole period ignores what is in the best interests of children by preventing the court from considering the age, maturity, cultural background and reasons for committing the offence in the rehabilitation process, as required by the CRC.[211]

161. A standard minimum non-parole period does not give primary consideration to the best interests of the child by failing to consider detention as a last resort and for the shortest appropriate period.

Deprivation of liberty should not be arbitrary

162. A minimum standard non-parole period under section 19AG, while being in accordance with such procedure as established by law,[212] may be arbitrary in contravention of article 9 of the ICCPR and article 37(b) of CRC. The UN Human Rights Committee has made clear that an arrest or detention may be permissible under domestic law, but may nevertheless be arbitrary. Arbitrariness must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability.[213] Under article 9 of the ICCPR, detention must meet certain criteria including that it be:

- reasonable;
- necessary in the individual case rather than the result of a mandatory policy;
- for a legitimate objective;
- proportionate to the reason for the restriction; and
- for the shortest time possible.[214]

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[210] Attorney-General's Department, *Rights of parents and children,* https://www.ag.gov.au/RightsAndProtections/HumanRights/Human-rights scrutiny/PublicSectorGuidanceSheets/Pages/Rightsofparentsandchildren.aspx.

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

[212] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979) art 9.

[213] As expressed in the Law Council's *Policy Statement on Principles Applying to Detention in a Criminal Law Context*: 'Arbitrariness' is to be interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice, lack of predictability and due process of law. For example, arbitrariness may result from a law which is vague or allows for the exercise of powers in broad circumstances which are not sufficiently defined. See Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context* (23 June 2013) http://www.lawcouncil.asn.au/lawcouncil/index.php/library/policies-and-guidelines, 4.

[214] See, for example, Human Rights Committee, *Views: Communication No 305/1988,* 39th sess, UN Doc CCPR/C/39/D/305/1988, (23 July 1990) [5.8] (*'Van Alphen v The Netherlands'*); Human Rights Committee, *Views: Communication No. 1134/2002,* 83rd sess, UN Doc CCPR/C/83/D/1134/2002 (17 March 2005), (*'Gorji-*

163. The Law Council accepts, of course, that protection of public safety and national security are legitimate objectives for a sentencing and parole scheme; and that a sentence is not arbitrary if it is imposed by a competent, independent and impartial authority.[215]

164. However, in the Law Council's view, section 19AG is a blanket limitation that allows insufficient flexibility to treat different cases differently. It is arbitrary insofar as it requires the imposition of a mandatory policy regardless of whether that policy is reasonable, necessary, or proportionate in the individual case.[216] By requiring a minimum non-parole period of three-quarters of the head sentence, there is a risk that a child terrorist offender will be detained beyond a justifiable period [217] as it does not allow an offender who has demonstrated rehabilitative prospects to be released into the community.

165. Further, a sentence of imprisonment without standards of review is by implication arbitrary.[218] This is discussed further below.

166. The arbitrariness of section 19AG is exacerbated by the breadth of the application of section 19AG to encompass all of Part 5.3 'terrorism offences' without differentiation between conduct of varying levels of seriousness. The level of arbitrariness is also exacerbated by the prevention on a court from, for example, making a recognizance release order for terrorism offences under paragraph 19AB(1)(e) or (2)(e), 19AE(2)(e) or 19AR(2)(e). The Government has not provided an evidential basis as to why courts should automatically be precluded from issuing recognizance release orders or confirming a pre-existing recognizance release order or non-parole period in the case of terrorism related offences.

Deprivation of liberty shall be used only as a measure of last resort and for the shortest appropriate period of time

167. The Law Council is concerned that by imposing a standard non-parole period for children convicted of terrorist offences, these children are not sentenced to imprisonment as a measure of last resort and for the shortest period of time. By imposing a minimum period in detention, consideration cannot be given to less restrictive sentences that sufficiently fulfil public safety objectives.

168. The UNCRC has stated that in order to ensure that the detention or imprisonment of a child is used only as a last resort, it is necessary to develop and implement a wide range of measures to ensure that children are dealt with in a manner appropriate to

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Dinka v Cameroon'), [5.1]; Human Rights Committee, *Views: Communication No 2094/2011,* 108th sess, UN Doc CCPR/C/108/D/2094/2011, (20 August 2013), ('*F.K.A.G. et al. v Australia'*), [9.3], [9.6]-[9.7]; Human Rights Committee, *Views: Communication No 2136/2012,* 108th sess, UN Doc CCPR/C/108/D/2136/2012, (20 August 2013), ('*M.M.M. et al. v Australia'*), [10.3]-[10.4], [10.6]; Human Rights Committee, *General Comment No. 27: Freedom of movement*, 67th sess, UN Doc CCPR/C/21/Rev. 1/Add.9 (2 November 1999), [13].

[215] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(d).

[216] *Report of the Working Group on Arbitrary Detention,* UNGAOR, 23rd sess, Agenda Item 3, UN Doc A/HRC/22/44 (24 December 2012), [61] citing Human Rights Committee, *Views: Communication No 1128/2002,* 59th sess, UN Doc CCPR/C/59/D/560/1993 (30 April 1997) ('*A. v. Australia*'); Human Rights Committee, *Views: Communication NO. 1128.2002* 83rd sess, UN Doc CCPR/C/83/D/1128/2002 (18 April 2005) ('*Marques de Morais v. Angola*), [6.1]; *Gangaram Panday v. Suriname*, *Judgement,* Inter-American Court of Human Rights, Ser. C, No. 16, 1994, [47; Opinions No. 4/2011 (Switzerland); No. 3/2004 (Israel).

[217] Human Rights Committee, *Views: Communication No. 1172/2003,* (28 March 2007) ('*Madani v. Algeria'*), [8.4] cited in *Report of the Working Group on Arbitrary Detention,* United Nations Human Rights Council, 23rd sess, Agenda Item 3, UN Doc A/HRC/22/44 (24 December 2012), [62].

[218] Human Rights Council, 23rd session, Agenda Item 3 Un Docs A/HRC/22/44 (24 December 2012), [62].

their well-being, and proportionate to both their circumstances and the offence committed.[219] This means that States parties should have in place a well-trained probation service to allow for the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day report centres, and the possibility of early release from detention.[220]

169. In the case of a child convicted of a terrorist offence, in determining a non-parole period, courts should be able to consider measures available to rehabilitate and reintegrate the child offender and therefore protect the community by preventing recidivist behaviour. This may include supervision orders that allow a child offender to be closely monitored while returning to live with their family and continue their education.[221] By requiring the court to award a minimum standard non-parole period, this precludes adequate consideration of alternatives to detention.

170. Further, the principle of detention as a last resort and for the shortest appropriate period requires a regular review of the child's development and progress in order to decide on his/her possible release.[222] By imposing a standard minimum non-parole period, consideration cannot be given to whether a child has progressed in detention by demonstrating remorse and prospects of rehabilitation so that they may serve the remainder of their sentence in the community.

The desirability of promoting a child's rehabilitation and reintegration

171. The primary purpose of any action taken against children in contact with the justice system is their rehabilitation and reintegration.[223] This can be achieved if the child convicted of a terrorist offence receives education, treatment, and care aimed at his/her release, reintegration and ability to assume a constructive role in society.[224]

172. The UNCRC has noted that 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration in society'.[225] As discussed above, a standard non-parole period precludes a court from appropriately considering alternatives to imprisonment, such as supervision orders, that are specifically aimed at rehabilitating the child.

173. The Law Council notes the sentencing comments of Lasry J in *MHK* where he stated that 'had I been permitted to do so, I would have fixed a minimum term of four years [non-parole], which would have better enabled your supervision and rehabilitation given your youth'.[226]

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[219] Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [23].
[220] Ibid [28].
[221] United Nations Office on Drugs and Crimes, *Handbook on Children Recruited and Exploited by Terrorist and Violent Extremist Groups: the Role of the Justice System* (Vienna, 2017), 96.
[222] Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [77].
[223] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 40(1); *International Covenant on Civil and Political Rights*, opened for signature, 999 UNTS 171 (entered into force 23 March 1976) art 14(4).
[224] Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [77].
[225] Ibid [11].
[226] *R v MHK* [2016] VSC 742, [78] (Lasry J). The Director of Public Prosecutions (Cth) successfully appealed this sentence on the grounds it was manifestly inadequate. The sentence was subsequently increased to a term of imprisonment of 11 years with a non-parole period of 8 years and 3 months (*DPP v MHK* [2017] VSCA 157).

174. The UNCRC has stated that:

> *…in cases of severe offences by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need of public safety and sanctions. In the case of children, such considerations must always be outweighed by the need to safeguard the wellbeing and the best interests of the child, and to promote his/her reintegration.*[227]

175. The Explanatory Memorandum explains that the policy rationale behind section 19AG 'is that individuals convicted of terrorism offences should not be released into the community sooner than absolutely required on the basis they have committed serious offences that have endangered public safety.'[228]

176. In the case of children, the Law Council is of the view that this objective pays insufficient regard to the rights and interests of children by prioritising the gravity of the offence and public safety, and principles of general deterrence and denunciation, over principles of rehabilitation and reintegration. To ensure appropriate consideration of principles of rehabilitation and reintegration in sentencing children convicted of terrorism offence, the courts should retain full discretion to determine non-parole periods.

Right to appeal

177. The right to a fair trial in article 14 of the ICCPR includes the right to have a sentence reviewed by a higher court.[229]

178. The United Nations Special Rapporteur on the Independence of the Judiciary has observed that the right of appeal in article 14(5) of the ICCPR:

> *…is negated when the trial judge imposes the prescribed minimum sentence, since there is nothing in the sentencing process for an appellant court to review. Hence, legislation prescribing mandatory minimum sentences may be perceived as restricting the requirements of the fair trial principle and may not be supported under international standards.*[230]

179. While there may be a right to appeal the conviction for an offence or the head sentence, a standard minimum non-parole period prevents substantial review of this sentence. This means that section 19AG may fail to ensure the right of appeal to a higher court for review of a sentence in contravention of article 14(5) of the ICCPR.[231]

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[227] Committee on the Rights of the Child, *General Comment 10: Children's rights in juvenile justice,* 44th sess, UN Doc CRC/C/GC/10 (25 April 2007) [71].
[228] Explanatory Memorandum, Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (Cth), 19.
[229] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979) art 14(5).
[230] Dato' Param Cumaraswamy, 'Mandatory Sentencing: the individual and Social Costs' (2001) 7(2) *Australian Journal of Human Rights* 7.
[231] Australian Human Rights Commission, Submission No 4 to the Senate and Legal Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 27 February 2012, 5. See also Bassina Farbenblum, University of New South Wales Faculty of Law, Submission No 3 to the Senate Legal and Constitutional Affairs Committee, *Inquiry into the Migration Amendment (Removal of Mandatory Minimum Penalties) Bill 2012*, 24 February 2011.

Right to be free from religious discrimination

180. It may be that persons of Muslim background and non-European descent will be more likely than persons of other religious and ethnic groups to have section 19AG applied when sentenced. This disproportionate application of the standard non-parole period may engage indirectly the right freedom from racial or religious discrimination.[232]

181. The Australian Institute of Criminology notes that, while historically planned acts of violent extremism in Australia have involved a range of ethnicities, religions, issues and political views, 'in recent times, the primary violent extremist threat to Australia has come from jihadism'.[233] This trend has had a particular influence on public perceptions of the Muslim community. A 2008 Victorian study conducted over a three-year period noted that counter-terrorism strategies often focus on people from culturally and linguistically diverse communities or distinct religious backgrounds.[234] Muslim communities in particular reported feeling:

> *… an increased perceived sense of surveillance, an apparent equating of Islam with terrorism, isolated racist incidence by police affecting young males more often than previously, and the perceived demonising of Muslims and non-Europeans by mass media coverage of terrorism.*[235]

182. In light of this evidence regarding public perceptions of the Australian Muslim community, Whealy J has criticised the operation of section 19AG, observing that the nature of section 19AG, along section 15AA and the high-risk prison classification for terrorism offences in NSW, 'may tend to reinforce the potential in the public mind for prejudice, animosity and bias'.[236]

183. The Law Council is concerned that given the potential indirect effect of section 19AG in reinforcing prejudice and bias towards the Muslim community, it is likely to impact adversely on the right to be free from racial and religious discrimination.

Recommendations

- **the INSLM find that section 19AG of the Crimes Act should be repealed on the basis that it:**
  - **(c) is an attenuated form of mandatory sentencing which interferes with the ability of the judiciary to determine a just penalty which fits the individual circumstances of the offender and the crime; and**
  - **(d) may be inconsistent with Australia's international human rights obligations;**
- **if section 19AG is to be retained, children should be exempted from its operation.**

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[232] *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1979) art 26.
[233] Shandon Harris-Hogan, 'Violent extremism in Australia: an overview' (2017) 491 *Australian Institute of Criminology Trends and issues in crim and criminal justice*, 6.
[234] Australian Institute of Criminology, 'Counter-terrorism policing and culturally and linguistically diverse communities 1: the challenges' (2008) 68 *AICrime Reduction Matters* citing S Pickering, D Wright-Neville, J McCulloch and P Lentini, *Counter-terrorism policing and culturally diverse communities. Final report.* (Melbourne: Monash University 2007).
[235] Ibid.
[236] Justice AG Whealy, 'Difficulty in obtaining a fair trial in terrorism cases' (2007) 81 *Alternative Law Journal* 743, 756.

Section 20C of the Crimes Act

184. Section 20C of the Crimes Act states that a child or young person who is in a State or Territory and is charged with a Commonwealth offence may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. This includes terrorist offences under the Criminal Code. Section 20C does not mean a court must operate under state or territory law. They may instead decide to sentence a child under Part IB of the Crimes Act – sentencing, imprisonment and release of federal offenders.

Consistency between state and territory procedures for dealing with juvenile terrorist offenders

Does the Law Council support, in principle, a consistent approach to the prosecution and sentencing of Commonwealth terrorist offenders, whether adults or juveniles? Are there any reasons why consistency might be more appropriate in cases of juveniles?

185. The Law Council acknowledges the decision of the Council of Australian Governments on 5 October 2017 that States and Territories would legislate to develop nationally consistent principles to ensure there is a presumption against bail and parole in agreed circumstances across Australia.[237] However, the Law Council further notes that currently the majority of Commonwealth offences are currently tried in state and territory courts,[238] and will likely continue to be so tried.

186. The Australian Government agencies have submitted to the INSLM that the Commonwealth relies on state and territory courts for criminal matters, including their rules of procedures, as a person may be charged with the mixture of Commonwealth and state and territory offences. The Australian Government agencies also acknowledged that 'the desire for consistency should not override the imperative to distinguish between the approach taken toward adults and that taken towards children and young people'.[239] They submitted that as there is no federal juvenile justice system, it is appropriate for children to be sentenced in state and territory jurisdictions where there are 'specialist juvenile justice systems which apply principles and procedures that are specifically designed with that cohort in mind'.[240]

187. It is the Law Council's view that children and young people charged with Commonwealth offences should continue to be sentenced under state and territory laws in accordance with section 20C of the Crimes Act. The Law Council considers that it would not be beneficial to young offenders to unify approaches for such matters.

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[237] Special Meeting of the Council of Australian Governments on Counter-Terrorism, *Communique* (Canberra, 5 October 2017), 2.
[238] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders,* Report No 103 (2006), 119.
[239] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, Submission No 7 to the Independent National Security Legislation Monitor, *Review of the prosecution and sentencing of children for Commonwealth terrorist offences*, June 2018, 22.
[240] Ibid.

188. The Law Council notes that the ALRC in its *Sentencing of Federal Offenders* report observed that states and territories already have well-developed juvenile sentencing principles and factors.[241] If federal legislation were to provide a comprehensive list of principles and factors for young federal offenders, state and territory judicial officers would be required to apply a different set of sentencing principles to those applicable to young state or territory offenders. It may be challenging for courts to facilitate different systems because a significant amount of resources would need to be applied to develop separate processes for a small number of cases. Different processes may also cause difficulties for young offenders who are charged with both state and federal offences. Dealing with two systems could be confusing for young offenders and may inhibit them from being able to participate in the judicial processes directly affecting them.[242] Access to justice for young offenders is facilitated when court procedures are simple to navigate, both for young people and their legal representatives.

189. Given there is no Commonwealth legislation providing for the trial of children, or special procedures to be following in sentencing children, it is plainly desirable that a court exercising federal jurisdiction be able to pick up State or Territory laws dealing with those matters. Those laws deal with such issues as the age of criminal responsibility, special procedures to be adopted during trials and more flexible approaches to sentencing. In the longer term, it may be desirable for Commonwealth legislation to be enacted ensuring a consistent, *and best-practice,* approach on such matters. This may include national minimum standards.[243] However, in the interim, given the small number of potential young federal offenders[244] the limited experience of the Commonwealth in this area and the significant resources that the drafting of such legislation would require, the current requirements should be retained until this work has been properly scoped. The Law Council is of the view that even if Commonwealth legislation were enacted that provides for a best-practice approach in sentencing young offenders, this may also create unnecessary complexity for those dealing with the legislation.

Does the Law Council consider terrorist offending to merit a higher degree of national consistency in approach to prosecution and sentencing compared with other categories of offending against Commonwealth laws?

190. The Law Council considers that it is desirable that there be national consistency in approaching the prosecution and sentencing of all categories of Commonwealth offences. In the case of juveniles, as noted, the Law Council supports the adoption best practice guidelines for juvenile justice, which include federal minimum standards that reflect the purposes, principles and factors state in juvenile justice legislation of the states and territories. There is no basis for making such approaches more consistent in relation to terrorist offending.

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[241] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders* Report No 103 (13 September 2006), 642-643.
[242] Office of the Children's Guardian NSW, Submission No 3 to the Independent National Security Legislation Monitor, *Review of the prosecution and sentencing of children for Commonwealth terrorist offences*, May 2018, 2.
[243] Australian Law Reform Commission, *Final Report: Same Crime, Same Time: Sentencing for Federal Offenders,* Report No 103 (2006), 642-643.
[244] Ibid.

Have you identified any differences between the existing state and territory laws and/or policies applicable to the prosecution, sentencing and/or imprisonment of young terrorist offenders which are of concern?

191. The Law Council has not identified any such differences.

Have you identified any existing state and territory laws and/or policies applicable to the prosecution, sentencing and/or imprisonment of young terrorist offenders which you regard as best-practice or which you believe would merit consideration by other jurisdictions?

192. The Law Council has not identified substantial differences between the states and territories. The Law Council is aware that police and prosecution in the states and territories exchange information among themselves and seek to ensure consistency of approach.

If the Law Council supports greater consistency, does it have a view about how that consistency would be best achieved (e.g.; through Commonwealth legislation or harmonisation of state and territory laws)?

193. The Law Council supports the harmonisation of state and territory laws, consistent with Commonwealth legislation. Collaboration between jurisdictions in the development of policy, legislation, practices and procedures assists in achieving consistency of approach. As noted, this may be in the form of best practice guidelines for juvenile justice, which include federal minimum standards.

I understand that in the case of children charged with terrorism offences, the CDPP consider they cannot 'force' a jury trial by filing an indictment and thus attracting the jury trial guarantee in s 80 of the Constitution, in the face of opposition by a State Children's court. Does the Attorney-General's Department agree with that view? Does the Department consider that the investing of federal jurisdiction under the *Judiciary Act 1903* (Cth) should be amended to make clear that the CDPP is not limited by state and territory law in deciding whether or not to file an indictment instead of proceedings summarily?

194. This question restates the question put to the CDPP and the Australian Government agencies by the INSLM. The Law Council supports the response made by the CDPP, namely that there is no need for any amendment to the Judiciary Act to clarify the scope of the section 80 power. The power under subsection 6(2D) of the *Director of Public Prosecutions Act 1983* (Cth) is sufficient to enable the CDPP broad power to file an ex officio indictment in a matter involving a juvenile.

Clarification regarding when terrorism offences are uplifted from a Children's Court to a superior court

195. The Law Council notes that state and territory laws differ as to the circumstances in which a child charged with an offence will have their matter heard and determined in a Children's Court or uplifted to a superior court. This may impact the maximum sentence a child convicted of a terrorist offence may receive, and other sentencing options that may be only available within the jurisdiction of the Children's Court.

196. MHK is one example where a young person charged with a terrorist offence has had their case uplifted to a superior court. MHK's case was uplifted from the Children's Court to the Victorian Supreme Court under section 356 of *Children, Youth and Families Act 2005* (Vic) (**Children, Youth and Families Act**). In reviewing this decision, Forrest J found that the maximum three-year sentence of imprisonment allowed in the Children's Court jurisdiction would be insufficient for the charges, which carry a maximum sentence of life imprisonment. Forrest J found that the charges therefore amounted to 'exceptional circumstances' under the Children, Youth and Families Act and therefore should be uplifted to the Supreme Court.

197. The Australian Government agencies submission suggested that the INSLM could review whether there is scope for state and territory laws to be more consistent in determining when a Children's Court should have jurisdiction over terrorism matters.[245] The INSLM would be well-placed to make such an inquiry to the extent that it informs the best practice guidelines for federal children terrorist offenders.

Recommendation

- **any review undertaken by the INSLM regarding when a Children's Court should have jurisdiction over federal terrorism matters should inform the development of best-practice guidelines for federal children terrorist offenders.**

ASIO questioning warrants

198. The Law Council notes that ASIO's preferred model for its compulsory questioning framework includes that questioning warrants be permitted for children aged 14 and above, noting the age profile of those who have been involved in recent terrorism investigations.

199. The Law Council will consider any such suggestion in the context of the proposed new framework for ASIO's compulsory questioning powers.

[245] Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation, Submission No 7 to the Independent National Security Legislation Monitor, *Review of the prosecution and sentencing of children for Commonwealth terrorist offences*, June 2018, 27.