



Our Ref:

30 May 2018

Dr James Renwick SC
Independent National Security Legislation Monitor
PO Box 6500
CANBERRA ACT 2600

Dear Dr ~~Renwick~~, *James*

Review of the Prosecution and Sentencing of Children for Commonwealth Terrorist Offences

Thank you for your letter dated 20 April 2018 inviting the New South Wales Bar Association (“Association”) to make submissions regarding the review of the prosecution and sentencing of children for Commonwealth terrorist offences.

1. Prosecution of children

As regards s 20C of the *Crimes Act 1914* (Cth), given that there is no Commonwealth legislation providing for the trial of children, or special procedures to be followed 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. However, in the interim, given the small number of potential offenders, the limited experience of the Commonwealth in this area and the significant resources that the drafting of such legislation would require, the current arrangements should be retained until this work has been properly scoped.

2. Sentencing

As regards s 19AG *Crimes Act 1914* (Cth), the Association opposes mandatory sentencing in principle. That is also the position of the Law Council of Australia (see LCA, *Policy Position: Mandatory Sentencing*, June 1914; LCA, *Policy Discussion Paper on Mandatory Sentencing*, May 2014). Section 19AG is a form of mandatory sentencing because it provides that a sentencing court cannot impose a non-parole period less than 75% of the term of the sentence. This “mandatory minimum” precludes the sentencing court from determining a just non-parole period in the particular circumstances of the case. There is nothing inherent in Commonwealth “terrorism offences” that justifies the removal of that sentencing discretion.

A study by the NSW Judicial Commission in 2013 (Poletti and Donnelly, “Special circumstances under s 44 of the Crimes (Sentencing Procedure) Act 1999” Judicial Commission of NSW, Sentencing Trends and Issues, 2013) found that, in respect of NSW offences, the non-parole period was set at less than 50% in 21.5% of cases, between 50% and 75% in 49.4% of cases and greater than 75% in 29% of cases. Courts sentencing for Commonwealth offences, including “terrorism offences”, should also be permitted to determine an appropriate non-parole period in the same way. In that context, it must 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.

The Association also supports the generally accepted sentencing principle that the primary focus of sentencing young offenders should be on rehabilitation. That position is reflected in section 6 of the *Children (Criminal Proceedings) Act 1987* (NSW). The Victorian Court of Appeal observed in *Webster v The Queen* [2016] VSCA 66 at [7]-[8]:

“What is so distinctive, and so important, about juvenile justice is that it requires a radically different balancing of the purposes of punishment. The punitive or retributive considerations which are appropriately applied to adults must be largely set to one side. ... There are three reasons for this. First, the young offender’s immaturity is seen as markedly reducing his/her moral culpability; secondly, custody can be particularly criminogenic for a young person, whose brain is still developing; and, thirdly, the very process of development and maturation which is under way is seen as providing a unique opportunity for rehabilitation and — hence — for minimising the risk of re-offending.”

See also *Campbell (a pseudonym) v The Queen* [2018] NSWCCA 87. A useful summary of NSW law in that regard is found in Odgers, *Sentence*, 3rd ed 2015 at 258-265.

It follows that the Association would support Commonwealth legislation that makes it clear that, if s 19AG *Crimes Act* 1914 (Cth) is to be retained, children are excepted from its operation.

If you have any questions please contact the Association’s Executive Director, Mr Greg Tolhurst on 9232 4055 or by email at gtolhurst@nswbar.asn.au.

Yours sincerely,



Arthur Moses SC
President

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