

Obj File Ref: A3950975

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

Dear Mr Renwick

Re: INSLM review of the prosecution and sentencing of children for Commonwealth terrorist offences

I am writing regarding your letter of 20 April 2018. Thank you for inviting the Office of the Children's Guardian (**OCG**) to make a submission to the review.

By way of background, the key functions of the Children's Guardian are outlined as follows.

#### Functions of the Children's Guardian

The Children's Guardian is an independent statutory office established under s 178 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW). Relevantly, the principal functions of the Children's Guardian are set out at s 181 of that Act as:

- Exercising functions relating to persons engaged in child-related work, including working with children check clearances, under the *Child Protection (Working with Children) Act 2012* (NSW);
- Promoting the best interests of all children and young persons in out-of-home care (**OOHC**);
- Ensuring that the rights of all children and young persons in OOHC are safeguarded and promoted;
- Establishing and maintaining a register for the purpose of authorising individuals as authorised carers;
- Accrediting designated agencies (ie agencies that arrange the provision of statutory and supported OOHC) and adoption service providers and monitoring their responsibilities;
- Registering organisations that provide or arrange voluntary OOHC and monitoring their responsibilities;
- Exercising functions relating to the employment of children;
- Developing and administering a voluntary accreditation scheme for persons working with children who have committed sexual offences against children; and
- Encouraging organisations to develop their capacity to be safe for children.



Office of the  
Children's Guardian

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Against the above background, the OCG makes the following observations. We set out our observations adopting the numbering of the review's 2 particular focus areas (ie the prosecution of children and sentencing).

### Observations

#### 1. Prosecution of children

Without knowing to what extent a Commonwealth framework would differ from the NSW framework, it is difficult to comment. In relation to procedural aspects, however, the OCG considers there is a sound argument to retain the NSW procedures for Commonwealth matters because there are very few Commonwealth matters against children. Having different processes in place has the potential to cause difficulties for young people who may receive conflicting information from various parts of the system. This would be particularly problematic where a young person was charged with both state offences and Commonwealth offences.

#### 2. Sentencing

The OCG considers that there is a good argument to depart from the three-quarters rule for young people. This is particularly relevant where a young person might receive a comparatively short custodial sentence and greater flexibility may allow a court to construct a sentence that supports the young person's reintegration into the community.

Further, the Children's Guardian distinguishes between juvenile and adult offending. The distinction is made because children need time and experience to mature, psychologically and emotionally. Factors which motivate a particular child's behaviour may not influence a fully mature adult, just as measures which may effectively deter an adult from offending may not prevent a child from engaging in the same conduct.

The distinction drawn by the Children's Guardian between juvenile and adult offending can most clearly be seen in how certain serious offences are treated for the purposes of the NSW Working With Children Check. A person convicted of, for example, murder, committed as an adult will be automatically disqualified from obtaining a working with children check in NSW. In contrast, a person convicted of murder committed as a child will be subject to a risk assessment. A risk assessment can take into account the full range of circumstances before reaching a conclusion as to whether a person poses a risk to the safety of children.

I trust this information is of assistance in your review.

Yours sincerely



**Janet Schorer**  
Children's Guardian  
May 2018



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Children's Guardian**

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