

The Hon Vickie Chapman MP

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Dear Dr Renwick

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

I refer to your letter of 10 March 2018 to the former Attorney-General and your call for submissions to this enquiry.

Thank you for providing an extension of time to permit the making of submissions by South Australia.

As it is likely that jurisdictions will have a further opportunity to make submissions or provide feedback on the publication of your report later this year, the following comments are preliminary and general in nature.

1. The enquiry, and any recommendations that might be made, ought to take into account the fundamental rights of children and young people, including in respect of education and personal development, in accordance with the international agreements to which Australia is a party (particularly the *United Nations Convention on the Rights of the Child* and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*). The enquiry should also be mindful of the developmental and cognitive differences between adults and children and the implications that has on individual culpability and also the greater potential of children to be rehabilitated. A cautious approach should be taken to the prosecution or sentencing of children as adults.
2. In respect of the enquiry into the operation of s20C of the *Crimes Act 1914* (Cth), the South Australian Government approves in principle the proposition that there should be national consistency in the laws and procedures for the trial and sentencing of a child or young person under 18 in respect of a Commonwealth terrorist offence, providing there are sufficient safeguards recognising the special vulnerability of children and young people and no diminution of the State's existing procedural rights for children and young people. Subject to that proviso,

unless there are substantial jurisdiction-specific reasons for departing from a uniform position, children in Australia charged with or convicted of Commonwealth terrorist offences should be dealt with in the same way. South Australia's support of this proposition is subject to the opportunity for consideration of the enquiry's final recommendations, and any proposed nationally consistent laws and procedures, and the opportunity for South Australia to consider the costs and other legal and social implications of any legislative, policy or procedural reforms that might be required.

3. In respect of State offences, South Australian provisions for the trial, sentencing and imprisonment of a child or young person as an adult are complex and are governed by the *Young Offenders Act 1993 (SA)*, *Criminal Procedure Act 1921 (SA)*, *Sentencing Act 2017 (SA)* and *Correctional Services Act 1982 (SA)*. However, generally speaking:
 - a. Young offenders are charged and tried in, and sentenced by, the Youth Court. In some cases, the Youth Court will conduct committal proceedings and may commit the youth for trial or sentence (as the case requires) to the Supreme Court or District Court. This includes where the offence charged is homicide or attempted homicide or assault with intent to commit homicide; the youth is charged with an indictable¹ offence and asks to be dealt with in the same way as an adult; or the Youth Court or Supreme Court determines, on application by the Director of Public Prosecutions (DPP) or a police prosecutor that the youth should be dealt with in the same way as an adult because of the gravity of the offence or because the offence is part of a pattern of repeated offending;
 - b. However, where a youth is charged with a major indictable offence² and the DPP is of the opinion that the youth poses an appreciable risk to the safety of the community, the DPP has a discretion to charge the youth as an adult in the Magistrates Court. If the Magistrates Court is of the opinion that the youth poses an appreciable risk to the safety of the community, it may at the conclusion of committal proceedings commit the youth for trial or sentence (as the case requires) to the Supreme Court or District Court, or otherwise to the Youth Court;
 - c. On sentencing a youth, the Supreme Court or District Courts have a discretion to deal with the youth as an adult (including in the imposition of a non-parole period); or make any order in relation to the youth that could be made by the Youth Court on sentencing a youth; or remand the youth to the Youth Court for sentencing;
 - d. Subject to any contrary direction of the sentencing court, a youth who has been dealt with as an adult and sentenced to imprisonment will serve that sentence in a training centre. If the sentence of imprisonment will

¹ Generally, under the *Criminal Procedure Act 1921*, an offence punishable by imprisonment of greater than two years.

² Generally, under the *Criminal Procedure Act 1921*, an offence punishable by imprisonment of at least five years.

extend past the youth's 18th birthday, the sentencing court will review the detention before the youth turns 18 and may direct that the youth be transferred to a prison.

4. In respect of the enquiry into the operation of s19AG of the *Crimes Act 1914* (Cth), as any proposed amendments to the current non-parole period would apply in relation to Commonwealth terrorist offences, it is strictly a matter for the Commonwealth whether this provision should be amended in respect of children. However, it should be noted that in South Australia, (aside from a youth who has been dealt with as an adult by the Supreme Court or District Court and is serving a sentence of imprisonment) a young offender cannot be detained by the Youth Court in a youth training centre for longer than three years and would be eligible for conditional release (i.e. "parole") after completing at least two-thirds of their sentence of detention (unless considered a recidivist young offender when they must complete at least four-fifths of their sentence).
5. In respect of the enquiry into the operation of s15AA of the *Crimes Act 1914* (Cth), similar to the comments in respect of s19AG, as this applies to Commonwealth terrorist offences, it is strictly a matter for the Commonwealth whether this provision should be amended in respect of children. However, it is relevant for the enquiry to note that South Australia recently enacted legislation (the *Statutes Amendment (Terror Suspect Detention) Act 2017* (SA)) that makes provision for presumptions against bail and parole for persons charged with or convicted of State offences who have a terrorism background. These provisions apply to persons under the age of 18 as well as to adults. The new legislation also permits the Attorney-General to make an application for extended supervision and continuing detention orders in respect of persons imprisoned for State offences who have a terrorism background. These provisions apply to persons 16 years of age and older.

Thank you for the opportunity to provide submissions to the enquiry.

Yours sincerely



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