Australian Bar Association

18 June 2018

Dr James Renwick SC
Independent National Security Legislation Monitor
Australian Government
One National Circuit Barton ACT 2600

Dear Dr Renwick

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

Thank you for your invitation to contribute to your review of the prosecution and sentencing of children for Commonwealth terrorist offences. Please find attached the ABA's submission which addresses the questions posed about Section 20C and Section 19AG of the Crimes Act 1914 (Cth).

I would be grateful if you could please let me know further details of the public hearing in due course.

Yours sincerely

Noel Hutley SC
President

SECTION 20C

1. Section 20C allows that a child charged with a Commonwealth terrorism offence (or any Commonwealth offence) may be tried, punished or otherwise dealt with under State/Territory law. It allows the range of penalties available under State legislation to be made available, rather than restricting the court to the Commonwealth sentencing options. The section is permissive, and presumably a court may also use the other options provided in the *Crimes Act 1914* (Cth) (the *Crimes Act*), but experience suggests that the local provisions are usually engaged.

2. It is fair to be concerned that, as it currently operates, s 20C might permit different approaches in the conduct of the same type of matters. This is of course not just limited to the prosecution of terrorism offences, but any offence against Commonwealth legislation committed by a child. Differences might be revealed, for example, in the way that courts approach matters of bail, admissibility of evidence, case management or procedural matters such as mandatory defence pre-trial disclosure. The provisions of the relevant State or Territory legislative framework will also decide whether proceedings are dealt with by a specialist Children's Court or otherwise.

3. We are not aware of any concerns having been expressed about the operation of the current regime. One perceived advantage is that it allows for regionally specific issues to be addressed by State Parliaments and agencies.

4. The Report of the Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC: Sydney, 2006), Report No 103, at [5.21] it stated:

> The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case. Courts have consistently recognised the importance of this sentencing principle. For example, in *Kable v Director of Public Prosecutions*, Mahoney ACJ stated that 'if justice is not individual, it is nothing'. (*Kable v Director of Public Prosecution* (1995) 36 NSWLR 374, 394). Individualised justice can be attained only if a judicial officer possesses a broad sentencing discretion that enables him or her to consider and balance multiple facts and circumstances when sentencing an offender. This broad discretion is required because sentencing is ultimately 'a synthesis of competing features which attempts to translate the complexity of the human condition and human behaviour to the mathematics of units of punishment usually expressed in time or money' (*Weininger v The Queen* [2003] HCA 14; (2003) 212 CLR 629.

5. In cases involving the sentencing of juvenile offenders this principle is of great importance. The imposition of standard and mandated non-parole periods will inevitably restrict the capacity of sentencing courts to give due weight to considerations that are specific to the sentencing of children.

6. The comments made by Judge Newman of the South Australian Children's Court, quoted in Fox R and Frieberg A, *Sentencing State and Federal Law in Victoria* (Oxford University Press: Melbourne, 1999) 2nd ed (at 827; [11.201]) are particularly apposite:

> ... Juveniles are less mature – less able to form moral judgments, less capable of controlling impulses, less aware of the consequences of acts, in short they are less responsible and therefore less blameworthy, than adults. Their diminished responsibility means that they 'deserve' a lesser punishment than an adult who commits the same crime... Lesser punishment means not only more sparing use of detention but also means significantly shorter terms of detention, bonds and periods of license disqualification, because time has a wholly different dimension for children than it does for adults ...

7. This reasoning underlines the sentencing regimes that exist in all jurisdictions for dealing with young offenders. These considerations have no lesser application in terrorism cases.

8. Given the relative scarcity of sentencing for these types of offences normal appeal processes are the preferable mechanism of ensuring consistency whilst ensuring judges are given appropriate discretion in setting non-parole periods for children or young offenders.

9. If, for the sake of consistency, it was sought to amend s 20C, this ought only happen if the section is replaced with a legislative regime comparable to those which operate in the States and Territories, and which reflects requirements contained within the UN Convention on the Rights of the Child. This Convention requires a contextual approach to sentencing when determining sentences for children. Australia ratified the Convention in 1990.[1]

10. The ABA is open minded about the need for such a regime for the purposes of Commonwealth sentencing, but if it was to be considered it would clearly need to be the subject of widespread consultation, as its implications would go far beyond the matters currently being considered by the INSLM.

11. In the meantime, there is a clear need to retain the existing provision, as the alternatives currently allowed for in the *Crimes Act* will be completely inadequate for the purposes of processing children through the criminal courts.

[1] https://www.humanrights.gov.au/publications/australias-commitment-childrens-rights-and-reporting-un

SECTION 19AG

12. The protection of the community is best achieved by a tailored, individualised approach to sentencing, both in detention and in the community.

13. This section, as it currently reads, imposes a mandatory sentencing approach for specific offences. It removes part of the sentencing discretion and replaces it with a "one size fits all" approach. This is particularly concerning when the offender is a child.

14. The ABA submits s 19AG of the *Crimes Act* should not apply to children convicted of Commonwealth terrorism offences.

15. It may be assumed that offenders (including children) who are sentenced for terrorism offences are likely to receive lengthy terms of imprisonment. There is a danger that, when they are considered for release they may have become institutionalised. We note the remarks of Johnson J in *Jinnette v R* [2012] NSWCCA 217 at [103] (Hoeben JA and Beech-Jones J agreeing):

> The more accurate way of characterising the Applicant's position with respect to institutionalisation and "special circumstances" is to take into account the need for a sufficient period of conditional and supervised liberty to assist the protection of the community, by maximising the prospect that the Applicant will not reoffend. This approach does not involve a somewhat unrealistic suggestion that institutionalisation can be avoided. Rather, it acknowledges the fact of institutionalisation, and seeks to reduce the adverse consequences of that state of affairs…

16. Parole periods also provide incentives to offenders to achieve the conditions upon which they might reasonably expect to obtain their release and enable the imposition of conditions which are in the public interest.

17. This has, potentially, particular significance in the case of children. The law makes assumptions about the developmental capacity of children through the imposition of age-based proscriptions.[2] The reasons are based on the assumptions about the soundness of judgment of a maturing mind. In *Marion's Case* (1992) 175 CLR 218, Deane J held:

> …the extent of the legal capacity of a young person to make decisions for herself or himself is not susceptible of precise abstract definition. Pending the attainment of full adulthood, legal

[2] For example, the presumption of *doli incapax* is based on the rationale that a child aged under 14 is not sufficiently intellectually and morally developed to appreciate the difference between right and wrong and thus lacks the capacity for mens rea: *RP v The Queen* (2016) 259 CLR 641 at [8] (Kiefel, Bell, Keane and Gordon JJ). *Doli incapax* is applicable in the federal sphere: Sections 4M and 4N of the Crimes Act and ss 7.1 and 7.2 of the Criminal Code (Cth).

> capacity varies according to the gravity of the particular matter and the maturity and understanding of the particular young person.

18. Further, not all children mature at a uniform rate.[3] Article 40 of the United Nations Convention on the Rights of the Child states:

> Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth"

19. Particular vulnerabilities have been noted in the context of terrorism offences. The offender in *R v Alou (No. 4)* [2018] NSWSC 221 (Johnson J) was an adult, but he had aided and abetted a 15 year old male in committing a terrorist act (including by providing the firearm). His Honour's remarks at [184] illustrate the types of forces that may be at work:

> It is clear that the Offender did nothing to dissuade Farhad Mohammad from this course. Although the Offender himself was just 18 years and two months old at the time, **he well knew that Farhad Mohammad was a 15-year old youth. The Offender was aware that Farhad Mohammad was vulnerable because of his age**, but he was content to send out Farhad Mohammad to commit this act. The Offender was prepared to exploit a young person as the perpetrator of a terrorist act in the knowledge that it was planned to kill a person or persons in the street, and that there was every prospect that Farhad Mohammad himself would die, as indeed happened. (emphasis added).

20. His Honour also observed that the child's 21 year old sister had "*played a major role in the indoctrination of her younger brother*" ([37], see too at [72]).

21. The 17 year old offender in *DPP (Cth) v MHK (a Pseudonym)* [2017] VSCA 157 (Warren CJ, Weinberg and Kaye JJA) was noted to have "*began to experience self-doubt and feelings of inadequacy and social anxiety*" when he was 16, and during a period of social isolation, turned to the internet and became radicalised. The Court noted at [56]-[57]:

> In the present case, the respondent was only 17 years of age at the time of the offending. **Ordinarily, and in general, the youth of an offender is an important mitigating circumstance. It is relevant to an assessment of the moral culpability of the offender, as the law recognises that the immaturity and impressionability of youth may be, and commonly is, an important contributing factor** to the involvement of a young offender in the crime for which that offender is to be sentenced. In addition, the law regards the rehabilitation of young offenders of substantial, if not primary, importance, not only in the interests of the offender, but also in the interests of the community.
>
> On the other hand, it is recognised that those principles need to be appropriately moderated where, as in a case such as this, the offender has been involved in serious and dangerous offending. (emphasis added).

[3] See for example *RP v The Queen* (2016) 259 CLR 641 at [12] (Kiefel, Bell, Keane and Gordon JJ).

22. The Court further held at [65]:

> …to some extent, his youth and immaturity at the time must be weighed in the balance in determining the level of his culpability. However, he had the benefit of a good upbringing, and he had progressed well in his education, until he was diverted by his increasing devotion to the extremist propaganda of ISIS. According to Mr Coffey, he did not suffer from any mental impairment at the time of the offending. He was, as we have stated, young and impressionable, and thus more prone to being corrupted than an older person. **However, equally, he was not a child, in the ordinary sense of that word, at the time of his offending. At the age of 17 years, he stood on the threshold of adulthood. He was old enough to know that what he was doing was grossly wrong, to give some thought to the enormity of the actions that he was planning to carry out, and to resist the allure of the evil influence of Islamic State.** For those reasons, while the respondent's youth is relevant, nevertheless, and taking that factor into account, his moral culpability cannot be described as being other than very great indeed. (emphasis added).

23. So whilst it can be accepted that terrorism offences are extremely serious, it does not follow that a child's involvement in terrorism-related offending necessarily demonstrates that the child should be regarded in the same way as an adult who commits the same offences. Nor does it follow that such a child should be deprived of the benefit of well-established sentencing principles which have been developed to achieve the over-arching goal of community protection through rehabilitation. These demand recognition of an offender's youth, and a high degree of flexibility when crafting an appropriate sentence.
24. The mandated formula in s 19AG should not apply to children being sentencing for Commonwealth terrorism offences, and the duration of the minimum term should be left to the discretion of the sentencing judge having regard the nature of the offending in a particular case.

25. Section 19AG should be amended so as not to apply in relation to a person who was a child at the time of the commission of the offence.

We thank you for the opportunity to comment on the legislation under review and will happily discuss these matters further.

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