



Australian  
Human Rights  
Commission

# Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

Australian Human Rights Commission

Submission to the Parliamentary Joint  
Committee on Intelligence and Security

22 August 2019

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# 1 Introduction

1. The Australian Human Rights Commission (Commission) welcomes the opportunity to make this submission to the Parliamentary Joint Committee on Intelligence and Security (Committee) in relation to its review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (the Bill).
2. Relevantly for the purposes of this submission, the Bill would:
  - extend the range of circumstances in which the presumption against bail in s 15AA of the *Crimes Act 1914* (Cth) (Crimes Act) would apply
  - create a new presumption against parole for certain offenders by inserting a new s 19ALB in the Crimes Act
  - amend s 105A.5 of the *Criminal Code* (Cth)<sup>1</sup> so that certain exculpatory information need not be provided to a respondent to proceedings for a continuing detention order
  - provide that when considering whether any of the following presumptions can, in the case of a child, be displaced:
    - the presumption against bail in s 15AA of the Crimes Act
    - the presumption of a minimum non-parole period in s 19AG of the Crimes Act
    - the presumption against parole in proposed s 19ALB of the Crimes Actthe best interests of the child must be ‘a primary consideration’, while the protection of the community must be ‘the paramount consideration’.
3. The text of the Bill is substantially the same as that of the Counter-Terrorism Legislation Amendment Bill 2019 — a Bill which lapsed with the dissolution of the last Parliament<sup>2</sup> (the Lapsed Bill). The Committee commenced an inquiry into that Bill, which lapsed with the Bill. The Commission made a submission in relation to the Committee’s previous (incomplete) inquiry, noting a number of human rights concerns and making three recommendations.<sup>3</sup>
4. The Commission’s views about the human rights implications of the Bill are unchanged. The Commission welcomes the Committee’s statement that it will consider submissions addressing the Lapsed Bill in the course of

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this inquiry. A copy of the Commission's previous submission is provided for ease of reference in **Attachment A**.

5. The Explanatory Memorandum to the Lapsed Bill stated that aspects of that Bill responded to a report of the Independent National Security Legislation Monitor (INSLM) on the prosecution and sentencing of children for terrorism offences (the INSLM Report).<sup>4</sup> At that time, the INSLM Report had not been tabled and was not publicly available. For that reason, the Commission recommended (in Recommendation 2 of its previous submission) that consideration of the Bill be deferred until such time as the INSLM Report had been released so that the claimed justifications for the Bill could be properly scrutinised.
6. The INSLM Report was tabled on 2 April 2019.<sup>5</sup> The Commission therefore makes the following brief remarks about the parts of that report relevant to the Bill. In doing so, the Commission draws on its submission to the INSLM in relation to the inquiry leading to his report. A copy of that submission is contained in **Attachment B**.

## **2 Section 15AA of the Crimes Act**

7. Section 15AA of the Crimes Act provides that in the case of persons charged with certain offences, bail must not be granted unless there are 'exceptional circumstances' to justify bail.<sup>6</sup>
8. The INSLM considered whether the presumption against bail in s 15AA should, insofar as it relates to children, be retained. He concluded that it should.<sup>7</sup> With respect, the Commission does not agree with this view.
9. For the reasons given in its submission to the INSLM, the Commission considers that a presumption against bail is not consistent with the human rights of affected children as it can lead to the detention of children in circumstances where it is not shown to be strictly necessary.<sup>8</sup> The Commission therefore repeats the recommendation it made to the INSLM that s 15AA be amended so that it does not apply to children.<sup>9</sup>

## **3 Section 19AG of the Crimes Act**

10. Section 19AG of the Crimes Act provides that in sentencing people following conviction for certain terrorism offences, courts must impose a mandatory non-parole period of three-quarters of the head sentence.
11. As explained in the Commission's submission to the INSLM, the *Convention on the Rights of the Child*<sup>10</sup> (CRC) requires that courts must have full

discretion when sentencing children to ensure that they are detained for the shortest appropriate periods of time for the purposes of rehabilitation and restorative justice.<sup>11</sup> For that reason, the Commission submitted that s 19AG should be amended so that it does not apply to children.<sup>12</sup> The INSLM agreed with this view.<sup>13</sup>

12. The Commission therefore repeats the recommendation it made to the INSLM that s 19AG should be amended so that it does not apply to children.

## **4 Proposed s 19ALB of the Crimes Act**

13. As section 19ALB was proposed for the first time in the Lapsed Bill, it is not considered in the INSLM Report. However, the principles explained in the Commission's submission to the INSLM indicate that, in the case of children, there should be a rebuttable presumption in favour of parole.<sup>14</sup> The proposed section would create the opposite presumption. For this reason, the Commission recommends that in the event s 19ALB is introduced into the Crimes Act, it should be amended so that it does not apply to children.

## **5 'Primary' and 'paramount' considerations**

14. If the Bill were passed in its present form, the presumptions against bail, parole, and shorter non-parole periods would apply unless there are shown to be 'exceptional circumstances'.<sup>15</sup> The Bill would have the effect that a court, in considering whether 'exceptional circumstances' exist, would be obliged to consider the best interests of the child as 'a primary consideration', and the protection of the community as 'the paramount consideration'. This appears to adopt a recommendation made by the INSLM in relation to the current s 15AA of the Crimes Act.<sup>16</sup>
15. For the reasons given in the Commission's previous submission to the Committee, this approach is not consistent with the human rights of affected children.
16. In all decisions involving a child, the CRC requires the best interests of that child to be a primary consideration.<sup>17</sup> The Commission therefore considers that if the various provisions do continue to apply to children, this requirement should continue to apply.
17. While it is conceivable that the Crimes Act could establish more than one primary consideration, it is not consistent with the concept of a 'primary'

consideration for there to exist some higher, 'paramount' consideration. The practical problem the Bill creates is that a paramount consideration for community safety might be taken always to outweigh a primary consideration for the best interests of the child, even if the decision in question would make only a marginal improvement to community safety but have a highly damaging effect on the child in question. By contrast, if these matters were both primary considerations, they could be considered on their respective merits.

18. For these reasons, the Commission recommends that the references to the protection of the community being a 'paramount' consideration be deleted from the Bill.

## **6 Conclusion and recommendations**

19. The Commission repeats the substance of Recommendations 1 and 3 of its previous submission to the Committee, for the reasons given in that submission. (With the release of the INSLM's report, Recommendation 2 in that submission is otiose). In light of the release of the INSLM report, the Commission also repeats its recommendations made to the INSLM that the bail and parole provisions of the Crimes Act affected by the Bill should be amended so that they do not apply to children.
20. For clarity, the Commission has collated and reordered these various recommendations below. The numbering of these recommendations has consequently changed from that in the Commission's previous submissions.

### **Recommendation 1**

Section 15AA(1) of the Crimes Act should be amended so that it does not apply to children.

### **Recommendation 2**

The proposed amendments to s 15AA of the Crimes Act should not be passed.

### **Recommendation 3**

If Recommendations 1 and 2 are not accepted, proposed s 15AA(3AA)(a) should be deleted, or, if that is not accepted, amended so that the



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protection of the community is at most another 'primary' consideration, rather than the 'paramount' consideration.

**Recommendation 4**

Section 19AG of the Crimes Act should be amended so that it does not apply to children.

**Recommendation 5**

If Recommendation 4 is not accepted, proposed s 19AG(4B)(a) should be deleted, or, if that is not accepted, amended so that the protection of the community is at most another primary consideration, rather than the paramount consideration.

**Recommendation 6**

Item 16 of the Bill, which would introduce proposed s 19ALB into the Crimes Act, should not be passed.

**Recommendation 7**

If Recommendation 6 is not accepted, proposed s 19ALB should be amended so that it does not apply to children.

**Recommendation 8**

If Recommendations 6 and 7 are not accepted, proposed s 19ALB(3)(a) should be deleted. If that is not accepted, it should be amended so that the protection of the community is at most another primary consideration, rather than the paramount consideration.

**Recommendation 9**

The amendments to s 105A.5 of the Criminal Code should not be passed.

**Recommendation 10**

If Recommendation 9 is not accepted, the Bill should be amended to ensure that all exculpatory information relevant to an application for a continuing detention order is provided to the respondent unless:

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- (a) the issuing court, having considered all aspects of the relevant case, is satisfied that that would unacceptably compromise national security or other compelling public interest, or
- (b) the respondent is in some alternative way provided with sufficient information adequately to defend the proceedings.

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<sup>1</sup> *Criminal Code Act 1995* (Cth) sch.

<sup>2</sup> The only substantive difference between the two Bills is in Item 11 of Part 1 of Schedule 1 of the Bill, which makes consequential amendments to the interaction of the *Crimes Act 1914* (Cth) with State and Territory Laws.

<sup>3</sup> Australian Human Rights Commission, *Submission to the Parliamentary Joint Committee on Intelligence and Security: Review of the Counter-Terrorism Legislation Amendment Bill 2019* (8 March 2019) paras 9, 25-56, available at <<https://www.aph.gov.au/DocumentStore.ashx?id=e1748951-b005-409c-ba6e-50d704e45c51&subId=667096>>.

<sup>4</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, para 5.

<sup>5</sup> Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), available at <<https://www.inslm.gov.au/sites/default/files/files/inslm-report-prosecution-sentencing-children-for-terrorism.pdf>>.

<sup>6</sup> *Crimes Act 1914* (Cth) section 15AA(1).

<sup>7</sup> See, generally, Recommendation 2a: Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), available at <<https://www.inslm.gov.au/sites/default/files/files/inslm-report-prosecution-sentencing-children-for-terrorism.pdf>>.

<sup>8</sup> See, generally, paras 69-75 and Recommendation 4: Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (15 June 2018), available at <[http://www.inslm.gov.au/sites/default/files/submissions/australian\\_human\\_rights\\_commission.pdf](http://www.inslm.gov.au/sites/default/files/submissions/australian_human_rights_commission.pdf)>.

<sup>9</sup> *Ibid.*, Recommendation 4.

<sup>10</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3. (entered into force 2 September 1990)

<sup>11</sup> Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (15 June 2018) paras 17-20.

<sup>12</sup> *Ibid.*, Recommendation 3.

<sup>13</sup> Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), Recommendation 1.

<sup>14</sup> See also the Commission's written response to a question taken on notice at a public hearing held by the INSLM on 2 August 2018, available at <https://www.inslm.gov.au/submissions/prosecution-sentencing-children-cwealth-terrorist-offences>.

<sup>15</sup> Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, item 8 (proposed s 15AA(3AA)), item 13 (proposed ss 19AG(4A) and (4B)) and item 16 (proposed s 19ALB).

<sup>16</sup> Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), Recommendation 2a.

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<sup>17</sup> Article 3 of the CRC provides: 'In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration.**' (emphasis added)



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# 1 Introduction

1. The Australian Human Rights Commission makes this submission to the Parliamentary Joint Committee on Intelligence and Security (the PJCIS) with respect to its inquiry into the Counter-Terrorism Legislation Amendment Bill 2019 (Cth) (the Bill).
2. The Bill would amend the provisions on bail and parole in Part IA and IB of the *Crimes Act 1914* (Cth) (the Crimes Act), and also the continuing detention order scheme in Division 105A of the *Criminal Code Act 1995* (Cth) (the Criminal Code).
3. With its proposed amendments to the Crimes Act, the Bill would expand the existing presumption against bail, and introduce a presumption against parole for a broader group of offenders. The Bill would also make it explicit that when determining whether exceptional circumstances exist to rebut the presumptions insofar as they apply to children, the best interests of the child is a primary consideration, while the protection of the community is the ‘paramount consideration’.
4. The Bill’s proposed amendments to the Criminal Code would allow the applicant for a continuing detention order to exclude exculpatory information, material and facts likely to be protected by public interest immunity from being included in the application for a continuing detention order, and from being provided to the offender.
5. The Commission acknowledges the vital importance of protecting Australia’s national security and the community from terrorism. Taking appropriate steps to prevent the commission of terrorist acts promotes the human rights of members of the Australian community,<sup>1</sup> and is consistent with Australia’s obligations under international law.<sup>2</sup>
6. However, it is also vital that the steps taken to prevent the commission of terrorist acts are themselves consistent with human rights. To comply with international human rights law, any limitation on human rights must not only pursue a legitimate aim. Each limitation also must be reasonable, necessary and proportionate. The Commission is concerned that certain aspects of the Bill fail to meet this standard.
7. As the Office of the High Commissioner for Human Rights has observed, *‘the purpose of security measures is, fundamentally, to protect freedom and human rights.’*<sup>3</sup> It is therefore essential that fundamental human rights are protected in the struggle against terrorism.<sup>4</sup>



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8. In light of the very short timeframe given to the public to make submissions to this inquiry, this submission addresses only a limited number of key human rights concerns raised by the Bill.

## 2 Recommendations

9. The Commission makes the following recommendations:

### **Recommendation 1**

The Commission recommends that the following parts of the Bill not be passed:

- (a) the amendments to s 15AA of the Crimes Act relating to bail
- (b) the insertion of s 19AG(4B) in the Crimes Act relating to 'exceptional circumstances' and the fixing of non-parole periods for some people under 18 years of age
- (c) the insertion of s 19ALB in the Crimes Act creating a new presumption against parole
- (d) the amendments to s 105A.5 of the Criminal Code.

### **Recommendation 2**

The Commission recommends that any consideration of amendments to the Crimes Act insofar as they relate to children should take place after the Independent National Security Legislation Monitor (INSLM) inquiry report is made available to the public.

### **Recommendation 3**

If the PJCIS recommends the Bill for passage, the Commission recommends that the Bill be amended:

- (a) So that if, contrary to Recommendation 1, the presumption against bail in s 15AA is expanded, and the presumption against parole in s 19ALB is introduced, those amendments do not apply to children.
- (b) So that, when determining whether exceptional circumstances exist to rebut the presumptions against bail and parole and the minimum non-parole period in the case of a child, the protection of the community is, at most, another primary consideration, and not the paramount consideration.

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- (c) To ensure all exculpatory information relevant to an application for a continuing detention order is provided to the respondent unless:
- (i) the issuing court, having considered all aspects of the relevant case, is satisfied that that would unacceptably compromise national security or other compelling public interest, or
  - (ii) the respondent is in some alternative way provided with sufficient information adequately to defend the proceedings.

### **3 The relevant provisions of the Bill**

10. The Commission provides below a brief outline of the operative parts of the Bill that raise the human rights issues and concerns discussed in this submission. It is not intended to be a comprehensive account of all of the provisions of the Bill.

#### **3.1 The presumptions against bail and parole**

##### **(a) *Extension of the presumptions***

11. In relation to a person charged with or convicted of certain offences,<sup>5</sup> the Crimes Act currently provides:
- in s 15AA(1), for a presumption against bail;
  - in s 19AG, for a mandatory minimum non-parole period of at least  $\frac{3}{4}$  of the sentence imposed for the relevant offence.
12. 'Exceptional circumstances' must be established to rebut the presumption against bail.
13. The Bill would extend the presumption against bail in s 15AA of the Crimes Act to a person:
- charged with or convicted of an offence against s 102.8 of the Criminal Code (associating with terrorist organisations)
  - subject to a control order within the meaning of Part 5.3 of the Criminal Code (terrorism)
  - whom the bail authority is satisfied has made statements or carried out activities supporting, or advocating support for, terrorist acts within the meaning of that Part.
14. By inserting s 19ALB, the Bill would also introduce a presumption against being released on parole for this same (expanded) group of offenders, and require 'exceptional circumstances' to exist to rebut this presumption.

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**(b) *Determining exceptional circumstances in relation to children***

15. The current presumption against bail and the mandatory minimum non-parole period discussed above also apply to children who are charged with or convicted of the relevant offences. As is the case with adult alleged offenders, 'exceptional circumstances' must be established to rebut the presumption against bail.
16. The Bill would introduce an element of discretion when setting a non-parole period for children, by allowing the sentencing court to set a lower minimum non-parole period if satisfied that 'exceptional circumstances' exist.
17. The new presumption against being released on parole, and the availability of exceptional circumstances to rebut that presumption, would also apply to children.
18. Where an offender or alleged offender is under the age of 18 years, the Bill would make it explicit that in determining whether 'exceptional circumstances' exist:
  - to justify granting bail
  - to justify a departure from the minimum  $\frac{3}{4}$  non-parole period for a terrorism offence
  - to justify the release of an offender on parolethe relevant authority must have regard to:
  - the protection of the community as the paramount consideration;
  - the best interests of the person as a primary consideration.

**3.2 Applications for Continuing Detention Orders**

19. Section 105A of the Criminal Code currently provides that a continuing detention order may be made in relation to a person who is detained in custody and serving a sentence of imprisonment for a serious terrorist offence, and who a court is satisfied poses an unacceptable risk of committing a serious terrorism offence if released into the community. The effect of a continuing detention order is to commit the offender to remain in detention for the period the order is in force, subject to periodic reviews.

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20. Under current s 105A.5(3) of the Criminal Code, an application for a continuing detention order must:
  - (a) include any report or other document that the applicant intends, at the time of the application, to rely on in relation to the application [inculpatory information]; and
  - (aa) include:
    - (i) a copy of any material in the possession of the applicant; and
    - (ii) a statement of any facts that the applicant is aware of; that would reasonably be regarded as supporting a finding that the order should not be made [exculpatory information]; and
  - (b) include information about the offender's age; and
  - (c) request that the order be in force for a specified period.
21. The applicant for a continuing detention order is required to give a complete copy of the application to the offender.
22. Sensitive inculpatory information may be protected under certain provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) or by orders of the court. However, when deciding whether to issue a continuing detention order, a court can only rely on information that has been included in the application, and provided to the offender. That helps ensure that a person responding to an application for a continuing detention order is able to respond meaningfully to the case being made against them.
23. The Bill would allow sensitive exculpatory information not to be included in an application, and therefore not provided to the offender, if that information is 'likely to be protected by public interest immunity'. In these circumstances, the Bill would require that an offender be told that exculpatory information has been excluded, and would allow them to challenge the public interest immunity claim.
24. It appears that rather than the applicant for a continuing detention order bearing the burden of proving public interest immunity in order to withhold information from an affected person, the Bill would place the onus on the offender to disprove the claim. And unless an offender challenges the applicant's claim for public interest immunity, a court could make a continuing detention order without being aware of relevant exculpatory information, material or facts.

## 4 Key human rights concerns of the Bill

### 4.1 Right to liberty and freedom from arbitrary detention

25. Article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR)<sup>6</sup> provides that everyone has the right to liberty. In particular, it provides that no one shall be deprived of his or liberty except on such grounds and in accordance with such procedure as are established by law. This means that any detention of a person must be lawful. Australia ratified the ICCPR in 1980.
26. In addition, article 9(1) provides that laws which provide for detention must not be arbitrary. The requirement that detention not be arbitrary extends beyond a requirement of lawfulness and requires in addition that detention not be inappropriate or unjust and that it be predictable. Lawful detention may become arbitrary when a person's deprivation of liberty is not necessary or proportionate to achieving a legitimate aim such as ensuring community safety.<sup>7</sup>
27. The Commission recognises that in some cases it may be appropriate to refuse bail, impose a  $\frac{3}{4}$  non-parole period, and/or refuse to make a parole order for a person charged with or convicted of a terrorism offence. Where all relevant circumstances are taken into account and an individualised assessment is made, such decisions may be a proportionate restriction of the human rights of the person negatively affected by the decision.
28. Presumptions against bail and parole, and mandatory minimum non-parole periods, prevent the court from making an individualised assessment in decisions dealing with a person's detention. Rather than the State having the burden of justifying that detention is necessary, a person is required to demonstrate that exceptional circumstances exist in order not to be detained. This directly and significantly impacts a person's right to liberty and may allow for the arbitrary detention of individuals, contrary to article 9(1) of the ICCPR.
29. The secondary materials do not contain persuasive reasons demonstrating that the extension of these presumptions against liberty to new categories of person is either necessary or proportionate to protect the community from harm. Given the significant potential limitation on individual rights, the Commission is concerned about the expansion of these provisions to a broader range of offences, without a sufficient evidence base.

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## 4.2 Rights of the child

30. Children enjoy all rights guaranteed by the ICCPR, as well as particular and special protections under the *Convention on the Rights of the Child* (CRC).<sup>8</sup> Australia ratified the CRC in 1990.
31. The CRC provides the overarching international human rights framework for the protection, promotion and fulfilment of the rights of children and young people. The CRC recognises the special status of children, including the needs of the child for 'special safeguards and care, including appropriate legal protection.'
32. Article 3 of the CRC protects the best interests of the child:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, **the best interests of the child shall be a primary consideration**. (emphasis added)
33. Article 37 of the CRC provides that the arrest, detention or imprisonment of a child shall be used only as a measure of last resort and for the shortest appropriate period of time. Article 40 of the CRC recognises the right of a child accused of a criminal offence to be treated in a manner consistent with the promotion of the child's sense of dignity and which takes into account the child's age and the desirability of promoting the child's reintegration into society.
34. Relevantly for present purposes, the UN Committee on the Rights of the Child has stated:

The protection of the best interests of the child means ... that the traditional objectives of criminal justice, such as repression/retribution, **must give way to rehabilitation and restorative justice objectives in dealing with child offenders**.<sup>9</sup>
35. The Explanatory Memorandum for the Bill explains that:

[t]he Bill responds to issues raised during the Independent National Security Legislation Monitor (INSLM) inquiry into the prosecution and sentencing of children for Commonwealth terrorist offences, namely the application to children of the existing presumption against bail, and, the minimum non-parole period for terrorist offenders under section 19AG of the Crimes Act.<sup>10</sup>
36. The Commission provided a submission to the INSLM inquiry in June 2018. In that submission,<sup>11</sup> the Commission recommended that the s 15AA presumption against bail, and the s 19AG minimum  $\frac{3}{4}$  parole period, not be applied to children.

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37. In support of that submission, the Commission wrote:

Contrary to the stated objects of s 19AG, the CRC requires that a court have flexibility in sentencing child offenders to ensure they are not imprisoned beyond the time necessary for rehabilitation. It also requires that parole authorities have discretion to release convicted children on parole where the purpose of detention has been served. It is not permissible to prolong the imprisonment of children for purely punitive purposes, or because of a perception that the community may have a 'concern about terrorism'. The need for flexibility in sentencing children is heightened in the context of terrorism offences because of the heavy penalties attached to those offences. In those circumstances, a mandatory minimum non-parole period may have a significant impact on development, education and capacity to integrate of an affected child, at a critical period of neurological, socio-emotional and physical change.

The right not to be subject to arbitrary detention has been referred to above, in the context of the minimum non-parole period mandated by s 19AG of the Crimes Act. However, the right is important at all stages of the prosecution of children, including arrest and bail, both pre and post charge.<sup>12</sup>

38. The Commission refers the Committee to its submission to the INSLM and the discussion of the relevant human rights considerations contained in it. In its submission to the INSLM, the Commission recommended that the minimum non-parole period and the presumption against bail should not apply to children. A fortiori, insofar as those provisions apply to children, they should not be extended to apply in new circumstances or to new categories of children.
39. At a hearing in August 2018, the INSLM set out some of his preliminary views, including that the presumption against bail in s 15AA and the  $\frac{3}{4}$  minimum non-parole rule in s 19AG, should not apply to children.<sup>13</sup> The Commission notes that the INSLM inquiry report has not, to date, been released to the public and that his final conclusions are therefore not known.
40. In the absence of compelling reasons, especially in regard to urgency, the Commission submits that any consideration of amendments to the bail and parole provisions of the Crimes Act relating to children should not proceed until after the public release of that report, so that any claims that the amendments are necessary and proportionate can be closely scrutinised.
41. In respect of the mandatory minimum  $\frac{3}{4}$  non-parole period, the Commission acknowledges that the Bill introduces a discretion in s 19AG(4A), based on exceptional circumstances, that would allow a sentencing court to fix a shorter non-parole period for children convicted

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of the relevant offences. The Commission therefore recommends that s 19AG(4A) be passed (while maintaining its primary position that s 19AG should not apply to children).

42. The Commission is particularly concerned at the proposed inclusion of the protection of the community as the 'paramount consideration' in determining whether exceptional circumstances exist to rebut the presumptions against bail and parole, or to fix a shorter non-parole period. In the Commission's view, this undermines the rights, freedoms and protections afforded to children in the CRC, and is not consistent with the well-established principles of human rights law concerning children.
43. The UN Committee on the Rights of the Child has stated:

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: dependency, maturity, legal status and, often, voicelessness.

**The best interests of the child** – once assessed and determined – **might conflict with other interests or rights** (e.g. of other children, the public, parents, etc.). ... the right of the child to have his or her best interests taken as a primary consideration means that **the child's interests have high priority** and not just one of several considerations. Therefore, **a larger weight must be attached to what serves the child best**.<sup>14</sup>
44. Placing the protection of the community as the paramount consideration is incompatible with recognising the best interests of the child as a primary consideration. As noted by the High Court:

The concluding words of Art.3.1 ... give[s] those interests **first importance** along with **such other considerations as may**, in the circumstances of a given case, **require equal, but not paramount, weight**.<sup>15</sup>
45. These authorities are explaining a simple point. 'Primary' means 'of the first rank.' A consideration that may be trumped by a 'paramount' consideration cannot be a 'primary' consideration.
46. The Commission accepts that the protection of the community is a relevant consideration, and may be given due weight in bail and parole decisions relating to children charged with and convicted of terrorist offences. Where a significant risk to the community is demonstrated to exist, this factor may well be the most important consideration in all the circumstances of the case. It should not however always be decisive, or of higher order than all other considerations, in these matters.
47. The Commission therefore recommends that the provisions of the Bill dealing with 'exceptional circumstances' that would make the safety of the



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community a 'paramount' consideration and the best interests of the child a 'primary consideration', not be passed.

48. In the event that this recommendation is not accepted, the Commission recommends that the Bill be amended so that the best interests of the child and the protection of the community are both primary considerations in determining whether exceptional circumstances exist for rebutting the presumption against bail and/or parole, and fixing a shorter non-parole period.

### **4.3 Fair trial rights**

49. Article 14 of the ICCPR protects a person's fair trial rights, which include the rights:
  - (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing.
50. Article 14 also provides that all people are 'equal before the courts'. This guarantees 'equality of arms', which, in general, includes a requirement that all parties to court proceedings must have equal rights to examine all the evidence brought by the other parties. Where for some reason this is not possible in all the circumstances of a particular case, a respondent (for example) must, at a minimum, be able adequately to meet the case put against her.<sup>16</sup>
51. As explained above, the Bill would allow the applicant for a continuing detention order not to include exculpatory information in the application if that information is 'likely to be protected by public interest immunity'.<sup>17</sup> It does not appear from the Bill that an applicant is required to justify that claim to a court before proceeding in this manner. Rather, the burden would effectively rest with the affected person to disprove public interest immunity, after being given notice by the applicant that information has been excluded on that basis.
52. In denying a person access to information, materials and facts that would reasonably be regarded as supporting a finding that a continuing detention order should not be made, the Bill may infringe a respondent's fair trial rights. Withholding exculpatory information from a person undermines their ability to effectively oppose the legitimacy and necessity of a continuing detention order.

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53. It is a well-established common law principle that a party, such as the Crown, may legitimately claim that public interest immunity should apply to exclude certain material from being adduced as evidence. It is understandable that this general principle also would apply in proceedings that are the subject of this Bill. However, the Commission has two primary concerns about how these *specific* public interest immunity provisions would operate in practice.
54. First, as explained above, the Bill appears to allow exculpatory information to be withheld merely where this information is 'likely to be protected by public interest immunity'. In other words, exculpatory information could be withheld on this basis without the Crown first satisfying a court that public interest immunity attaches to the relevant information. On its face, this does not appear to be a reasonable or proportionate limitation of a person's fair trial rights. It would be more appropriate to permit a person to withhold exculpatory information only where that person bears the onus of proving—to a court—that the public interest lies in withholding the information.
55. Secondly, where such exculpatory material is withheld, the Bill does not set out clearly what will be the likely consequences vis-à-vis the proceedings themselves. The Commission acknowledges one protection, adverted to in the Explanatory Memorandum, that, in such circumstances, the court could exercise its inherent jurisdiction 'to stay proceedings entirely if it is satisfied that withholding the information would involve unacceptable injustice or unfairness'.<sup>18</sup> However, the option of staying proceedings is a blunt instrument. If proceedings are not stayed following the exclusion of exculpatory material, the Bill does not provide for any other measures that would help preserve the individual's fair trial rights. For example, it may be suitable to consider, in such circumstances, for the offender to be provided with the gist, or a summary of the exculpatory information in order to adequately respond to an application for a continuing detention order.
56. Continuing detention orders allow a person to be kept in detention in circumstances where they have served their sentence, and have not been charged with any further offence. These orders are a serious limitation on a person's right to liberty and freedom from arbitrary detention. The Commission is concerned about the introduction of a provision which increases the prospect of a particularly intrusive imposition on a person's human rights being applied, without the person having the benefit of their full fair trial rights.

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- <sup>1</sup> For example, the right to life (article 6 of the ICCPR) and the rights to bodily integrity (an aspect of article 7 of the ICCPR) and security of person (article 9(1) of the ICCPR).
- <sup>2</sup> United Nations Security Council, *Resolution 1373* (2001), UN Doc S/RES/1373 (2001), paras 2(b) and (e).
- <sup>3</sup> Mary Robinson, UN High Commissioner for Human Rights, Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective on Counter-Terrorist Measures (23 September 2002) 1, available at <http://iilj.org/wp-content/uploads/2016/08/Office-of-the-High-Commission-on-Human-Rights-Note-to-the-Chair-of-the-CTC.pdf>.
- <sup>4</sup> See eg the Commission's submission to the Senate Legal and Constitutional Legislation Committee in relation to its inquiry into the Anti-Terrorism Bill (No 2) 2005 (11 November 2005), available at [http://humanrights.gov.au/legal/submissions/terrorism\\_sub\\_12-11-2005.html](http://humanrights.gov.au/legal/submissions/terrorism_sub_12-11-2005.html); Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008), available at [http://humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://humanrights.gov.au/legal/publications/counter_terrorism_laws.html).
- <sup>5</sup> The relevant offences are mostly, but not exclusively, terrorism related.
- <sup>6</sup> *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>7</sup> United Nations Human Rights Committee, General Comment 31 (2004) at [6]. See also Joseph, Schultz and Castan 'The International Covenant on Civil and Political Rights Cases, Materials and Commentary' (2nd ed, 2004) p 308, at [11.10].
- <sup>8</sup> *Convention on the Rights of the Child*, articles 3, 8(1).
- <sup>9</sup> UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007) [10] (emphasis added).
- <sup>10</sup> Explanatory Memorandum, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) 2.
- <sup>11</sup> Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *INSLM Review - Prosecution and Sentencing of Children for Commonwealth Terrorist Offences* (2018), available at [https://www.inslm.gov.au/sites/default/files/submissions/australian\\_human\\_rights\\_commission.pdf](https://www.inslm.gov.au/sites/default/files/submissions/australian_human_rights_commission.pdf).
- <sup>12</sup> Australian Human Rights Commission, Submission to the Independent National Security Legislation Monitor, *INSLM Review - Prosecution and Sentencing of Children for Commonwealth Terrorist Offences* (2018) [32], [48].
- <sup>13</sup> Independent National Security Legislation Monitor, Transcript of Proceedings, 2 August 2018, 7-8, available at <https://www.inslm.gov.au/sites/default/files/files/inslm-public-hearing-transcript-20180802.pdf>.
- <sup>14</sup> UN Committee on the Rights of the Child, *General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art.3, para 1)*, 62<sup>nd</sup> sess, UN Doc CRC/C/GC/14 (2013) [37], [39] (emphasis added).
- <sup>15</sup> *Minister of State for Immigration & Ethnic Affairs v Ah Hin Teoh* [1995] HCA 20; (1995) 128 ALR 353; (1995) 69 ALJR 423; (1995) 183 CLR 273 (7 April 1995) per Mason CJ and Deane J [31] (emphasis added).
- <sup>16</sup> UN Human Rights Committee, *General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial*, 90<sup>th</sup> sess, UN Doc CCPR/C/GC/32 (2007) [13].
- <sup>17</sup> Though the Bill would require that the person be informed that exculpatory information has been excluded, and allow them to challenge the public interest immunity claim asserted by the applicant.
- <sup>18</sup> Explanatory Memorandum, Statement of Compatibility with Human Rights, Counter-Terrorism Legislation Amendment Bill 2019 (Cth) 20 [87].



**Australian  
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Commission**

# Independent National Security Legislation Monitor (INSLM) Review – Prosecution and Sentencing of Children for Commonwealth Terrorist Offences

**AUSTRALIAN HUMAN RIGHTS COMMISSION  
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15 June 2018

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## 1 Introduction

1. The Australian Human Rights Commission (the Commission) makes this submission to the Independent National Security Legislation Monitor (INSLM), Dr James Renwick SC, in relation to his review of certain legislation and powers in relation to the prosecution and sentencing of children for Commonwealth terrorist offences (the Review).
2. The Commission is established by the *Australian Human Rights Commission Act 1986* (Cth) (AHRC Act). It is Australia's national human rights institution.
3. The INSLM is required to have regard to Australia's international human rights obligations.<sup>1</sup> That is consistent with the objects of the *Independent National Security Legislation Monitor Act 2010* (Cth) (INSLM Act), one of which is to ensure that Australia's national security legislation is consistent with Australia's international human rights obligations.<sup>2</sup>
4. The INSLM has indicated that the present review will consider, in particular, the following:
  - (a) **Prosecution of children:** Section 20C of the *Crimes Act [1914]* (Cth) means that a child charged with a Commonwealth terrorism offence may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. The requirements for the trial of children differ among the States and Territories. The review will consider whether Commonwealth legislation should ensure a consistent approach to such matters.
  - (b) **Sentencing:** Section 19AG of the *Crimes Act 1914* (Cth) establishes minimum non-parole periods for persons convicted of certain offences. For most terrorism offences, upon conviction, s 19AG(2) compels the court to fix a single non-parole period of at least three-quarters of the sentence for that offence. The review will consider whether s 19AG should be amended for children convicted of Commonwealth terrorism offences.<sup>3</sup>
5. The INSLM has indicated that, for the purposes of the Review, 'children' means people between 10 and 17 years of age. The scope of the Review 'does not include consideration of changing the age of criminal responsibility for children'.<sup>4</sup>
6. As well as addressing the two particular matters above, this submission briefly addresses several further matters which the INSLM has indicated may be considered in the course of the Review.

## 2 Summary

7. The Commission recognises the vital importance of ensuring that law enforcement agencies can effectively prosecute terrorism offences and that courts can impose appropriate penalties to safeguard Australia's national security and protect the community from terrorism. Indeed, such steps are consistent with Australia's obligations under international law, pursuant to United Nations Security Council Resolutions,<sup>5</sup> and the obligation to protect the

right to life of persons within Australia's jurisdiction. This right is itself a human right, enshrined in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR).<sup>6</sup>

8. Human rights law assumes that relevant authorities will be granted sufficient powers to fulfil their legitimate mandate. Human rights law also accepts, subject to certain conditions, that prosecutions and sentences may impinge to some extent on individual rights and freedoms. Critically, any such limitation on human rights must be:
  - (a) **prescribed by law**.
  - (b) **necessary** to achieve a legitimate objective compatible with international human rights law.
  - (c) **proportionate** to achieving the legitimate objective.<sup>7</sup>
9. As the United Nations (UN) Office of the High Commissioner for Human Rights (OHCHR) has observed, 'the purpose of security measures is, fundamentally, to protect freedom and human rights'.<sup>8</sup> It is therefore essential that fundamental human rights are protected in the struggle against terrorism.<sup>9</sup>
10. Children enjoy the same human rights as adults, which are protected by a number of core human rights treaties. However, in recognition of the special status of children, their rights receive additional elucidation and protection under the *Convention on the Rights of the Child* (CRC).<sup>10</sup> By ratifying the CRC, Australia has acknowledged that the unique status of children warrants 'special safeguards and care, including appropriate legal protection'.<sup>11</sup> These include special considerations that must be taken into account in relation to the prosecution and sentencing (including the administration of sentences) of children for criminal offences, including terrorism offences.
11. This submission contains:
  - (a) an outline of the minimum requirements of human rights law applying to the prosecution, sentencing and imprisonment of children
  - (b) a brief discussion of the application of these principles to ss 20C and 19AG of the *Crimes Act 1914* (Cth)
  - (c) a brief discussion of several other matters the INSLM has indicated he may consider in the course of the Review.

### 3 Recommendations

#### Recommendation 1

The INSLM should undertake, or recommend that the Australian Government cause to be undertaken, a complete survey of the relevant State and Territory provisions governing the prosecution and sentencing of children for terrorism offences. This survey should include an assessment of whether these

provisions are consistent with the rights of the child protected by the *Convention on the Rights of the Child* outlined in this submission.

## **Recommendation 2**

The INSLM should recommend that, following the review contemplated in Recommendation 1, the Commonwealth, States and Territories legislate to ensure that any child charged with a Commonwealth terrorism offence be tried, punished or otherwise dealt with in accordance with the rights protected by the *Convention on the Rights of the Child*.

## **Recommendation 3**

The INSLM should recommend that s 19AG of the *Crimes Act 1914* (Cth) relating to minimum non-parole periods be amended so that it does not apply to children.

## **Recommendation 4**

The INSLM should recommend that s 15AA of the *Crimes Act 1914* (Cth) relating to bail for persons accused of certain Commonwealth offences be amended so that it does not apply to children.

# **4 Human rights framework**

12. Australia is a party to seven key human rights treaties.<sup>12</sup> A number of these treaties protect rights relevant to the sentencing and prosecution of people for terrorist offences. This submission focuses on the rights protected by the CRC, which provides the overarching international human rights framework for the protection, promotion and fulfilment of rights of children and young people.<sup>13</sup> The CRC recognises the special status of children, including the needs of the child for 'special safeguards and care, including appropriate legal protection.' The CRC relevantly provides further detail about the requirements of the criminal process rights and guarantees articulated in the ICCPR in relation to their application to children.
13. The following discussion describes the principal human rights relevant to the Review, and is intended to provide a framework to assist the INSLM in determining whether the legislation under consideration is consistent with the human rights of children.

## **4.1 General principles relating to juvenile justice**

14. The CRC contains a number of rights protecting children who are involved in the criminal justice system. In its *General Comment 10*,<sup>14</sup> the UN Committee on the Rights of the Child<sup>15</sup> has conducted a survey of these rights, and shown they embody a comprehensive policy for juvenile justice.<sup>16</sup> As the Committee has explained, the following rights in the CRC have particular relevance to any system of juvenile justice that is adequately to protect the rights of the child:



- **Non-discrimination (art 2):** States parties must take all necessary steps to ensure that all children in conflict with the law are treated equally.<sup>17</sup> No child should be discriminated against for any reason, no matter their religion, race or abilities; whatever they think or say; what their culture is; whether they are boys or girls or whether they are rich or poor.<sup>18</sup>
  - **The best interests of the child (art 3):** Any decision made or action taken that may affect a child must *always* make the best interests of the child a primary consideration. This means that when adults make decisions that affect children, they should consider what would be best for the child. Importantly for present purposes, the Committee has stated:

The protection of the best interests of the child means ... that the traditional objectives of criminal justice, such as repression/retribution, **must give way to rehabilitation and restorative justice objectives in dealing with child offenders.**<sup>19</sup>
  - **Ensuring the child's survival and development (art 6):** Every child has the inherent right to life, and it is the responsibility of decision-makers to ensure they are provided every opportunity to develop and reach their potential — physically, spiritually, morally and socially. The deprivation of liberty has very negative consequences for the child's development and 'seriously hampers his/her reintegration in society'.<sup>20</sup>
  - **Participation and the right to be heard (art 12):** Children are experts in their own lives and experiences, and have the right to have their say in decisions that affect them. Every child has the right to express his or her opinion, and can provide advice and valuable insight into how their rights can best be protected and fulfilled.<sup>21</sup> The Committee has stated that 'decision makers in judicial or administrative proceedings [should] explain the extent of the consideration given to the views of the child and the consequences for the child'.<sup>22</sup> Although children's views must be taken into account, there is no requirement to make decisions consistent with those views, where departure from those views is justified by other considerations.
15. General Comment 10 also discusses the treatment of children in the juvenile justice system, including the use of disciplinary measures, the use of force and restraint, monitoring and accountability, and access to complaints mechanisms.<sup>23</sup> The United Nations has promulgated other rules and guidelines addressing the rights of children involved in the justice system, including the Rules for the Protection of Juveniles Deprived of their Liberty (JDL Rules or Havana Rules)<sup>24</sup> and the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules).<sup>25</sup>
16. Australia's obligations under the CRC apply to all children in Australia. For the purposes of the CRC, children are individuals under 18 years of age.<sup>26</sup> That means that the rights in the CRC apply to all those who are 'children' for the purposes of the Review.

## 4.2 Articles 37 and 40 of the CRC

17. Further to the rights outlined above, the CRC includes particular provisions relating to the prosecution and sentencing of children. In considering the rights below, it must be borne in mind that all human rights — including rights that pertain specifically to children — are interrelated and indivisible. The content of the rights described below is therefore to be read in light of all the rights in the CRC.
18. **Article 37** of the CRC safeguards the rights of children in contact with the youth justice system, and requires that:
  - No child shall be subjected to torture, or other cruel, inhuman or degrading treatment or punishment (art 37(a)).
  - No child shall be deprived of their liberty unlawfully or arbitrarily (art 37(b)).
  - Deprivation of liberty, including arrest, detention and imprisonment, should be used only as a ‘measure of last resort’ and for the ‘shortest appropriate period of time,’ so that the child’s right to development is fully respected and ensured (art 37(b)).
  - Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner that is consistent with their developmental age (art 37(c)).
  - Detained children must be separated from adults, unless that separation is not in the child’s best interests (art 37(c)).
  - A child deprived of their liberty shall have the right to maintain contact with his or her family through correspondence and visits, except in exceptional circumstances (art 37(c)).
  - Children have the right to legal and other assistance if they come into contact with the justice system (art 37(d)).
19. **Article 40** of the CRC outlines a number of minimum guarantees that apply to children in criminal proceedings. In particular, article 40 contains the following protections:
  - The prohibition of retroactive criminal laws (art 40(2)(a)). The Committee on the Rights of the Child has emphasised that in a time of increasing legislation aimed at preventing or combating terrorism, it must be ensured that these laws ‘do not result in retroactive or unintended punishment of children’.<sup>27</sup>
  - The presumption of innocence (art 40(2)(b)(i)) — all children are presumed innocent until proven guilty according to law.<sup>28</sup>
  - The right to effective participation in criminal proceedings (art 40(2)(b)(iv)).
  - The requirement that prompt and direct information of any criminal charges be given to the accused child and, if appropriate, their parent/guardian (art 40(2)(b)(ii)).<sup>29</sup>

- The right to timely determination of criminal charges. Criminal matters must be heard and determined without delay and with appropriate parental involvement (art 40(2)(b)(iii)). The requirement for appropriate parental involvement is related to the right of the child to maintain regular personal relations and direct contact with his or her parents, in accordance with art 9(3) of the Convention, which helps ensure the well-being of children deprived of their liberty.
  - The freedom from compulsory self-incrimination (art 40(2)(b)(iv)). The Beijing Rules observe that the right to silence is a ‘basic procedural safeguard’.<sup>30</sup>
  - The availability of diversions from the criminal justice system (art 40(3)(b)). Whenever appropriate and desirable, children should be diverted away from judicial proceedings, provided that human rights and legal safeguards are fully respected. This promotes the rights of the child, as it avoids the negative effects of criminal proceedings on the child, including the stigma of conviction, and provides a mechanism through which unnecessary arrest, detention and/or imprisonment can be avoided in accordance with art 37(b) of the CRC.<sup>31</sup>
  - The right to appeal (art 40(2)(b)(v)).
  - The right to have privacy respected at all stages of proceedings (art 40(2)(b)(vii)).
20. The rights described above must be protected in any laws allowing for or regulating the prosecution and sentencing of children, whether substantive or procedural in nature. It will be seen that a number of the rights above will best be protected by the creation of special procedures for trials involving children, to ensure (for example): that children can be heard in a way appropriate for their level of development; that all decisions in relation to a particular prosecution (including the decision to prosecute, decisions about legal representation, procedural decisions, and sentencing decisions) make the best interests of the affected child a primary consideration; that rehabilitation and restorative justice are the primary aims in juvenile sentencing; and that children are only sentenced to imprisonment or other forms of detention as a matter of last resort.

## **5 Prosecuting children – consistency across States/Territories**

21. Section 20C of the Crimes Act provides that a child or young person charged with a Commonwealth offence, including a terrorism offence, may be tried, punished or otherwise dealt with as if the offence was an offence against a law of a State or Territory. Legislation and rules of court regulating criminal trials, including those involving children, differ among the States and Territories.
22. Taken together, the rights protected by the CRC provide a set of principles which must apply in any prosecution of a person who is younger than 18 years of age. The CRC therefore requires uniformity between State and Territory rules governing the trial of children in the sense that it requires the prosecution

and sentencing of children in all jurisdictions to comply with the CRC. That includes a requirement that children be treated and sentenced in a manner that is appropriate to their status as children. Provided that the fundamental rights of children are adequately protected, the CRC does not require absolute uniformity between the States and Territories. As Van Bueren has put it, the key requirement is that '[w]here separate systems of justice are established, they should still be in conformity with international human rights law'.<sup>32</sup>

23. In the context of the ICCPR, the UN Human Rights Committee has determined that, in a federal system, the right to a fair trial does not require uniformity of all procedural rules across all jurisdictions.<sup>33</sup> However, the ICCPR protects the right to equality before the courts, as well as to the right to non-discrimination on unreasonable grounds.<sup>34</sup> Therefore, where a significant procedural right is enjoyed by people to a different extent, solely on the basis of their place of residence, that difference *may* impermissibly limit the human rights of the affected person. That will depend on the nature and extent of the procedural difference.<sup>35</sup>
24. The Commission submits that, before any conclusion is reached about the need for uniformity in the procedure applicable in trials of children for terrorism offences, a comprehensive survey of State and Territory laws and rules of court should be undertaken. At the conclusion of that survey, the following principles should be applied:
  - (a) The rules in each State and Territory governing the prosecution of children for terrorism offences should be assessed for compliance with the rights protected by the CRC, as outlined above.
  - (b) In the event that any State or Territory jurisdiction does not fully protect the rights of children in terrorism trials, those laws should be amended accordingly.
  - (c) Where 'best practices' to protect the rights of children in terrorism trials are identified in particular jurisdictions, those practices should be implemented in other jurisdictions.
  - (d) Any attempt to impose uniformity of rules in relation to the prosecution of children for terrorism offences should not involve any 'levelling down'; that is, uniformity should not be achieved at the cost of reducing protections for children in any particular State or Territory.
25. The Commission considers that a thorough review of the prosecution and sentencing of children could appropriately also include for consideration:
  - (a) the conditions in which children are detained (both on remand and following conviction), to ensure that the conditions of detention are not inconsistent with the human rights contained in the ICCPR and the Convention against Torture<sup>36</sup>
  - (b) the minimum age of criminal culpability. The National Children's Commissioner has recommended that the minimum age be raised to 12 years.<sup>37</sup>

## **Recommendation 1**

The INSLM should undertake, or recommend that the Australian Government cause to be undertaken, a complete survey of the relevant State and Territory provisions governing the prosecution and sentencing of children for terrorism offences. This survey should include an assessment of whether these provisions are consistent with the rights of the child protected by the *Convention on the Rights of the Child* outlined in this submission.

## **Recommendation 2**

The INSLM should recommend that, following the review contemplated in Recommendation 1, the Commonwealth, States and Territories legislate to ensure that any child charged with a Commonwealth terrorism offence be tried, punished or otherwise dealt with in accordance with the rights protected by the *Convention on the Rights of the Child*.

## **6 Sentencing children – minimum non-parole periods (s 19AG)**

26. Section 19AG of the Crimes Act establishes minimum non-parole periods for persons convicted of certain offences. When a person is convicted of a terrorism offence,<sup>38</sup> s 19AG(2) compels the sentencing court to fix a single non-parole period of at least three-quarters of the sentence imposed. Section 19AG applies to both children and adults sentenced in relation to relevant offences.
27. The Commission has not identified significant commentary from the UN Human Rights Committee or the Committee on the Rights of the Child addressing parole regimes. However, the Commission considers that a number of the rights protected by the CRC require that courts have a significant degree of flexibility in determining non-parole periods when sentencing children. For that reason, the Commission considers that s 19AG(2) of the Crimes Act is likely to be inconsistent with the rights of affected children.
28. Section 19AG was introduced into the Crimes Act by the *Anti-Terrorism Act 2004* (Cth). The Second Reading speech of the Minister for Justice in relation to that legislation stated that ‘sentences for convicted terrorists should reflect community concern about terrorism’. The Minister continued:

The significant period that those sentenced are serving on parole – which in most cases is necessary to reintegrate prisoners back into the community – is not warranted in the case of terrorists and does not reflect community concern about the crimes.<sup>39</sup>
29. The Commission notes two aspects of these remarks:
  - (a) First, the Minister acknowledged that parole is ‘necessary to reintegrate prisoners back into the community’.

- (b) Secondly, the Minister suggested that the objective of ‘reintegration’ is ‘not warranted in the case of terrorists’.
30. These remarks were said to justify restricting the right to parole for persons convicted of terrorism offences. As the Minister went on to observe, fixing the minimum non-parole period in this way was an ‘extraordinary measure’.<sup>40</sup>
31. Whatever may be said about these remarks insofar as they apply to adult offenders, the CRC requires, in the case of children, that:
- (a) the focus of criminal justice must be rehabilitation and restorative justice, and particularly requires the consideration of ‘the child’s age and the desirability of promoting the child’s reintegration ... in society’<sup>41</sup>
  - (b) deprivations of liberty be for the ‘shortest appropriate period of time’<sup>42</sup>
  - (c) alternatives to punitive detention should be considered in the case of child offenders and detention of children should always be a last resort.<sup>43</sup>
32. Contrary to the stated objects of s 19AG, the CRC requires that a court have flexibility in sentencing child offenders to ensure they are not imprisoned beyond the time necessary for rehabilitation. It also requires that parole authorities have discretion to release convicted children on parole where the purpose of detention has been served. It is not permissible to prolong the imprisonment of children for purely punitive purposes, or because of a perception that the community may have a ‘concern about terrorism’. The need for flexibility in sentencing children is heightened in the context of terrorism offences because of the heavy penalties attached to those offences. In those circumstances, a mandatory minimum non-parole period may have a significant impact on development, education and capacity to integrate of an affected child, at a critical period of neurological, socio-emotional and physical change.
33. In the case of *R v MHK* [2016] VSC 742, Lasry J was required to sentence a child who had pleaded guilty to a charge of a relevant Commonwealth terrorism offence. His Honour imposed a head sentence of seven years imprisonment. Section 19AG required the court to direct that the child ‘serve at least a minimum period of 75% of the head sentence’,<sup>44</sup> which amounted to a minimum term of five years and three months.<sup>45</sup> In making this order, Lasry J observed, in addressing the child:
- had I been permitted to do so, I would have fixed a minimum term of four years, which would have better enabled your supervision and rehabilitation given your youth.<sup>46</sup>
34. These remarks illustrate that concerns about the operation of s 19AG are not purely theoretical. Section 19AG imposes a blunt sentencing requirement that detracts from a sentencing judge’s capacity to make an individualised assessment of what is necessary and appropriate in the context of the particular child offender before the judge. Specifically, the section can lead to results that are not consistent with the human rights of children, in that:

- (a) it does not allow the best interests of the child to be made a primary consideration in all sentencing decisions
  - (b) it can lead to terms of imprisonment longer than are strictly necessary
  - (c) it can lead to results which may be contrary to a judge's assessment of the specific supervision and rehabilitation requirements in respect of an individual child offender.
35. In relation to children involved in the criminal justice system, art 40(4) of the CRC requires that:
- A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available.
36. The article also requires that children be 'dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence'.
37. Any sentence must be proportionate both to the seriousness of the offence and to the circumstances of the offender. These circumstances include age, physical and mental health, family and socio-economic background, cultural affiliations, intellectual development and level of educational attainment. The sentencing authority must take into account all the relevant circumstances of each individual case.
38. By requiring the imposition of a mandatory minimum term of imprisonment at the time of sentencing, s 19AG diminishes the capacity of both sentencing courts and parole authorities to ensure sentenced children are detained for the minimum justifiable period, taking into account all of their individual circumstances from time to time.
39. For the above reasons, the Commission considers that s 19AG is not consistent with the rights of children.
40. For the purposes of this submission the Commission has not considered whether s 19AG of the Crimes Act is consistent with the human rights of adults prosecuted for relevant Commonwealth offences.

### **Recommendation 3**

The INSLM should recommend that s 19AG of the *Crimes Act 1914* (Cth) relating to minimum non-parole periods be amended so that it does not apply to children.

## **7 Other matters relating to the prosecution and sentencing of children for terrorist offences**

### **7.1 'Arbitrary' deprivations of liberty**

41. Article 37(b) of the CRC provides that:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. ... 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.

42. The Committee on the Rights of the Child has considered the deprivation of liberty of children in a wide range of circumstances, including police custody for children accused of terrorism.<sup>47</sup>
43. Depriving children of liberty has particularly severe consequences, given their dependency and vulnerability to abuse and victimisation. This can have negative impacts on their social reintegration and rehabilitation.<sup>48</sup> All deprivations of liberty for a child should ensure that any harm to the child's development is minimised.<sup>49</sup>
44. Article 37(b) requires that detention should not be 'arbitrary'. The UN Human Rights Committee has determined that 'arbitrariness' is not to be equated with 'against the law'; it must be interpreted more broadly to include such elements as inappropriateness, injustice and lack of predictability.<sup>50</sup> Schabas has explained that a deprivation of liberty would be 'arbitrary' for the purposes of article 37(b) if it exhibited further elements including 'unreasonableness, capriciousness and [dis]proportionality'.<sup>51</sup>
45. Importantly, non-discretionary restrictions on liberty should be avoided. As Schabas notes:

mandatory pre-trial detention and sentencing of children is not compatible with article 37(b) of the CRC, because it ignores the principle of proportionality and the discretion necessary for the decision in the individual case.<sup>52</sup>
46. This principle is reflected in the recommendation made by the National Children's Commissioner in her 2016 report, that mandatory sentencing for children and young people should be discontinued in all jurisdictions that are currently using it.<sup>53</sup>
47. The UN Economic and Social Council's *Guidelines for Action on Children in the Criminal Justice System* state that, to facilitate social reintegration, 'it is important to ensure easy access by relatives and persons who have a legitimate interest in the child to institutions where children are deprived of their liberty', unless their best interests suggest otherwise.<sup>54</sup>
48. The right not to be subject to arbitrary detention has been referred to above, in the context of the minimum non-parole period mandated by s 19AG of the Crimes Act. However, the right is important at all stages of the prosecution of children, including arrest and bail, both pre and post charge. To the extent the INSLM considers any of these matters in the course of the Review, the Commission submits that current legislation and practice should be scrutinised closely to ensure that it complies with the requirements in article 37(b) of the CRC.



## **7.2 Separating child offenders from adult offenders**

49. The INSLM has invited the Commission to provide information about whether art 37(c) would necessarily preclude retaining offenders in the juvenile detention system once they turn 18 years of age.
50. There are significant risks associated with detaining minors in adult correctional facilities, including that they may be subject to sexual or other forms of assault. In the *Study on Violence Against Children*, an independent expert appointed by the UN Secretary-General found that children detained in adult facilities were at 'heightened risk of self-harm or suicidal behavior'.<sup>55</sup>
51. Article 37(c) of the CRC relevantly provides that every child deprived of liberty shall be separated from adult prisoners unless it is in the child's best interest not to be so separated. It applies in cases of both criminal and non-criminal detention.
52. Article 10(2)(b) of the ICCPR similarly requires that accused juveniles be separated from adults and brought as speedily as possible for adjudication.
53. It follows that the detention of children in adult prisons is generally contrary to the provisions of the CRC.<sup>56</sup> So, too, is the detention of adults in juvenile facilities.
54. Australia maintains a reservation to the obligation under article 37(c) of the CRC to separate children from adults in prison. The reservation states that:

the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by Article 37(c).<sup>57</sup>
55. The Committee on the Rights of the Child has said that this reservation is unnecessary, as 'there appears to be no contradiction between the logic behind it and the provisions of article 37(c) of the Convention'.<sup>58</sup> The Commission notes that the reservation is limited to the stated need to detain children in locations close to their families, in light of Australia's geography and demography. It does not have broader application. The National Children's Commissioner has recommended that the reservation be withdrawn.<sup>59</sup>
56. Article 37(c) of the CRC relevantly provides:

[E]very child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.
57. The Committee on the Rights of the Child has commented that this paragraph of art 37(c):

does not mean that a child placed in a facility for children has to be moved to a facility for adults immediately after h/she turns 18. **Continuation of his/her stay in the facility for children should be possible if that is in his/her best interest and not contrary to the best interests of the younger children in the facility.**<sup>60</sup>

58. The above remarks of the Committee on the Rights of the Child recognise that a person who has committed a crime while a child, and sentenced to a term of imprisonment that extends beyond their eighteenth birthday, may themselves be placed at risk if, on turning 18, they are immediately transferred to an adult facility. These risks are likely to be particularly severe in the case of persons sentenced for terrorism offences, who, as adults, are likely to be detained in maximum security facilities, and at least in some cases with other adults convicted of terrorism offences.
59. However, any decision to allow a person to remain in a juvenile detention facility after turning 18 may only be made if that is not contrary to the interests of the younger children in the facility. That will require a careful assessment of the circumstances of each person sentenced as a child who remains liable to imprisonment on turning 18. The general principle remains one of separation. By way of illustration, the joint detention of children with persons up to 25 years in Germany was the subject of critical comment by the Committee on the Rights of the Child.<sup>61</sup> A blanket policy allowing persons over the age of 18 to remain in juvenile detention facilities will therefore not be consistent with the CRC.
60. The Commission submits that some of the key factors that should be taken into account in considering the placement or movement of young people to adult facilities are:
- (a) whether they committed the offence as a child and so should be treated as a child in sentencing
  - (b) whether they are deemed to be at risk in an adult custodial setting, whether under or over 18
  - (c) in the case of young people who turn 18 while in juvenile detention, the practice of a number of States and Territories to permit young people over 18 to stay in juvenile facilities into their early twenties may be permissible if it is in the best interests of each particular young adult offender and does not impinge on the rights of others in the relevant place of detention. In fact, in appropriate cases it may be beneficial to have an older positive peer model for younger inmates.
61. The unique situation of persons who turn 18 years while serving terms of imprisonment suggests that special consideration should be given to devising measures to ensure that these people are not placed at risk by being immediately transferred to adult prisons. In some circumstances, it may be permissible for individual young offenders to remain for a time in juvenile detention facilities after they turn 18, provided that would not negatively affect the rights of children in those facilities. More generally, however, it might involve consideration of the construction of special facilities for the detention of

younger adults, and/or the development of guidelines to ensure that young adults are not imprisoned in inappropriate facilities where they may be at risk due to their age.

### **7.3 Who should make decisions about where young offenders should be detained?**

62. In a letter dated 16 May 2018, the INSLM invited the Commission to provide information about whether it would be more consistent with the CRC for any decision about whether a child serves a custodial sentence in a juvenile or adult facility to be made, at least in the first instance, by an exercise of judicial (as opposed to administrative) power.
63. Generally speaking, the CRC does not dictate whether decisions affecting a child must be made by a judicial or an administrative body.
64. With respect to deprivations of liberty, art37(d) provides that children shall have the right:
- to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.
65. The reference to a ‘court or other competent, independent and impartial authority’ in art 37(d) indicates that the decision need not necessarily be taken by a judicial organ, but any organ meeting the CRC requirements. Of particular importance are the impartiality of the body, and that it be empowered both to review the legality of detention and to order immediate release if necessary.<sup>62</sup> A decision on the legality of detention must be taken ‘promptly’. Some guidance about the speed with which a review of detention must be made may be found in the jurisprudence of the UN Human Rights Committee, which has, on a number of occasions, considered the equivalent protection in art 9(4) of the ICCPR.<sup>63</sup>
66. Article 40(2)(b)(iii) provides a general minimum guarantee that children have a matter determined ‘without delay’:
- by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians.<sup>64</sup>
67. Article 40 includes the words ‘authority or judicial body’ to encompass all bodies of an adjudicatory nature which have a responsibility in the juvenile justice field.<sup>65</sup> There is no requirement under international law that the body determining the charge be judicial, so long as the authority’s procedures comply with the safeguards enshrined in the CRC.
68. In summary, the CRC does not require decisions about detention placement to be made by judicial bodies, as distinct from other forms of tribunal. Whichever

body is authorised to make these decisions must comply with the requirements of the CRC, most relevantly: the body must be impartial, and must make its decisions promptly; in any decision, the best interests of the child must be a primary consideration; the body must ensure that the views of the child are heard; and the body must ensure that any detention is for the minimum duration necessary and is no more restrictive than necessary. Given the evolving capacities of each child, and the importance of prioritising rehabilitation in the juvenile justice system, it is also essential that whichever body is authorised to make decisions about the location or duration of detention is authorised to conduct regular reviews to ensure that detention does not continue longer than strictly necessary, and that the location of any detention remains appropriate from time to time.

## **7.4 Bail**

69. Section 15AA of the Crimes Act regulates the grant of bail to defendants charged with certain offences, relevantly including most Commonwealth terrorism offences.<sup>66</sup> Section 15AA does not distinguish between adult defendants and child defendants.
70. The practical operation of s 15AA is that it establishes a presumption against bail for relevant terrorism offences and puts the onus on a defendant to reverse that presumption by establishing that there are 'exceptional circumstances' such that bail should be granted. If 'exceptional circumstances' are established, the relevant bail authority will determine bail in accordance with relevant State or Territory laws. Whatever decision is made by the bail authority is subject to appeal. Where the decision is to grant bail and the prosecution seeks to appeal, the initial decision to grant bail is stayed until the appeal is determined. That means that, even where a bail authority grants bail at first instance, bail is effectively denied until such time as the prosecution appeal is decided.
71. The Crimes Act does not define 'exceptional circumstances'. The Supreme Court of NSW considered the application of s 15AA to a 16 year old charged with a terrorism offence in the matter of *R v NK* [2016] NSWSC 498. In deciding to grant bail on 'strict conditions', Hall J held that:
- depending upon the evidence, in some cases the possible vulnerability of youth to adult persuasion or influence may be a relevant consideration in a determination as to whether exceptional circumstances under s 15AA exist.<sup>67</sup>
72. The Commission considers that the fact that an accused is under 18 years of age is always, in the relevant sense, an 'exceptional circumstance'. The CRC requires that children should be detained only where that is demonstrated to be necessary and proportionate. That strongly supports the view that there should be a presumption in favour of granting bail to children accused of all offences. That presumption can, of course, be displaced where a court is satisfied bail would not be appropriate in all the circumstances, including that the best interests of the child are outweighed by other factors.

73. In *AB v Director of Public Prosecutions (Cth)* [2016] NSWSC 1042, the Supreme Court of NSW again considered an application for bail by a child accused of a terrorism offence. Despite finding that exceptional circumstances did exist to justify bail, Beech-Jones J nevertheless concluded that he was obliged to refuse bail under the relevant NSW bail laws because the bail conditions that had been proposed:

[did] not address the form of attack that AB discussed in his online posts and because the potential harm that could result from the materialisation of the appreciable risk that he will carry out those threats is so great it means that the risk of harm to the community is unacceptable even allowing for the hardship that will be occasioned to AB from being detained pending trial.<sup>68</sup>

74. His Honour noted that it was ‘concerning’ that a ‘vulnerable youth’ could be detained despite the charges against him being weak.<sup>69</sup> He concluded that that ‘strongly suggests that what has been undertaken is an exercise in preventative detention’, which, if justified, ‘can only provide a measure of short term security for the public’.<sup>70</sup> He went on to observe:

I note that the maintenance of terrorism charges that I have found to have only weak support in the evidence serves only to prolong the period that AB is in pre-trial custody and prevents him receiving the supervision, counselling and assistance that he clearly needs. In the medium to long term it is that form of intervention which is far more likely to protect the community rather than the continued detention of AB.<sup>71</sup>

75. This latter case demonstrates that s 15AA of the Crimes Act cannot be read in isolation. It is part of a matrix of bail provisions that can apply to prevent people under the age of 18 charged with Commonwealth offences from being granted bail even when courts, having considered all of the circumstances of a particular case, do not consider that pre-trial detention is warranted. That is a result that is not consistent with the rights of the child described in this submission.

#### **Recommendation 4**

The INSLM should recommend that s 15AA of *the Crimes Act 1914* (Cth) relating to bail for persons accused of certain Commonwealth offences be amended so that it does not apply to children.

## Endnotes

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<sup>1</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 8(a)(i).

<sup>2</sup> *Independent National Security Legislation Monitor Act 2010* (Cth) s 3(c)(i).

<sup>3</sup> Independent National Security Legislation Monitor, *Review - The prosecution and sentencing of children for Commonwealth terrorist offences*. At <https://www.inslm.gov.au/current-review-work> (viewed 9 June 2018).

<sup>4</sup> Independent National Security Legislation Monitor, *Review - The prosecution and sentencing of children for Commonwealth terrorist offences*. At <https://www.inslm.gov.au/current-review-work> (viewed 11 June 2018).

<sup>5</sup> United Nations Security Council, Resolution 1373 (2001), 4385<sup>th</sup> meeting, [UN Doc. S/RES/1373 \(2001\)](#) (28 September 2001); United Nations Security Council, Resolution 2249 (2015), 7565<sup>th</sup> meeting, [UN Doc. S/RES/2249 \(2015\)](#) (20 November 2015).

<sup>6</sup> *International Covenant on Civil and Political Rights (ICCPR)*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>7</sup> See eg United Nations Economic and Social Council, *Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985). Available at <http://www.refworld.org/docid/4672bc122.html> (viewed 15 June 2018).

<sup>8</sup> Mary Robinson, UN High Commissioner for Human Rights, *Note to the Chair of the Counter-Terrorism Committee: A Human Rights Perspective On Counter-Terrorist Measures* (23 September 2002), 1. At [http://www.un.org/en/sc/ctc/docs/rights/2002\\_09\\_23\\_ctcchair\\_note.pdf](http://www.un.org/en/sc/ctc/docs/rights/2002_09_23_ctcchair_note.pdf) (viewed 28 April 2017).

<sup>9</sup> Human Rights and Equal Opportunity Commission (as the Commission was then known), Submission No 158, 158A and 158B to Senate Legal and Constitutional Legislation Committee, *Inquiry into the Anti-Terrorism Bill (No 2) 2005*, 11 November 2005. At <http://www.humanrights.gov.au/submission-anti-terrorism-bill-no-2-2005> (viewed 28 April 2017); Australian Human Rights Commission, *A Human Rights Guide to Australia's Counter-Terrorism Laws* (2008). At <https://www.humanrights.gov.au/human-rights-guide-australias-counter-terrorism-laws> (viewed 28 April 2017).

<sup>10</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>11</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), Preamble.

<sup>12</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976); *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976); *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981); *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, opened for signature 12 October 1984, 1465 UNTS 85 (entered into force 16 June 1987); *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990); *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969); *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 2515 UNTS 3 (entered into force 3 May 2008). At <https://treaties.un.org/pages/Treaties.aspx?id=4&subid=A&lang=en> (viewed 26 January 2015).

<sup>13</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

<sup>14</sup> UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007).

<sup>15</sup> The Committee on the Rights of the Child is an expert body established by article 43 of the *Convention on the Rights of the Child*.

<sup>16</sup> UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007) [5].

<sup>17</sup> See *Convention on the Rights of the Child*, art 2. UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007) [6].

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- <sup>18</sup> See *Convention on the Rights of the Child*, art 2. UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007) [6].
- <sup>19</sup> UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (2007) [10] (emphasis added).
- <sup>20</sup> Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007), [11].
- <sup>21</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 12.
- <sup>22</sup> Committee on the Rights of the Child, *General Comment No.12: The right of the child to be heard*, 51<sup>st</sup> session, UN Doc CRC/C/GC/12 (1 July 2009) [33].
- <sup>23</sup> Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007) [89].
- <sup>24</sup> *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113, 45<sup>th</sup> sess, 68<sup>th</sup> plen mtg, UN Doc A/RES/45/113 (14 December 1990).
- <sup>25</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg UN Doc A/RES/40/33 (29 November 1985).
- <sup>26</sup> *Convention on the Rights of the Child*, above, article 1.
- <sup>27</sup> Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007), 13 [41].
- <sup>28</sup> Article 14(2) of the ICPPR also guarantees the presumption of innocence.
- <sup>29</sup> *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)(b)(ii).
- <sup>30</sup> *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33, 40<sup>th</sup> sess, 96<sup>th</sup> plen mtg UN Doc A/RES/40/33 (29 November 1985) [7.1].
- <sup>31</sup> Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 28.
- <sup>32</sup> Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 25.
- <sup>33</sup> *Hesse v Australia*, UN Doc CCPR/C/75/1087/2002 (2002).
- <sup>34</sup> Articles 14(1) and 26 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
- <sup>35</sup> See eg *Cheban v. Russian Federation*, UN Doc CCPR/C/72/D/790/1997 (2002), *Kavanagh v. Ireland*, UN Doc CCPR/C/71/D/819/1998 (2001).
- <sup>36</sup> *Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987). At [https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg\\_no=IV-9&chapter=4&clang=en](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&clang=en) (viewed 3 May 2018).
- <sup>37</sup> Australian Human Rights Commission, *Children's Rights Report 2016*, 191 (recommendation 9).
- <sup>38</sup> 'Terrorism offence' is defined in s 3 of the *Crimes Act 1914* (Cth).
- <sup>39</sup> Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).
- <sup>40</sup> Commonwealth, *Parliamentary Debates*, Senate, 17 June 2004, 24181 (Sen Chris Ellison).
- <sup>41</sup> *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).
- <sup>42</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), art 37(b).
- <sup>43</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), arts 40(3), 37(b).
- <sup>44</sup> *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- <sup>45</sup> *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- <sup>46</sup> *R v MHK* [2016] VSC 742 at [78] (Lasry J).
- <sup>47</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 61 (referring to UN Committee on the Rights of the Child, *Concluding Observations: Spain*, UN Doc. CRC/C/15/Add.185,2002 (2002) [53]-[54]).
- <sup>48</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 58.
- <sup>49</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 58.



<sup>50</sup> *Van Alphen v The Netherlands*, UN Doc CCPR/C/39/D/305/1988 (1990) at [5.8]; *A v Australia*, UN Doc CCPR/C/59/D/560/1993 (1997) at [9.2]. These communications considered the prohibition on arbitrary detention contained in article 9 of the ICCPR, which contains an equivalent protection to that in art 37(b) of the CRC.

<sup>51</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 82.

<sup>52</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 64.

<sup>53</sup> Australian Human Rights Commission, *Children's Rights Report 2016*, 196 (recommendation 12).

<sup>54</sup> UN Economic and Social Council, *Guidelines for Action on Children in the Criminal Justice System*, Resolution 1997/30 (1997), [20].

<sup>55</sup> *Report of the independent expert for the United Nations study on violence against children*, UN Doc A/61/299 (29 August 2006), [63].

<sup>56</sup> *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), note 5, art 37(c). See note 7 for the effect of Australia's reservation to article 37(c) of the CRC.

<sup>57</sup> United Nations Treaty Collection, *Convention on the Rights of the Child* (Declarations and Reservations) (Australia). At

[https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg\\_no=IV-11&chapter=4&lang=en#EndDec](https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtldsg_no=IV-11&chapter=4&lang=en#EndDec) (viewed 8 June 2018).

<sup>58</sup> Committee on the Rights of the Child, *Concluding observations: Australia*, UN Doc CRC/C/AUS/CO/4 (2012), para 9. At

[http://www2.ohchr.org/english/bodies/crc/docs/co/CRC\\_C\\_AUS\\_CO\\_4.pdf](http://www2.ohchr.org/english/bodies/crc/docs/co/CRC_C_AUS_CO_4.pdf) (viewed 15 May 2015).

<sup>59</sup> Australian Human Rights Commission, *Children's Rights Report 2016*, 185 (recommendation 7).

<sup>60</sup> Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44<sup>th</sup> sess, UN Doc CRC/C/GC/10 (25 April 2007), 23 [86] (emphasis added).

<sup>61</sup> CRC Committee, *Concluding Observations: Germany* (UN Doc. CRC/C/15/Add.226, 2004), para. 60, referred to in William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 93.

<sup>62</sup> William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 94.

<sup>63</sup> Article 9 of the ICCPR uses the language 'without delay.' See William Schabas and Helmut Sax, *A Commentary on the United Nations Convention on the Rights of the Child, Article 37: Prohibition on Torture, Death Penalty, Life Imprisonment and Deprivation of Liberty* (Brill, 2006), 94.

<sup>64</sup> *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)(b)(iii).

<sup>65</sup> Geraldine Van Bueren, *A Commentary on the United Nations Convention on the Rights of the Child, Article 40: Child Criminal Justice* (Brill, 2005), 15.

<sup>66</sup> *Crimes Act 1914* (Cth), s 15AA(1)–(2).

<sup>67</sup> *R v NK* [2016] NSWSC 498, [40]–[41].

<sup>68</sup> *AB v Director of Public Prosecutions* (Cth) [2016] NSWSC 1042 at [5]–[6].

<sup>69</sup> *AB v Director of Public Prosecutions* (Cth) [2016] NSWSC 1042 at [5]–[6].

<sup>70</sup> *AB v Director of Public Prosecutions* (Cth) [2016] NSWSC 1042 at [5]–[6].

<sup>71</sup> *AB v Director of Public Prosecutions* (Cth) [2016] NSWSC 1042 at [5]–[6].