



20 August 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
P O Box 6021
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CANBERRA ACT 2600

By email: pjicis@aph.gov.au

Dear Chair

Supplementary submission: Review of the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019

The Law Council welcomes the opportunity to provide a supplementary submission to the Parliamentary Joint Committee on Intelligence and Security's (**the Committee**) inquiry into the Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (**the Bill**).

In making this supplementary submission the Law Council acknowledges the contribution of its National Criminal Law Committee.

This submission is supplementary to Law Council submission dated 13 March 2019 provided to the Committee in relation to the inquiry into the Counter-Terrorism Legislation Amendment Bill 2019 which lapsed when the Parliament was prorogued in April 2019.

The Law Council notes that the Bill contains the same provisions as the lapsed Counter-Terrorism Legislation Amendment Bill 2019. Further, pursuant to clause 8 of Schedule 1 of the *Intelligence Services Act 2001* (Cth) the Committee has accepted evidence to its review of the Bill all evidence including submissions and transcripts taken for the Committee's review of the Bill. The Committee therefore has available to it for consideration the Law Council's submission provided to the Committee in relation to the earlier Bill.¹

The Law Council makes this supplementary submission now having had the benefit of reading the report of the Independent National Security legislation Monitor (**INSLM**) following his review of the laws relating to the *Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* which was released on 2 April 2019 (**the Report**).²

¹ Law Council of Australia, Submission No 4 to Parliamentary Joint Committee on Intelligence and Security, *Counter-Terrorism Legislation Amendment Bill 2019* (13 March 2019).

² Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018) available at <<https://www.inslm.gov.au/sites/default/files/files/inslm-report-prosecution-sentencing-children-for-terrorism.pdf>>.

Section 19AG of the *Crimes Act 1914* (Cth)

Section 19AG of the *Crimes Act 1914* (Cth) (**Crimes Act**) currently applies to both adults and children convicted of one of the offences listed in subsection 19AG(1). The Law Council does not support any provision such as that contained in section 19AG, as the Law Council considers section 19AG to be an attenuated form of mandatory sentencing as it applies to both adults and children. As indicated in the Law Council's initial submission to the Committee, the Law Council strongly opposes all forms of mandatory sentencing.³

The Law Council notes the Bill seeks to amend section 19AG of the Crimes Act so as to require a court sentencing a child for one of the relevant offences contained in subsection 19AG(1) to impose a non-parole period which is three quarters of the head sentence in accordance with subsection 19AG(2), unless the court finds there are 'exceptional circumstances' to justify a shorter non-parole period, as permitted in proposed subsection 19AG(4A).

The Law Council notes that in the Report the INSLM made a recommendation that section 19AG of the Crimes Act should not apply to children at all and that the section should be amended as a matter of 'urgency' to exempt children from its operation.⁴ The INSLM was of the view that section 19AG does not comply with the *Convention on the Rights of the Child (CRC)*, to which Australia is a signatory, as it is inconsistent with the principle that detention should only be used as a measure of last resort and only for the shortest period.⁵ The INSLM considered that '[f]undamentally, this is because s 19AG precludes any judicial discretion in setting a child's non-parole period'⁶ and further that exempting children from the application of section 19AG 'would be entirely consistent with the current Commonwealth approach to laws imposing mandatory penalties'.⁷

The Law Council maintains the view, consistent with the recommendation of the INSLM, that children should be exempt from the operation section 19AG which is, in effect, a form of attenuated mandatory sentencing, seeking to restrict judicial sentencing discretion in the structure of a sentence of imprisonment for offences that come within the ambit of the section. The Law Council also endorses the observation of the INSLM that:

In addition to depriving the sentencing court of discretion to set a briefer minimum non-parole period, s 19AG has the consequence that 'additional sentencing alternatives' involving detention or 'imprisonment' otherwise available under s 20AB cannot be imposed on a person convicted of a terrorism offence.⁸

³ Law Council of Australia, *Discussion Paper on Mandatory Sentencing* (May 2014) < <https://www.lawcouncil.asn.au/docs/ff85f3e2-ae36-e711-93fb-005056be13b5/1405-Discussion-Paper-Mandatory-Sentencing-Discussion-Paper.pdf> >; Law Council of Australia, *Mandatory Sentencing Policy Statement* (May 2014) < <https://www.lawcouncil.asn.au/docs/00d7155f-ce39-e711-93fb-005056be13b5/1405-Policy-Statement-Mandatory-Sentencing-Policy-Position.pdf> >.

⁴ See Recommendation No. 1 of Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018), 62 [6.46].

⁵ *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) ('Convention on the Rights of the Child').

⁶ Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018), 57 [6.26].

⁷ *Ibid*, 58 [6.29].

⁸ *Ibid*, 51 [6.7]. See *Crimes Act 1914* (Cth), subsection 20AB(6) that specifically precludes the application of section 20AB(1) for offences that fall within the ambit of section 19AG.

The Law Council notes that while the INSLM made the recommendation that section 19AG be 'urgently amended so that s 19AG no longer applies to offenders who were under 18 at the time of offending'⁹, the Bill does not seek to exclude children from the application of section 19AG and the requirement that a non-parole is 75% of the head sentence. The Bill only seeks to allow the court to depart from the application of section 19AG to children where the court finds that there are 'exceptional circumstances' to justify such a departure. In considering whether 'exceptional circumstances' are established, the court will be required to take into account 'the best interests of the child as a primary consideration' while the paramount consideration will be the 'protection of the community'.¹⁰

The Law Council considers that this approach regarding mandatory non-parole in the case of children except where there are 'exceptional circumstances' is inconsistent with Australia's international obligations in relation to the sentencing of children for criminal offences, as acknowledged by the INSLM, and does not support the proposed amendments contained in the Bill in relation to section 19AG. The sentencing discretion is still unduly restricted by the requirement for the high test of 'exceptional circumstances' to be applied. This restriction fetters the courts ability to ensure the sentence applied to a child remains proportionate to their individual circumstances and the nature of the offending conduct as required under international law and in particular the CRC.¹¹

The Law Council considers that it should be a matter for a court to determine what weight is to be given to each of the often competing considerations relevant to sentencing an offender in accordance with established sentencing principles.¹² Further the Law Council echoes what was stated by the INSLM that, while general deterrence and the need for denunciation may very often outweigh rehabilitation as sentencing considerations relevant to young offenders convicted of more serious offences,¹³ these principles 'do not require in every case a rigid minimum three-quarters rule, and to retain it will, at least in some cases, lead to a disproportionate and unjust result'.¹⁴ The INSLM goes on to compare the inflexibility of section 19AG with the position adopted in England and Wales, where a juvenile offender can be given a long head sentence, with a shorter non-parole period so as to provide them with the incentive to 'reform promptly, while still protecting the community'.¹⁵ The INSLM notes that this may have particular importance in circumstances where the Judge may find the 'immaturity which has made the child offender susceptible to radicalising influence may make them more fit for rehabilitation'.¹⁶

The INSLM also noted that there is no longer any automatic release to parole and that the decision to release an offender to parole is now determined in all cases by the Attorney-General or their delegate. While in some cases, even where the non-parole period is less than 75% of the head sentence, the effect of the decision of the Attorney-General may remain that the offender is in custody for 75% of their sentence. Noting this the INSLM was of the view that 'exempting children from the operation of section 19AG will provide both the

⁹ See Recommendation No. 1 of Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018), 62 [6.46].

¹⁰ Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019 (Cth), schedule 1, cl 13 (proposed s 19AG (4B)).

¹¹ *Convention on the Rights of the Child* (n 5) art 40.

¹² *Markarian v The Queen* (2005) 228 CLR 357.

¹³ See *Director of Public Prosecutions (Cth) v MHK* (a Pseudonym) (No 1) (2017) 52 VR 272, 294 [73].

¹⁴ Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018), 59 [6.36].

¹⁵ *Ibid*, 59 [6.37].

¹⁶ *Ibid*, 60 [6.38].

sentencing court and the Attorney-General with a greater degree of flexibility in relation to the parole of juvenile terrorist offenders'.¹⁷

The Law Council considers that the amendments in the Bill will retain a problematic degree of inflexibility when sentencing children for terrorism offences and maintains the primary position that children should be exempt from the operation of section 19AG in accordance with the recommendation of the INSLM. This exemption is necessary in order to provide a Court with the discretion to mould a sentence in relation to a child, which is appropriate in relation to a particular case.

Proposed section 19ALB

The Law Council notes the Bill seeks to insert a new section 19ALB into the Crimes Act which will reduce the discretion permitted to the Attorney-General to release a person to parole who has been either convicted of a terrorism offence, is subject to a control order relating to terrorism, or the Attorney-General is satisfied has made statements or advocated for or supported terrorist acts within the meaning of Part 5.3 of the *Criminal Code Act 1995* (Cth) (**Criminal Code**).

The Law Council reiterates its concerns that the practical effect of the amendments will be that a person subject to this provision will unlikely be in a position to prove exceptional circumstances allowing release on parole.

The Law Council is also concerned that this provision will have application to children and proposed subsection 19ALB(3) serves to limit and fetter the discretion of the Attorney-General when considering the decision to release a child to parole. The comments of the INSLM in relation to section 19AG are also relevant this proposed section in that exempting children from this provision would again provide the Attorney-General with a 'greater degree of flexibility in relation to the parole of juvenile terrorist offenders'.¹⁸

The Law Council recommends that children should therefore be exempt from the application of section 19ALB.

Bail - Section 15AA

The Law Council considers that the requirement for 'exceptional circumstances' to be shown before a person can be granted bail for an offence to which section 15AA applies should not apply to a child. By imposing this restriction on the release of a child accused of an offence to which section 15AA applies, it creates a situation where in practice, Australia's international obligations under the CRC to ensure a child is only detained or imprisoned as a measure of last resort and for the shortest period of time is not able to be realised.¹⁹

The Law Council notes that proposed subsection 15AA(3AA) provides that in determining whether exceptional circumstances exist to justify the granting of bail to a child, the court is required to have regard to the protection of the community as the paramount consideration and the best interests of the child as a primary consideration. In requiring the court to consider the best interests of the child as a primary consideration, the Law Council notes this is consistent with the requirements of the CRC.²⁰

¹⁷ Ibid, 61 [6.44].

¹⁸ Ibid.

¹⁹ *Convention on the Rights of the Child* (n 5) art 37(b).

²⁰ Ibid, art 3(1).

In relation to section 15AA, the Law Council notes that the Bill does implement the recommendation of the INSLM. The INSLM found that section 15AA 'may be regarded as compliant with Australia's obligations under the CRC' as it is 'possible for a bail authority to apply section 15AA such that the interests of the child are a primary consideration'.²¹ The INSLM contrasted this provision with section 19AG as discussed above by observing that:

*...the discretion of a court in deciding whether to grant bail under s 15AA is not constrained in the same way or to the same extent as in the context of s 19AG which requires a sentencing court to impose a specific minimum non-parole period.*²²

The INSLM also relevantly found that 'a matter being a primary of guiding consideration does not mean that it is *the* dominant or paramount or decisive consideration'.²³ This reasoning formed the basis of the INSLM's recommendation that section 15AA be amended to require as a primary consideration the requirement for the court to consider the best interests of the child and for the paramount consideration to be the protection of the community as is reflected in proposed section 15AA(3). As noted by the INSLM, this is similar to the test applied in the control orders scheme in Division 104 of the Criminal Code.

Thank you once again for the opportunity to provide this supplementary submission [REDACTED]

Yours sincerely

[REDACTED]
Arthur Moses SC
President

²¹ Independent National Security Legislation Monitor, *Report to the Prime Minister: The Prosecution and Sentencing of Children for Commonwealth Terrorism Offences* (Report No 5, 2018), 73 [7.44].

²² Ibid.

²³ Ibid, 73 [7.45].