

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

(via online submission)

Dear Dr Renwick

## **REVIEW OF THE PROSECUTION AND SENTENCING OF CHILDREN FOR COMMONWEALTH TERRORIST OFFENCES**

Thank you for your letters of 7 March 2018 and 23 April 2018 regarding your review of inquiry into the prosecution and sentencing of children for Commonwealth terrorist offences.

The Commission for Children and Young People (the Commission) is an independent statutory body established to promote improvement and innovation in policies and practices affecting the safety and wellbeing of Victorian children and young people. We have a particular focus on vulnerable children and young people as defined in the *Commission for Children and Young People Act 2012* (CCYP Act).

It is encouraging that the Commonwealth Government is reviewing current practice relating to bail, prosecution and sentencing of children for terrorist offences, and considering if there are opportunities to improve how children are treated in this context.

This review provides the Commonwealth with a unique opportunity to demonstrate Australia's commitment to long-standing international human rights principles that children are entitled to special protections, care and assistance.<sup>1</sup>

### **Prosecution of children - section 20C of the *Crimes Act 1914* (Cth)**

The Commission acknowledges that section 20C of the *Crimes Act 1914* (Cth) provides for children prosecuted and sentenced for Commonwealth terrorism offences to be tried, punished or otherwise dealt with as if it was an offence against a law of a State or Territory.

The Commission notes the broad variation in approaches taken by States and Territories in this respect, as outlined in the document prepared by your office 'Summary of relevant State and Territory legislation'. If a single approach to prosecuting and sentencing children for Commonwealth terrorism offences is to be developed, it is important that the inquiry ensure that the approach demonstrates strong fidelity to the following elements of the Convention of the Rights of the Child (CROC):

*(Article 3): 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.*

<sup>1</sup> The Geneva Declaration of the Rights of the Child of 1924, the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), the International Covenant on Economic, Social and Cultural Rights (in particular in article 10).



*(Article 37c): Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age.*

It would also be important to ensure the creation of a single approach affords children with the strongest safeguards from across the jurisdictions, rather than adopting less developed approaches to their prosecution and sentencing. For example, the Victorian *Charter of Human Rights and Responsibilities Act 2005* (Vic) (the Charter) provides that a child charged with a criminal offence has the right to a procedure that takes account of his or her age and the desirability of promoting the child's rehabilitation (section 25(3)).

The Commission would like to engage further with the Inquiry in the event a single approach is recommended, to provide more detailed feedback on elements that a Commonwealth approach to children should include, such as:

- capacity for certain matters to be heard by a specialised Children's Court
- requiring courts to give primary consideration to the best interests of the child when prosecuting and sentencing children
- encouraging all courts to develop protocols to provide for court proceedings that use less formal language during trials to ensure children better understand the court process<sup>2</sup>
- encouraging courts to recognise the unique vulnerability of children in the context of terrorism related offences, through their greater susceptibility to being targeted by recruiters and their engagement with social media.<sup>3</sup>

### **Sentencing – section 19AG of the *Crimes Act 1914* (Cth)**

The Commission is strongly supportive of amending section 19AG of the *Crimes Act 1914* (Cth) to remove the minimum three quarter non-parole rule for children and to permit the courts to exercise discretion when determining a child's parole period.

The establishment of a mandatory three-quarter non-parole period for children is contradictory to section 25(3) of the Charter, the above Articles of the CROC and to Article 37(b) of the CROC which states that:

*... 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.*

It is essential that, even in relation to serious offences, the judiciary has the capacity and discretion to individually tailor the non-parole period and the amount of time spent on parole to reflect each child's specific circumstances, age and developmental capacity, rehabilitative prospects and progress, mental health, the particulars of the offence/s and, where relevant, any guilty plea made or co-operation given by the child.

Parole provides an opportunity for children to be supervised and engaged by professional services to support their rehabilitation. The Commission appreciates the gravity of terrorism offences but believes that, for some children, community safety will be better served by providing opportunities for their successful rehabilitation and community integration on parole with appropriate conditions to mitigate risks to the community.

The CROC highlights the importance of providing children opportunities for rehabilitation and reintegration into the community, at Article 40:

*States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the*

<sup>2</sup> 'Inquiry into youth justice centres in Victoria – final report', Legislative Council, Legal and Social Issues Committee, March 2018, recommendation 10, page 64

<sup>3</sup> 'Joint submission of the Department of Home Affairs, the Attorney-General's Department, the Australian Federal Police and the Australian Security Intelligence Organisation to questions from the INSLM', p10.



*child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.*

### **Presumption against bail – section 15AA of the *Crimes Act 1914* (Cth)**

The Commission is supportive of amending section 15AA of the *Crimes Act 1914* (Cth) to remove the presumption against bail for matters involving children. The above articles of the CROC require that courts have the capacity to exercise discretion when determining whether children are to be granted bail.

### **Other issues**

The Council of Australian Governments (COAG) has made a commitment to a nationally consistent pre-charge detention scheme for terrorism suspects.

I draw your attention to legislation currently being considered in the Victorian Parliament that proposes to permit children as young as 14 years of age to be subject to preventative detention and questioning.<sup>4</sup> Given the seriousness of this proposal and the potential negative impact on children so detained, the Victorian Government has included a range of safeguards in the draft Bill. These include a requirement that the Commission be notified when a child is taken into custody under a preventative detention power and that the Commission be given access to the child, the place of detention and any relevant information, documentation or footage in order to monitor the treatment of a detained child.<sup>5</sup>

The provision for an independent oversight body such as the Commission to monitor children's safety and wellbeing is an example of a safeguard that should be in place in the event that the preventative detention of children, or any similar scheme, is included in the development of a nationally consistent approach.

Thank you for the opportunity to contribute to this important inquiry. Please contact Julie Nesbitt, Manager, Analysis and Strategy, (03) 8601 5818 if you have any questions about this submission.

Yours sincerely



Liana Buchanan  
**Principal Commissioner**

18/6/18



Justin Mohamed  
**Commissioner for Aboriginal  
Children and Young People**

18/6/18

cc: Ms Megan Mitchell, National Children's Commissioner  
Hon. Jenny Mikakos, Minister for Families and Children

<sup>4</sup> Justice Legislation Amendment (Terrorism) Bill 2018 (Vic)

<sup>5</sup> Justice Legislation Amendment (Terrorism) Bill 2018 (Vic) New Part 1B of the Terrorism (Community Protection) Act 2003 (Vic): Role of the Commission for Children and Young People