

**Review of the prosecution
and sentencing of children for
terrorism offences**

**Legal Aid NSW submission to the
Independent National Security
Legislation Monitor**

June 2018

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About Legal Aid NSW

The Legal Aid Commission of New South Wales (**Legal Aid NSW**) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW). We provide legal services across New South Wales through a state-wide network of 24 offices and 221 regular outreach locations, with a particular focus on the needs of people who are socially and economically disadvantaged.

We assist with legal problems through a comprehensive suite of services across criminal, family and civil law. Our services range from legal information, education, advice, minor assistance, dispute resolution and duty services, through to an extensive litigation practice. We work in partnership with private lawyers who receive funding from Legal Aid NSW to represent legally aided clients.

We also work in close partnership with LawAccess NSW, community legal centres, the Aboriginal Legal Service (NSW/ACT) Limited and pro bono legal services. Our community partnerships include 29 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Criminal Law Division assists people charged with criminal offences appearing before the Local Court, Children's Court, District

Court, Supreme Court, Court of Criminal Appeal and the High Court. The Criminal Law Division also provides advice and representation in specialist jurisdictions including the State Parole Authority and Drug Court.

The Commonwealth Crime Unit (**CCU**) is a specialist unit within the Criminal Law Division. The CCU provides legal advice and representation to people charged under Commonwealth criminal laws, including terrorism.

The Children's Legal Service (**CLS**) is another specialist unit with the Criminal Law Division. The CLS advises and represents children and young people involved in criminal cases in the Children's Court, District Court and Supreme Court.

Legal Aid NSW welcomes the opportunity to make a submission to the *Review of the Prosecution and Sentencing of Children for Terrorism Offences*. Should you require any further information, please contact:

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Consistency - section 20C of the Crimes Act

The first issue in the review concerns section 20C of the *Crimes Act 1914* (Cth) (**Crimes Act**). The review is considering whether Commonwealth legislation should ensure a consistent approach to the trial and punishment of children charged with or convicted of a Commonwealth terrorism offence.

Legal Aid NSW notes that some degree of inconsistency exists in relation to the trial and sentencing of all Commonwealth offenders. Section 20C applies to children charged with or convicted of all Commonwealth offences, not just terrorism offences. Furthermore, section 68(2) of the *Judiciary Act 1903* (Cth) effectively provides that State and Territory courts can exercise criminal jurisdiction with respect to Commonwealth offenders. The effect of this provision is to apply NSW procedure to Commonwealth matters, including for arrest, custody, bail, hearing, trials and appeals. Given that children facing terrorism charges in NSW will mostly be tried on indictment in a higher court, rather than in the Children's Court, the same trial procedure will apply to them as applies to adult defendants facing terrorism charges. Given this broader context, we question whether there is merit in considering or pursuing legislative consistency in the very limited area of children charged with or convicted of Commonwealth terrorism offences.

If reform were to be pursued, this should not, in our view, take the form of comprehensive legislation to deal with the sentencing, administration and release of children charged with or convicted of Commonwealth offences, or specifically terrorism offences. We consider that it is generally satisfactory for these matters to be dealt with according to the laws and procedures of the States and Territories. However, we would be open to the legislation of certain minimum standards in this area, as recommended by the Australian Law Reform Commission (**ALRC**) in its report, *Same Crime, Same Time: Sentencing of Federal Offenders*.¹ We have reservations about some of the recommendations or aspects of the recommendations made by the ALRC, but we would be supportive of provisions to ensure that certain basic rights and protections are afforded to children in the prosecution and sentencing process. For instance, we would support minimum standards governing:

- the principles to be applied by courts when sentencing children. We are generally comfortable with recommendation 27.1(b) of the ALRC on this issue
- prohibition on publications which identify the child the subject of proceedings, or are likely to lead to the identification of the child. This was recommended by the ALRC in recommendation 27.1(f), and is consistent with article 40(2) (vii) of the *United Nations Convention on the Rights of the Child* (**CRC**), to which Australia is a signatory
- the right to legal assistance and representation for young defendants. This is required by Article 40 of the CRC

¹ *Report No 103* (2006), see Chapter 27, recommendation 27.1.

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- where young offenders should serve sentences of imprisonment. On this issue, we note that the ALRC recommended that a young federal offender sentenced to detention in a juvenile detention facility must not be transferred to an adult prison until he or she is at least 18 years of age, unless a court determines “either that it is in the best interests of the young person to do so or that there are exceptional circumstances justifying the transfer”.² We do not support the reference to “best interests” in this test, as we cannot see how it would be in the best interests of a child to be transferred to an adult correctional facility.

The presumption against bail – section 15AA of the Crimes Act

The second issue of the review concerns the presumption against bail for those charged with particular offences relating to terrorism, including children. Section 15AA of the Crimes Act provides that a bail authority must not grant bail to a defendant charged with certain terrorism offences, unless satisfied there are “exceptional circumstances” to justify bail.

Legal Aid NSW does not support section 15AA. Bail laws, and the determination of bail, involve a balancing exercise between the right of a defendant to liberty and the presumption of innocence, and the need to ensure that a defendant does not abscond, interfere with witnesses, or commit other offences.³ In our view, section 15AA, by limiting the grant of bail to “exceptional circumstances”, does not strike an appropriate balance. It prevents a case by case assessment of whether bail should be granted in a particular case, taking into account subjective and objective factors relevant to risk. It also contravenes the *International Covenant on Civil and Political Rights*, which provides that ‘it shall not be the general rule that persons awaiting trial shall be detained in custody’.⁴

Legal Aid NSW has particular concerns about the application of section 15AA to children. In addition to raising the above concerns, section 15AA contravenes several provisions of the CRC, including:

- Article 3, which provides that in all actions concerning children, the best interests of the child shall be a primary consideration.
- Article 37(b), which provides that no child shall be deprived of his or her liberty arbitrarily. The 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, which provides, amongst other things, that children accused of having infringed the criminal law have the right to be treated in a manner ... which takes

² Recommendation 27.1(h).

³ NSW Bureau of Crime Statistics and Research (BOSCAR), *Bail presumptions and risk of bail refusal: An analysis of the NSW Bail Act* (July 2010)

⁴ *International Covenant on Civil and Political Rights* article 9(3).

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.

The New South Wales Law Reform Commission (**NSW LRC**) has highlighted that children often do not fully comprehend the criminal system and their own situation.⁵ They may take time to develop trust and confidence in their lawyer. The NSW LRC stated that the presumption against bail may therefore compromise a young person's ability to 'provide cogent instructions and to participate in the court process in an effective way'.⁶

The cases of both *R v NK* [2016] NSWSC 498 and *AB v Director of Public Prosecutions* (Cth) [2016] 1042 considered section 15AA in its application to children. Both highlighted the potential vulnerability of children charged with Commonwealth terrorism offences. NK was diagnosed with an intellectual disability and Asperger's syndrome, and Justice Hall referred to the "possible vulnerability of youth to adult persuasion or influence" when considering section 15AA.⁷ AB was also diagnosed with Asperger's syndrome, as well as major depression and a mild cognitive disability. Justice Beech-Jones observed that "AB will be affected by his incarceration due to his youth and mental fragility"⁸ and expressed concern that "such a vulnerable youth is to be detained even though the charges against him are weak".⁹

Legal Aid NSW would recommend, at a minimum, that section 15AA not apply to children, or at the least that it be modified so that there is a lower and more age-appropriate threshold for the granting of bail to children.

Statutory non-parole periods – section 19AG of the Crimes Act

The third issue in the review concerns the minimum non-parole periods for persons convicted of terrorism offences, established under section 19AG of the Crimes Act. The review is considering whether section 19AG should be amended for children convicted of Commonwealth terrorism offences.

Legal Aid NSW submits that the statutory non-parole period in section 19AG should not apply to children. Legal Aid NSW has concerns about section 19AG generally. By requiring a court to impose a non-parole period that is three quarters of the sentence to be served, the provision hampers the exercise of judicial discretion appropriate to the circumstances of a particular case. It runs counter to the notion of individualised justice. In New South Wales, there is a standard non-parole period regime, but the standard non-parole period for an offence is:

... a matter to be taken into account by a court in determining the appropriate sentence for an offender, without limiting the matters that are otherwise required

⁵ NSW LRC *Bail* [19.50]-[19.51].

⁶ NSW LRC *Bail* [19.50]-[19.51].

⁷ At [40]-[41].

⁸ At [5].

⁹ At [6]. However this was also as a result of the application of the *Bail Act 2013* (NSW).

or permitted to be taken into account in determining the appropriate sentence for an offender.¹⁰

Furthermore, it does not apply when sentencing offenders who were under 18 at the time of the offence.¹¹

In section 19AG, by contrast, there is no flexibility or discretion to not apply the non-parole period, regardless of the circumstances of the case. It also applies to children.

Section 19AG is particularly inappropriate for children, who require a tailored sentencing approach with an emphasis on rehabilitation. As Chief Justice McClellan observed in *KT v R* (2008):

The principles relevant to the sentencing of children have been discussed on many occasions. Both considerations of general deterrence and principles of retribution are, in most cases, of less significance than they would be when sentencing an adult for the same offence. In recognition of the capacity for young people to reform and mould their character to conform to society's norms, considerable emphasis is placed on the need to provide an opportunity for rehabilitation ...¹²

However, the courts have also acknowledged that the greater the objective gravity of an offence, the less likely it is that retribution and general deterrence will cede to the interests of rehabilitation.¹³

These factors and nuances are not able to be taken into account under section 19AG, which does not distinguish between the sentencing of children and adults, and does not allow for any judicial discretion in the setting of a non-parole period. For instance, in *The Queen v MHK* [2016], Justice Lazry noted that if not for section 19AG, he would have sentenced the defendant (who was 17 years old at the time of the offence) to a non-parole period of four years, "which would have better enabled [his] supervision and rehabilitation given [his] youth".¹⁴

Section 19AG is arguably a form of mandatory sentencing, which has been widely criticised, in particular in its application to children.¹⁵

Like section 15AA, section 19AG appears to breach various provisions of the CRC, including article 3 (the best interests of the child), article 37(b) (deprivation of liberty), and article 40. For instance, article 40 provides that children convicted of infringing the law should 'be treated in a manner ... which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive

¹⁰ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54B(2).

¹¹ *Crimes (Sentencing Procedure) Act 1999* (NSW), s 54D(3).

¹² *KT v R* (2008) 182 A Crim R 571 at [22]ff, citations omitted.

¹³ *JE v R* (2008) 183 A Crim R 150 at [16]; *MJ v R* [2010] NSWCCA 52 at [37]–[39]; and *JT v R* [2011] NSWCCA 128 at [34]–[35].

¹⁴ *The Queen v MHK* [2016] VSC 742 at [78].

¹⁵ See for instance, the Law Council of Australia, *Discussion Paper on Mandatory Sentencing* (May 2014), generally and at p23 for children, and the Australian Law Reform Commission, *Seen and heard: priority for children in the legal process*, Report 84 (1997), paras 19.55-19.64.

role in society'. Mandating that children serve a long non-parole period runs counter to these principles.

Legal Aid NSW therefore holds the view that section 19AG should not apply to children sentenced for Commonwealth offences. If it is to apply in some form, the court should retain a discretion not to apply the non-parole period to the child if it is not appropriate in all the circumstances of the case.