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

Australian Human Rights Commission

Submission to the Parliamentary Joint
Committee on Intelligence and Security

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# 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)[[1]](#endnote-2) 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 Act

the best interests of the child must be ‘a primary consideration’, while the protection of the community must be ‘the paramount consideration’.

1. 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[[2]](#endnote-3) (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.[[3]](#endnote-4)
2. 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 this inquiry. A copy of the Commission’s previous submission is provided for ease of reference in **Attachment A**.
3. 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).[[4]](#endnote-5) 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.
4. The INSLM Report was tabled on 2 April 2019.[[5]](#endnote-6) 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**.

# Section 15AA of the Crimes Act

1. 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.[[6]](#endnote-7)
2. 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.[[7]](#endnote-8) With respect, the Commission does not agree with this view.
3. 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.[[8]](#endnote-9) The Commission therefore repeats the recommendation it made to the INSLM that s 15AA be amended so that it does not apply to children.[[9]](#endnote-10)

# Section 19AG of the Crimes Act

1. 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.
2. As explained in the Commission’s submission to the INSLM, the *Convention on the Rights of the Child*[[10]](#endnote-11) (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.[[11]](#endnote-12) For that reason, the Commission submitted that s 19AG should be amended so that it does not apply to children.[[12]](#endnote-13) The INSLM agreed with this view.[[13]](#endnote-14)
3. 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.

# Proposed s 19ALB of the Crimes Act

1. 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.[[14]](#endnote-15) 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.

# ‘Primary’ and ‘paramount’ considerations

1. 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’.[[15]](#endnote-16) 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.[[16]](#endnote-17)
2. 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.
3. In all decisions involving a child, the CRC requires the best interests of that child to be a primary consideration.[[17]](#endnote-18) The Commission therefore considers that if the various provisions do continue to apply to children, this requirement should continue to apply.
4. 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.
5. For these reasons, the Commission recommends that the references to the protection of the community being a ‘paramount’ consideration be deleted from the Bill.

# Conclusion and recommendations

1. 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.
2. 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 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:

1. 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
2. the respondent is in some alternative way provided with sufficient information adequately to defend the proceedings.
1. *Criminal Code Act 1995* (Cth) sch. [↑](#endnote-ref-2)
2. 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. [↑](#endnote-ref-3)
3. 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>>. [↑](#endnote-ref-4)
4. Explanatory Memorandum, Counter-Terrorism Legislation Amendment (2019 Measures No. 1) Bill 2019, para 5. [↑](#endnote-ref-5)
5. 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>>. [↑](#endnote-ref-6)
6. *Crimes Act 1914* (Cth) section 15AA(1). [↑](#endnote-ref-7)
7. 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>>. [↑](#endnote-ref-8)
8. 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>>. [↑](#endnote-ref-9)
9. Ibid., Recommendation 4. [↑](#endnote-ref-10)
10. *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3.

(entered into force 2 September 1990) [↑](#endnote-ref-11)
11. Australian Human Rights Commission, *Submission to the Independent National Security Legislation Monitor* (15 June 2018) paras 17-20. [↑](#endnote-ref-12)
12. Ibid., Recommendation 3. [↑](#endnote-ref-13)
13. Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), Recommendation 1. [↑](#endnote-ref-14)
14. 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>. [↑](#endnote-ref-15)
15. 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). [↑](#endnote-ref-16)
16. Independent National Security Legislation Monitor, *Report to the Prime Minister: The prosecution and sentencing of children for terrorism* (2018), Recommendation 2a. [↑](#endnote-ref-17)
17. 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) [↑](#endnote-ref-18)