



Australian Government
Attorney-General's Department

22 March 2019

Mr Andrew Hastie MP
Chair
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Mr Hastie

Thank you for the opportunity to appear at the Parliamentary Joint Committee on Intelligence and Security hearing on Friday 15 March 2019 to present evidence on the Counter-Terrorism Legislation Amendment Bill 2019 (the Bill).

At the hearing, I agreed to provide the committee with a written response regarding:

- how the Bill in its current form conforms or does not conform to recommendation 1 of the Independent National Security Legislation Monitor (INSLM) in his report on the prosecution and sentencing of children for terrorism, and
- how recommendation 2a of that report is dealt with in the Bill.

Recommendation 1 of the INSLM's report is that:

s 19AG be amended so that s 19AG no longer applies to offenders who were under 18 at the time of offending. This will also enable the s 20AB options to be available for those offenders.

Recommendation 2a is that:

Section 15AA of the Crimes Act be amended so that, in the case of children, and within the exceptional circumstances test, it expressly provides for additional consideration of the best interests of the child in every case as a primary consideration, and protection of the community as a paramount consideration.

The Bill's explanatory memorandum notes that the Bill responds to issues raised during the INSLM inquiry. A key issue considered by the INSLM and ultimately reflected in recommendations 1 and 2a is ensuring that the rights of children who are being prosecuted and sentenced for terrorist offences are taken into account. In response, provisions have been inserted into the Bill to make it explicit that the best interests of the child must be considered by the relevant decision maker at the key points in the criminal justice processes of bail, sentencing and parole.

This is achieved in the Bill by adopting recommendation 2a of the INSLM report in full, at item 8:

- In determining whether exceptional circumstances exist to justify granting bail to a person who is under 18 years of age, without limiting the matters the bail authority may have regard to, the bail authority must have regard to (a) the protection of the community as the paramount consideration; and (b) the best interests of the person as a primary consideration.

Item 13 of the Bill also responds to the issues raised in the INSLM report to ensure that the rights of children who are being prosecuted and sentenced for terrorist offences are taken into account but does so in a way consistent with the obligation upon government to protect the community from terrorist threats. This is achieved in the same way as item 8, namely by making the protection of the community the paramount consideration and the best interests of the child a primary consideration. Accordingly, while item 13 differs from the approach recommended by the INSLM in recommendation 1, the measure is intended to be responsive to the issues raised during the INSLM inquiry, namely the need to protect the rights of children who are being prosecuted and sentenced for terrorism offences. This is consistent with the Convention on the Rights of the Child and aligns with the drafting formulation already provided for in Commonwealth legislation underpinning Control Orders.

The Bill also ensures that these same factors are taken into account under the new presumption against parole (which was not the subject of such an express recommendation), with item 16 of the Bill providing that:

- In determining whether exceptional circumstances exist to justify making a parole order in relation to a person who is under 18 years of age, without limiting the matters the Attorney-General may have regard to, the Attorney-General must have regard to: (a) the protection of the community as the paramount consideration; and (b) the best interests of the person as a primary consideration.


All three of these provisions safeguarding the rights of children are in addition to the existing safeguards available to all persons being considered for bail and parole for a Commonwealth offence, namely:

- The defendant (and the Commonwealth Director of Public Prosecutions) has the option to appeal the decision of the bail authority.
- Release on parole is already at the discretion of the Attorney-General or delegate for all federal offenders at the conclusion of their non-parole period (the amendments merely set a higher threshold for these offenders who present the highest risk to the community).
- The existing procedural fairness arrangements in Part IB of the Crimes Act will apply to the expanded class of offenders under the Bill.
 - For example, where the Attorney-General is not satisfied that exceptional circumstances exist to justify making a parole order in relation to a terrorism-related offender, the Attorney-General must give the offender written notice of the refusal and the reasons for the refusal.
 - The Attorney-General must reconsider the offender for parole within 12 months of the refusal decision (and every 12 months thereafter as necessary). On each occasion, the offender will have the opportunity to demonstrate that exceptional circumstances exist to justify their parole.
 - Decisions in relation to whether to grant parole as well as the conditions of any such parole, are reviewable decisions under the *Administrative Decisions (Judicial Review) Act 1977*.

I request that this letter be held under embargo, along with the INSLM report, until after the INSLM report is tabled in Parliament. Tabling of the report is scheduled to occur by 2 April 2019, the next sitting day of Parliament. Following the public release of the report, the Government will provide a public response formally addressing all of the recommendations of the report.

I appreciate the opportunity to make these comments at this time.

Yours sincerely



Stephen Bouwhuis
Assistant Secretary