



Australian Government

Independent National Security Legislation Monitor

Dr James Renwick CSC SC

Children, national security and citizenship

Some reflections

Scope of the INSLM's Functions

- Section 4 of the INSLM Act defines 'counter-terrorism and national security legislation' as:
 - Section 33AA, 35 and 35A of the *Australian Citizenship Act 2007*
 - Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*
 - Part 4 of the *Charter of the United Nations Act 1945*
 - The following provisions of the *Crimes Act 1914*
 - Division 3A of Part IAA
 - Section 15 AA and 19 AG
 - Part IC to the extent that the provisions relate to the investigation of terrorism offences
 - Chapter 5 of the *Criminal Code*
 - Part IIIAA of the *Defence Act 1903*
 - The *National Security Information (Criminal and Civil Proceedings) Act 2004*.

The definition includes other provision of the listed legislation which relate to the specified provisions

National Security and CT Landscape

- In conducting my statutory deadline reviews I concluded:
 - there is currently a ‘probable’ level of threat of one or more terrorist attacks occurring in Australia
 - that threat level will remain a significant factor in the Australian national security and counter-terrorism landscape for the reasonably foreseeable future, certainly during my term as INSLM, which ends on 30 June 2020, and indeed for the next five years
 - while more complex or extensive attacks cannot be ruled out, and must be prepared for, attacks by lone actors using simple but deadly weapons, with little if any warning, are more likely than the former type of attack
 - there can be no guarantee that the authorities will detect and prevent all attacks
 - there is also the risk of opportunistic if unconnected ‘follow-up’ attacks in the immediate aftermath of a completed attack, at a time when police and intelligence agencies are fully occupied in obtaining evidence and returning the attacked locality to normality

Recent Changes

- The attack in Christchurch, New Zealand and in Sri Lanka will require significant re-thinking of the nature of the threat.
- Foreign fighters and their children remain a cohort of particular significance both because of their direct potential to be perpetrators of terrorist acts but also because of their capacity to inspire others, including children, to act.
- the UK Home Secretary, Sajid Javid, said in a speech on 20 May this year:
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- *In fact, of all the terrorist plots thwarted by the UK and our Western allies last year, 80% were planned by people inspired by the ideology of [ISIL]/Daesh, but who had never actually been in contact with the so-called Caliphate.*

Children

- The position of children and young people is not straightforward. Of course, as a matter of humanity, reflecting the terms of the Convention on the Rights of the Child, the plight of very young children is distressing and there is general hope for their safe return. Beyond the very young, the position becomes more complex. As I said in my recent report to the Prime Minister concerning the *Prosecution And Sentencing Of Children For Terrorism Offences*,
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- There are ... parallels between child soldiers and Australian children in territory controlled by ISIL: the fact that each are certainly victims does not mean they cannot also become perpetrators, and thus they remain a cohort of interest.

Children

- That remains true even though ISIL no longer controls territory as it once did. As a matter of law, the cohort of children need to be divided, between:
 - those under the age of criminal responsibility, which is 10,
 - those under 14 where there the presumption against criminal intent applies,
 - and those between 14 and 18 who are to be tried and punished as juveniles.
- It is very possible that there were young Australians over 14 years of age who have committed one or more terrorist offences or breached the declared area provisions which made it a crime to be in Mosul and Raqqa without reasonable excuse. And within these groups no doubt the level of criminal culpability will vary.

Current reviews

- Review of the operation, effectiveness and implications of the terrorism-related citizenship loss provisions in the *Australian Citizenship Act 2007*:
 - Section 33AA ('renunciation by conduct')
 - Section 35 ('service outside Australia in armed forces of an enemy country or a declared terrorist organisation')
 - Section 35A ('conviction for terrorism offences and certain offences')
 - Section 35AA ('declared terrorism organisation')
- Review of the operation, effectiveness and implications of amendments made by the *Telecommunications and Other Legislation Amendment (Assistance and Access Act) 2018*

Latest INSLM report – Prosecution and sentencing of children for terrorism

- Report focused primarily on ss 19AG, 15AA and 20C of the Crimes Act in addition to many other provisions of Commonwealth, State and Territory laws.
- My report contained 11 key recommendations and was tabled in Parliament on 2 April 2019. The government is to provide a response to my report within 12 months.
- The findings of the children's report are likely to be relevant to my current review of the citizenship loss provisions, particularly in relation to the possible implications for children that may flow from the operation of the citizenship loss provisions (including how the provisions are balanced against Australia's obligations under the UN Convention on the Rights of the Child).

Children's Report

- In federal criminal law, where imprisonment is ordered, there is a head sentence imposed, and a judicial determination of a non-parole period. Because of a perception that an early terrorism offender had received a lenient non-parole period, s 19AG of the Crimes Act (Cth) was enacted. It requires every court imposing a term of imprisonment on an adult or child convicted of a terrorism offence to fix a non-parole period of at least three-quarters of the duration of the head sentence, hence the '75% rule'. At the time s 19AG was enacted, parole was almost automatic. That is no longer the case. This change diminishes dramatically the necessity of the provision. Section 19AG precludes any judicial discretion in setting a child's non-parole period.
- I concluded that Section 19AG in its current form, as it applies to children, is in breach of Australia's obligations under the CRC and recommended that it no longer apply to those under 18 at the time of offending.

Where should children be tried

- Children's courts are at the front line of juvenile justice and do important work in often difficult conditions. Nevertheless, the report recommended that there be a minimum threshold set by federal law such that:
- Serious terrorism charges – those carrying a maximum sentence of imprisonment of 15 years or more – should always be tried on indictment (in which case s 80 of the *Constitution* guarantees a jury trial) and not in children's courts.
- There be no change to the current provisions which permit the CDPP and the accused to agree to proceed summarily with reduced penalties where the maximum penalty would normally be (up to) ten years.
- In all other cases, the matter should be transferred to a court which can hear the matter with a jury unless the accused can persuade the court that there are special circumstances which justify the matter being heard by the children's court.

Judicial exchanges

As Chief Justice Ferguson of the Supreme Court of Victoria said in her submission to the inquiry: 'Terrorism trials generally involve a high level of legal and evidentiary complexity and require significant pre-trial management. Cross-jurisdictional learning is an important tool.' I concluded that enhancing judicial training in terrorism matters, including on the unique issues arising in the trial of children, is highly desirable. The Judges of England and Wales who regularly try terrorism matters told me that they welcome the participation of Australian judges in their annual training. The details of such training are matters for the independent judiciary. I therefore recommended that monies be made available to the appropriate Australian judicial education bodies to allow English and Australian judges expert in the conduct of terrorism trials to travel each year to the other jurisdiction to observe the conduct of terrorism trials and to provide or receive judicial continuing legal education with a view to encouraging appropriate improvements and innovations in the conduct of such trials.

Federal Court and indictable terrorism matters

- I also recommended that in all terrorism matters tried on indictment, the Federal Court of Australia should have jurisdiction concurrent with the courts of the States and Territories, including because of:
 - the disparity in the approaches taken in the eight State and Territory jurisdictions;
 - the complexity of federal legal and procedural issues which typically arise in terrorism cases;
 - the truly national nature of terrorism offences;
 - the fact that the Federal Court already has jurisdiction to make Control Orders under Div 104 of the *Criminal Code* and is shortly to be given concurrent jurisdiction in criminal prosecutions for breaches of the *Corporations Act* (Cth);
 - the recent appointment of specialist criminal law judges to the Federal Court.

Publication

- A key function of the INSLM is in monitoring whether relevant laws remain 'proportionate to any threat of terrorism or threat to national security, or both'. In a sceptical age, in both Australia and the United Kingdom it is not infrequently said that the terrorism and national security threats are overstated. It is important for public confidence that as much as possible is authoritatively revealed, provided the national interest is not thereby damaged. The public and its elected representatives have a strong interest in being told by government with regularity and accuracy how often counter-terrorism powers are used, and equally statistics as to consequential arrests, convictions and other limitations upon liberty, and I have so recommended.

Questions

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