Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

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Margery Nicoll
Acting Chief Executive Officer
Law Council of Australia
19 Torrens Street
Braddon ACT 2612

[redacted]

Dear Ms Nicoll

Establishment of a federal parole authority: intended policy advocacy project

Thank you for the opportunity to provide feedback on the Law Council of Australia's (**LCA**) intended policy advocacy on the establishment of a federal parole authority. The Queensland Law Society (**QLS**) appreciates being consulted on this important issue.

This response has been compiled by the QLS Criminal Law Committee, whose members have substantial expertise in this area.

The Society strongly agrees with the views of the LCA's National Criminal Law Committee that a federal parole authority should be established as the independent decision-maker on parole applications by federal offenders, replacing the current role of the Commonwealth Attorney-General.

Prior to 2012, release to parole was automatic for offenders serving sentences of, or effectively totalling, less than 10 years. Significant changes to Commonwealth parole laws were made by way of the *Crimes Legislation Amendment (Powers and Offences) Act 2012* (Cth) (***CLA Act***) which sought to implement some of the recommendations made by the Australian Law Reform Commission (**ALRC**) in its 2006 report, *Same Crime, Same Time: Sentencing of Federal Offenders* (**ALRC Report**).[1] These changes removed automatic parole and require the Commonwealth Attorney-General to make a decision whether or not to grant parole in each case.

The *CLA Act* failed to implement a key recommendation of the ALRC Report, being the establishment of a federal parole authority to make parole-related decisions in relation to federal offenders.[2] The ALRC Report highlighted:

> The ALRC is of the view that the existing arrangements whereby the Attorney-General or departmental delegate make parole decisions in relation to federal offenders are not appropriate.

[1] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, April 2006).
[2] Ibid 15.

> Because such decisions affect an individual's liberty, they should be made through transparent and accountable processes in accordance with high standards of procedural fairness and independently of the political arm of the executive. The current arrangements lack adequate transparency and independence.
>
> While parole decisions are made by the executive rather than the judicial branch of government, these decisions form part of the administration of criminal justice. In that context, transparency requires that justice should be done and be seen to be done. The criminal justice process should be transparent, not only to the offender and the bureaucracy, but to the community at large. Transparency provides safeguards for the offender and the community, and ensures they can see that decisions are made impartially and not arbitrarily.
>
> Parole decisions should be made within a legislative framework approved by Parliament. However, it is important that such decisions are made on the basis of the facts in individual cases and insulated as far as possible from political considerations of the day.
>
> The ALRC is also of the view that the establishment of an independent federal parole authority would improve the parole decision-making process in other ways, for example, through the involvement of relevant specialists and community members. [3]

This recommendation was accepted by the Government at the Federal Criminal Justice Forum in Canberra in September 2008, when then Minister for Home Affairs, the Hon Bob Debus MP, noted some of the main priorities for action emerging from the Forum included the establishment of a federal parole board.[4] The Crimes Legislation Amendment (Powers and Offences) Bill 2011 (**CLA Bill**) was subsequently introduced and referred to the House of Representatives Social Policy and Legal Affairs Committee (**Committee**) for inquiry and report.

The CLA Bill did not include any establishment of a federal parole authority. In its report, the Committee observed:

> The Committee is concerned that the Attorney-General remains responsible for parole decisions. This is contrary to the recommendation of the ALRC Report and was an issue raised in consultation. In other jurisdictions, parole decisions are made by a judicial officer or board rather than the executive arm of government.
>
> The Committee notes the importance of the separation of the legislative, executive and judicial arms of power and expresses grave concern over parole discretions residing with the Attorney-General. The Committee strongly suggests that the establishment of a federal parole board warrants further urgent consideration.[5]

It does not appear the Committee's recommendation was acted on, where the *CLA Act* removed automatic parole and the three year limit on supervision during parole but did not simultaneously provide for the establishment of a federal parole authority. Indeed, the *CLA Act* increased Executive power and discretion relating to parole decisions when the ALRC's key recommendation was to remove exactly this power and discretion from the Executive's hands.

Accordingly, the Society considers the establishment of a federal parole authority to be important and urgent.

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[3] Ibid 573-4 [23.9].
[4] Editors, 'Commission news' (2009) 94 *Reform* 45.
[5] House of Representatives Standing Committee on Social Policy and Legal Affairs, *Advisory Report: Crimes Legislation Amendment (Powers and Offences) Bill 2011* (Report, February 2012) 50 [7.73]-[7.74].

A federal parole authority would also be compatible with Australia's obligations under the *International Covenant on Civil and Political Rights*[6] which relevantly includes the following rights:

- Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[7]
- The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.[8]
- No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.[9]

The composition and structure of a federal parole authority

In response to the LCA's request for preliminary views on the composition and structure of a federal parole authority, we take the three models for reform proposed by the ALRC as a good starting point for discussion, being:

(1) delegating decision-making authority in relation to federal offenders to existing state and territory parole authorities;
(2) establishing a federal parole authority as an independent statutory authority; and
(3) establishing a parole division within the Administrative Appeals Tribunal.

As regards the first option, we agree with the ALRC that responsibility for release of federal offenders into the community prior to the expiration of their sentence should reside at the federal level, where decision-making authority in relation to federal offenders should not be delegated to existing state and territory parole authorities.[10]

We would prefer option two, being the establishment of a federal parole authority as an independent statutory authority, as opposed to the establishment of a parole division within the Administrative Appeals Tribunal (**AAT**). The ALRC recommended parole decisions should be subject to the rules of natural justice and to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), but 'should not be subject to merits review but where the [parole authority] makes a decision to refuse release on parole, the federal offender should have the right to have the decision reconsidered by the [parole authority] periodically'.[11]

Where the primary role of the AAT is the independent merits review of a range of federal administrative decisions, we do not consider it the most appropriate body to make federal parole decisions.[12] However, we are cognisant of the lack of accountability for parole decisions when

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[6] *International Covenant on Civil and Political Rights,* opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).
[7] Ibid art 9(1).
[8] Ibid art 10(3).
[9] Ibid art 17(1).
[10] Australian Law Reform Commission (n 1) 575 [23.17].
[11] Australian Law Reform Commission, *Sentencing of Federal Offenders* (Discussion Paper 70, 15 February 2005) 29, proposal 23-3.
[12] We acknowledge the role of the AAT is not limited to the merits review of administrative decisions, where members exercise other powers under a number of legislative instruments (for example, the issuing of telecommunications interception warrants under the *Telecommunications (Interception) Act 1979* (Cth) and the conduct of compulsory examinations in connection with confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth)).

compared to criminal sentencing, both of which impact equally on a person's fundamental right to liberty, and consider parole decisions should be subject to merits review in the AAT to promote consistency and accountability in decision-making.

Accordingly, we support the establishment of a federal parole authority as an independent statutory authority, along with a right to merits review of such decisions in the AAT, and consider this would provide significant benefits to the administration of criminal justice in Australia. For example, a federal parole authority would ensure:

- independence, transparency, objectivity and accountability, along with high standards of procedural fairness, to decisions that affect an individual's liberty;
- decisions are made on the basis of established legislative criteria, and insulated from political considerations of the day, rather than on the basis of expedient political considerations;
- broad inter-jurisdictional equality in decision making;
- a wider range of expertise, as well as members of the community, in the decision-making process; and,
- community trust in the process where it is clear to the offender and to the community there has been no political involvement in the process.

We also suggest consideration be given to the ALRC's other recommendations as a starting point for discussion, namely:

- members should be appointed for fixed terms and should include a legally qualified chair and deputy chair and members with relevant expertise, for example, in the areas of psychology, psychiatry and social work;
- men and women should be represented and there should be at least on Aboriginal or Torres Strait Islander member;
- federal offenders should have an opportunity to appear before the parole authority if it is of the opinion that the information currently before it does not justify releasing the person on parole or licence;
- federal offenders should be allowed legal or other representation to assist in preparing a parole application as well as when appearing before the parole authority, and QLS considers this should include sufficient funding for community legal centers, national Aboriginal and Torres Strait Islander legal services and National Legal Aid to provide equity of access;
- federal offenders should have the benefit of an appropriately qualified interpreter where necessary;
- the parole authority should have access to the same information and reports currently considered by state and territory parole boards and the power to require production of such information;
- the parole authority should have the power to require persons to appear before it for the purpose of carrying out its functions;
- the parole authority should publish reasons for its decisions; and,

- the parole authority should publish an annual report on its operations, which must be tabled in the Australian Parliament.[13]

In addition to the above, our members raise the need to retain good aspects of the current federal parole system (for example, the automatic consideration of parole as opposed to the need to make an application for parole to be considered). However, consideration should be given to the length of time within which a new application can be made after a refusal. Currently, for federal parole that time is 12 months, whereas in Queensland, it is 6 months. We submit this longer timeframe has the potential to increase incarceration rates without good reason.

Our members also emphasize their preference for a right to oral hearings before any federal parole authority instead of the current situation in Queensland where parole interviews take place in prison with a corrective services officer and are then communicated to the parole board via a report.[14]

Finally, we recommend legislative criteria include a similar consideration to that provided in Queensland's *Ministerial Guidelines to the Parole Board*, which requires the parole board to 'consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole under supervision prior to the fulltime completion of their prison sentence.'[15]

Finally, consideration should be given to situations where both state and federal offences exist, and making one authority the decision-maker in relation to parole would reduce administrative burden.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully

[redacted]

Kara Thomson
President

[13] Australian Law Reform Commission, *Sentencing of Federal Offenders* (Discussion Paper 70, 15 February 2005) 28-9, proposal 23-2.
[14] The UK approach in *Osborn v Parole Board* [2013] UKSC 61 highlighted that common law standards of procedural fairness may require the board to hold an oral hearing in light of the facts of the case and the importance of what is at stake.
[15] Minister for Corrective Services, *Ministerial Guidelines to the Parole Board of Queensland* (Ministerial Guidelines, 3 July 2017) 2 [1.3].