Law Council of Australia

Principles underpinning a federal parole authority

Position Paper

November 2022

Law Council
OF AUSTRALIA

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1. The Law Council's position

Decisions affecting the liberty of individuals should be made in a transparent, accountable, and independent manner. Parole, as a form of conditional release of offenders into the community to serve part of their sentence, engages the basic right of individuals to their liberty.

A federal parole authority should be established as an independent statutory body, empowered to make parole decisions. It should work within a transparent institutional framework, which would assist in improving the administration of justice at the Commonwealth level.

The federal parole authority should have the resources and expertise to:

- properly afford prisoners procedural fairness, including providing all relevant material and adequate time to respond to notices of intention to refuse parole; and
- make decisions that give due weight to all relevant considerations as required by the *Crimes Act 1914* (Cth) (**Crimes Act**).

The successful functioning of a federal parole authority will be determined by the extent to which it is underpinned by four key design principles: independence, transparency, procedural fairness, and accountability.

The federal parole authority's decisions should be final, subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and not subject to the responsible Minister's approval. The authority should also make decisions in relation to the conditions to be attached to release on parole and license.

The federal parole authority should be established as an agency separate to the current Commonwealth Parole Office (**CPO**), which is located within the Attorney-General's Department (**Department**). The federal parole authority should be overseen by an agency head who is appointed by the Governor-General (subject to statutory protections to ensure their independence and expertise) and have staff who are employed directly under the governing Act.

The membership of a federal parole authority should include a mix of legally qualified persons and individuals with broader inter-disciplinary expertise relevant to the objectives of the parole system. In addition, a diverse range of viewpoints from across the community should be included: for example, the perspectives of victims of crime, and the perspectives of First Nations Australians. The perspective of First Nations Australians should be considered integral to the decision-making process and experts in the field of effective community corrections operations for First Nations people including drug and alcohol rehabilitation, returning to country, reconnection with kin and community should be included in decision making panels.

To better support the effectiveness of a federal parole authority, an Office for the Management of Federal Offenders (**OMFO**) should be established. Importantly, the functions of the OMFO should include maintaining an up-to-date case management database of all federal offenders and a victim notification register.

It is essential to future evidence-based reform in this area that comprehensive statistical information monitoring parole decisions and offender demographic information be captured and included in regular reporting to the public. This would enable more informed evaluation

of the effectiveness of parole provisions in realising the objectives of parole, including the reintegration and rehabilitation of offenders.

The establishment of an independent federal parole authority should be accompanied by the necessary investment in additional legal assistance funding to assist federal prisoners to respond to notices of intent to refuse parole, to represent them at any hearing, and if necessary, to challenge adverse decisions.

2. Design principles for a federal parole authority

A successfully functioning federal parole authority must be underpinned by four key design principles: independence, transparency, procedural fairness, and accountability.

Independence

The ultimate responsibility for administering a system for release of federal offenders is within the scope of executive power. Relevantly, the High Court has explained that:

> *Once a person is sentenced, the exercise of judicial power is spent and the responsibility for the future release of the person while still under sentence passes to the executive branch of the government of the State.*[1]

The executive arm of government should appropriately retain responsibility for formulating the parameters and relevant criteria for granting parole. However, the objectives of the parole system would be better achieved if the decision-making function applying the relevant statutory criteria to the facts of a federal offender were exercised by an independent parole authority.

The Law Council acknowledges the role of the executive in designing the parameters of a parole scheme and that the executive may legitimately exercise political judgment in setting these parameters. However, it does not follow from this legitimate role for the executive that parole decisions applying an established scheme to the circumstances of an offender 'lies outside the ambit of the doctrine of natural justice or the duty to act fairly'.[2] Relevantly, Mason CJ observed:

> *True it is that the courts do not substitute their view of policy for that prescribed by the executive, but this does not mean that policy issues stand apart from procedural fairness. Although it is unrealistic and impractical to insist on a person having the opportunity to present submissions on matters of high level general policy, the same considerations do not apply to the impact of policy on the individual and to those aspects of policy which are closely related to the circumstances of the particular case and that is the case here.*[3]

As stated previously, the risk of perceived and actual political interference is a key reason for ensuring decisions about the grant of parole to federal offenders be made by an independent decision maker. Although the Attorney-General is the first law officer of Australia, the political realities of their ministerial and parliamentary office also create a significant possibility that decision-making on the granting of parole could be influenced by political considerations, particularly in high-profile cases, such as those involving terrorism or child sexual abuse offences.

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[1] *Minogue v Victoria* (2019) 268 CLR 1, [14] citing *Power v The Queen* (1974) 131 CLR 623 at 627; *Bugmy v The Queen* (1990) 169 CLR 525, 534, 536; *Leeth v The Commonwealth* (1992) 174 CLR 455, 471-2, 476, 490-1; *Baker v The Queen* (2004) 223 CLR 513, 528 [29]; *Elliott v The Queen* (2007) 234 CLR 38, 41-2 [5]; *Crump v New South Wales* (2012) 247 CLR 1, 16-7 [27]-[28], 20-1 [41]-[42]; *Knight v Victoria* (2017) 261 CLR 306, 323 [28].

[2] *The State of South Australia v O'Shea* (1987) 163 CLR 387, 389 [18] (Mason CJ).

[3] Ibid.

Significantly, all state and territory jurisdictions have, to a substantial extent, entrenched an independent parole decision maker by statute.[4] There are some exceptions in the case of high-risk offenders.[5]

In this context, the continued absence of an independent decision maker at the federal level may produce an arbitrary difference in treatment between federal and state and territory parole applicants. This has the potential to undermine the fundamental principle that within the Australian criminal justice system, like cases should be treated alike.

Transparency

The criminal justice system is sustained by public confidence and trust that it is administered impartially. Articulating the importance of independence by establishing an independent statutory agency, and making procedural fairness protections visible, would assist in promoting transparency. In this regard, the Australian Law Reform Commission (**ALRC**) reasoned:

> *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* .[6]

Procedural fairness

Currently, parole decisions are subject to review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). In general, procedural fairness requires ensuring a person who may be affected by an exercise of power is given an opportunity to be heard, an opportunity to advocate their case for a favourable exercise of the power and to make meaningful submissions.[7]

In the context of the current legislative framework for federal parole decision making, the core of procedural fairness has been held to mean:

> *… the requirement to make the person aware of the main factors or issues that would or could militate against the grant of parole. This would usually require making the person aware of specific adverse information that is credible, relevant and significant to the decision*.[8]

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[4] Independent statutory agencies are established by *Crimes (Administration of Sentences) Act 1999* (NSW); *Corrections Act 1986* (Vic); *Corrective Services Act 2006* (QLD); *Sentence Administration Act 2003* (WA); *Correction Services Act 1982* (SA); *Corrections Act 1997* (Tas); *Crimes (Sentence Administration) Act 2005* (ACT); *Parole Act 1971* (NT).

[5] For example, in Western Australia for prisoners sentenced to indefinite imprisonment only the Governor may grant parole under s 27(2) *Sentence Administration Act 2003* (WA). Similarly, s 25 *Sentence Administration Act 2003* (WA) provides only the Governor can determine release of prisoners serving life imprisonment on parole.

[6] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) 573-4 [23.9].

[7] *Khazaal v Attorney-General* (Cth) [2020] FCA 448 [55] citing *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180 [82] (French CJ, Kiefel, Bell, Gageler, Keane, Nettle and Gordon JJ).

[8] *Khawaja v Attorney General* (Cth) [2022] FCA 334, [21] (Thawley J).

The absence of key procedural fairness protections in the statutory framework is suboptimal because it leaves the determination of the requirements of procedural fairness to the discretion of the Attorney-General. This absence was noted by Wigney J:

> *There is certainly no requirement for a hearing, no express requirement for the Attorney to notify the person affected by the decision concerning parole to be notified of any particular information, and no express requirement that the person be given the opportunity to make submissions. There is no doubt, however, that the Attorney must afford procedural fairness to the person affected by the parole decision. As the statutory scheme does not prescribe any procedure, it is entirely a matter for the Attorney to determine a procedure that will afford procedural fairness to the person and avoid any unfairness or injustice*.[9]

The Law Council is of the view that the design principles discussed in this paper would be best achieved by embedding key procedural fairness protections in the Crimes Act. These key protections include ensuring that:

- federal offenders have an opportunity to appear before the proposed federal parole authority where the authority is of the opinion that the information currently before it does not justify releasing the person on parole;
- federal offenders are allowed legal or other representation before the federal parole authority;
- federal offenders have the benefit of an appropriately qualified interpreter where necessary;
- the federal parole authority has access to the same information and reports currently considered by state and territory parole authorities and has powers to require the production of such information;
- the federal parole authority has power to require persons to appear before it for the purpose of carrying out its functions;
- registered victims of crime are given the opportunity to provide input into the deliberations of the federal parole authority;
- federal offenders be provided with a reasonable length of time in which to respond to correspondence from the parole authority, to provide them the opportunity to seek legal or other assistance.
- the federal parole authority disclose to federal offenders all information available (including positive information) to ensure the offender can effectively address all parole considerations.
- the federal parole authority publishes reasons for its decisions; and
- the federal parole authority prepares an annual report on its operations, which must be tabled in the Australian Parliament.

[9] *Khazaal v Attorney-General* (Cth) [2020] FCA 448, [66]; see also, *Lodhi v Attorney-General* (Cth) [2020] FCA 1383, [6].

Timing of decisions

There are two important statutory protections in the current scheme which, in the view of the Law Council, should be retained:

- the requirement to make a parole order prior to the end of the non-parole period; and
- the requirement for reconsideration of parole within 12 months after a decision to refuse to grant it.

Legal Assistance

Legal assistance is not necessary in relation to parole applications where the authority decides to grant parole. To ensure efficient decision making and in order to ensure that legal assistance funding is targeted to the areas of greatest need, the Law Council supports a staged decision-making process that would see an automated notification to applicants advising of their eligibility to make a parole application and provided a simple and easy to read form to apply for parole.

Upon receipt of an application, the authority, in a private hearing or meeting, would review the application and grant parole in appropriate cases.

Where the authority is considering refusing parole, the authority would notify the applicant of an intention to refuse parole and provide information on how to obtain legal assistance. The authority would then conduct a hearing at which the offender could appear and be represented and would decide whether to grant or refuse parole.

Additional funding for legal assistance is required in relation to federal offenders who receive a notice of intent to refuse their parole application and for federal offenders seeking judicial review of an adverse decision.

Communications with vulnerable prisoners

Procedural fairness requires 'consideration must also be given to the particular facts and circumstances of the case' such that the procedures adopted in an individual case do not result in a 'practical injustice'.[10]

In the context of vulnerable members of the prisoner population including prisoners with limited literacy and culturally and/or linguistically diverse backgrounds, avoiding practical injustice requires ensuring that communications to prisoners are drafted in a manner that is easily understood and reasonable steps are taken to assist any vulnerable prisoners with comprehending this information. This means that letters to prisoners regarding the parole application process should be drafted concisely in plain-English. The OMFO should take reasonable steps to ensure that affected prisoners receive relevant communication and are aware of any applicable deadlines.

Disclosure of relevant documents

Ideally, prisoners who are subject to a notice of intent to refuse a parole application should be supplied with all relevant information available (including positive information) to ensure the offender can effectively advocate for their release on parole. Generally, this should include disclosure of copies of any document that will be considered by the federal

[10] *Khazaal v Attorney-General* (Cth) [2020] FCA 448, [54] citing *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex Parte Lam* (2003) 214 CLR 1, [37] (Gleeson CJ).

parole authority. However, in some circumstances, for example where the documents cannot be disclosed for national security reasons or is subject to public interest immunity, the original documents may not be able to be disclosed. In these circumstances, a detailed summary of the document should be provided to the parole applicant.

Accountability

The Law Council is concerned that the current arrangements for federal parole decision making, which do not include the regular publication of parole decisions and key metrics, fail to meet standards of accountability. An up-to-date and comprehensive evidence base for policy makers is needed for continuous improvement and re-calibration of policy settings in this area. It is imperative to the accountability of a federal parole authority that there be a statutory requirement for the Attorney-General to table an annual report in Parliament in relation to the federal parole decision-making function.

A key limitation in data collection by the CPO appears to be that CPO data is reliant upon data submitted by corrective service agencies in each state and territory jurisdiction which have divergent data intake parameters. Efforts should be taken to promote consistency in data intake across corrective services agencies.

To create a future evidence base for policy reform, the OMFO should administer an up-to-date database consolidating case management information in relation to all federal offenders. In this regard, collation of data about the following metrics would likely be helpful.

- **Offender characteristics**. Parameters likely to reflect a federal prisoner's vulnerability, such as mental health conditions, intellectual disability, First Nations background, requirement for an interpreter, and whether the offender was aged 18 or younger at the time of offending.
- **Breakdown of federal parole outcomes in relation to offence types**.
- **Breakdown of breaches of parole where offenders were returned to custody**. Also, broken down to distinguish revocations under sections 19AU (failure to comply with condition of order) and section 19AQ (parole order or licence revoked following further offence) of the Crimes Act.
- **Delays.** The number of parole decisions taken after the completion of the minimum non-parole period (the deadline set by section 19AL of the Crimes Act), and if possible, the reason for the delay.
- **Capturing the quality of supervision.** For example, counting the types of supervision intervention, for example, cognitive behavioural therapy, employment support, housing assistance, etc.

Consideration should be given to the approach taken in the New South Wales Bureau of Crime Statistics and Research Re-Offending Database. Specifically, regard should be had to the offender-level demographic information included in this database in building a Commonwealth database.

3. Powers and scope of a federal parole authority

Powers of federal parole authority

In order to make impartial decisions, that achieve the objectives of the parole system, it is important that a federal parole authority have the power to require reports of a similar nature to those provided to state and territory parole boards.

A federal parole authority should have the power to require the production of information and to require persons to appear before it, where necessary, for the purpose of carrying out its functions.[11] It is noted that the powers of the federal parole authority, and a power to require people to appear before it, should be subject to robust safeguards and limitations to fairly balance competing rights and interests.

In addition, the processes of a federal parole authority should ensure and opportunity for victims to be heard and their interests taken into account. To this end, a victim notification register should be established to enable affected victims to be notified when a federal offender is being considered for parole, and input to be sought from the affected victim for consideration in the parole decision-making process.

Establishment of an Office for the Management of Federal Offenders

The Law Council calls for implementation of Recommendation 22-4 of the 2006 Australian Law Reform Commission Report 'Same Crime, Same Time: Sentencing of Federal Offenders' (**2006 ALRC Report**), which proposes to establish an OMFO within the Department to effectively monitor federal offenders and provide regular reporting of statistics to enhance evidence-based policy making. Recommendation 22-4 of the ALRC Report proposed that the functions of the OMFO include:

- maintaining an up-to-date case management database in relation to all federal offenders;
- providing secretariat or other support to the proposed federal parole authority, depending on the model adopted for establishing the authority;
- establishing and maintaining a victim notification register;
- liaising with the states and territories in relation to federal offenders, including special categories of offenders;
- participating as a full member of the Corrective Services Administrators' Conference and in the activities of the Australasian Juvenile Justice Administrators and providing support for the relevant federal minister in relation to active participation in the Corrective Services Ministers' Conference;
- monitoring progress towards compliance with the Standard Guidelines for Corrections in Australia and the Standards for Juvenile Custodial Facilities in relation to federal offenders, and liaising with the states and territories in relation to those standards;

[11] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders,* (Report No 103, 2006) 583 [23.45].

- ensuring the treatment of federal offenders complies with Australia's international obligations;
- providing advice to the states and territories in relation to the sentencing, administration and release of federal offenders, in particular in relation to joint offenders;
- providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
- providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;
- providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
- providing advice to the Australian Government about:
    - funding, including priorities for special programs for federal offenders;
    - state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
    - state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders; and
    - young federal offenders and federal offenders with a mental illness or intellectual disability.[12]

The OMFO should develop key performance indicators to monitor the administration and release of federal offenders. The OMFO should report publicly against these indicators on an annual basis.

[12] Ibid 556 [22.44].

4. Composition of a federal parole authority

The objectives of the parole system would be better achieved by constituting a federal parole authority with a mix of legally qualified, inter-disciplinary expertise and a broad range of perspectives across the community. Members should be appointed for fixed terms and should include a legally qualified chair and deputy chair and members with relevant expertise in areas such as psychology, psychiatry, and social work.

In the first instance, a federal parole authority's membership should include appropriately qualified and experienced former members of the judiciary and members of the legal profession. Illustratively, membership might include:

- former judges; and
- qualified and expert members of the legal profession including barristers and solicitors with practice experience in federal and state criminal law and parole matters.

To safeguard procedural fairness requirements, each panel of federal parole authority members responsible for deciding a parole application should be chaired by a legally qualified person. In addition, including a legal representative on each decision-making panel will assist in ensuring accurate and legally informed written reasons are provided in relation to federal parole outcomes.

It will also be important to include other members with a wide range of inter-disciplinary expertise. For example, suitably qualified members may include:

- **Academics including criminologists and penologists.** This Position Paper refers to some of the scholarly literature assessing the effectiveness of parole. Academics may be able to provide insight into the evidence for the effectiveness of parole in relation to particular offence types and the complex social, economic and mental health drivers of offending. More generally, inclusion of academic perspectives may assist in promoting an evidence-based discussion of the parole decision making scheme and opportunities for future improvement.

- **Social and youth workers, counsellors, and experts on rehabilitation**. The relevant considerations listed in section 19ALA of the Crimes Act refer to assessment of a prisoner's satisfactory completion of Court-mandated programs, and whether release is likely to 'assist the person to adjust to lawful community life'. Professionals with experience in delivering these kinds of programs may add important expertise to the parole decision-making process.

- **Psychiatrists and medical professionals**. Including the perspective of medical professionals, including psychiatrists, would better inform discussion of mental health factors driving offending behaviour.

- **Psychologists**. Including the perspective of a psychologist may offer expertise dealing with intellectual and psychological issues impacting applicants particularly in the context of Autism Spectrum Disorder, Foetal Alcohol Syndrome, and applicants with intellectual disabilities.

- **Perspectives of victims of crime**. Including people who have been, or have supported, victims of crime.

- **First Nations perspectives**. Relevant First Nations experts to ensure cultural safety and understanding that decisions are culturally informed and appropriate.

More generally, the membership of a federal parole authority should reflect the diversity of the community. To this end, there should be equal representation of women, and community representation should include members who are representative of Australia's multicultural population, including those from ethnically, culturally, and linguistically diverse backgrounds.

5. Background information

Federal parole decision making affects a significant number of offenders. For example, the Commonwealth Parole Office decided 300 parole applications in 2019-20, and 319 applications in 2020-21.[13] Given the expanding number of federal offences, it is likely that these numbers will increase further in the future.

This Position Paper is informed by the Law Council's Policy Statement on Rule of Law Principles, which provides, relevantly:

- the law must be both readily known and available, and certain and clear;
- the law should be applied to all people equally and should not discriminate between people on arbitrary or irrational grounds;
- everyone should have access to competent and independent legal advice; and
- the executive should be subject to the law and any action undertaken by the executive should be authorised by law.[14]

In the context of the criminal justice system, these Rule of Law Principles require that no one should be subjected to arbitrary detention.[15] The definition of arbitrariness, in this context, is interpreted broadly to include not only unlawfulness, but also elements of inappropriateness, injustice, lack of predictability, and due process of law. For example, arbitrariness may result from a law that is vague or allows for the exercise of powers in broad circumstances which are not sufficiently defined.[16]

The Law Council has previously committed to advocating for the human rights of persons in custody and detention, and for the application and enforceability of international human rights standards in places of custody and detention.[17]

The rule of law requires that states must comply with their international legal obligations. Accordingly, the Australian regime for deciding parole applications should be guided by principles and norms established in international human rights law. As a party to the *International Covenant on Civil and Political Rights* (**ICCPR**),[18] Australia must respect, protect, and fulfill the human rights listed below:

- *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 procedures as are established by law.*[19]

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[13] Attorney General's Department, Documents Released Under Freedom of Information to NSW Legal Aid, (2021) FOI21/233..
[14] Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011).
[15] Law Council of Australia, *Policy Statement on Principles Applying to Detention in a Criminal Law Context* (22 June 2013).
[16] Ibid 4.
[17] Law Council of Australia, *Policy Statement: Human Rights and the Legal Profession – Key Principles and commitments* (May 2017) 6.
[18] International Covenant on Civil and Political Rights, opened for signature 19 December 1996, 999 UNTS 171 (entered into force 23 March 1976) ('ICCPR').
[19] ICCPR, art 9(1).

- *The penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation.*[20]

- *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.*[21]

The United Nations Human Rights Committee has found that Article 9 of the ICCPR requires consideration of parole 'must be in accordance with the law' and release 'must not be denied on grounds that are arbitrary.'[22] Furthermore, the administration of parole conditions and revocations for breach of parole should also not be arbitrary. Relevantly, the Human Rights Committee observed:

> *If such release is granted upon conditions and later the release is revoked because of an alleged breach of the conditions, then the revocation must also be carried out in accordance with law and must not be arbitrary and, in particular, not disproportionate to the seriousness of the breach.*[23] *(citations omitted)*

Significantly, the *Convention on the Rights of the Child*[24] requires States to ensure that detention or imprisonment of children should only be used as a measure of last resort, in exceptional circumstances, for the shortest possible period of time and only if it is in the best interests of the child.[25]

Australia ratified the *Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*[26] in 2017. The Law Council notes the Commonwealth, along with some state and territories, have appointed bodies to act as the National Preventative Mechanism (**NPM**).[27] It is anticipated that the NPM will conduct preventive monitoring visits of places of detention to ensure that people detained are not subjected to torture or to cruel, inhuman or degrading treatment while detained.

The rationale for parole

The current federal scheme for parole decision making establishes the following objectives listed in section 19AKA of the Crimes Act:

(a) protection of the community;

(b) rehabilitation of the offender; and

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[20] Ibid art 10 (3).
[21] Ibid art 17(1).
[22] Human Rights Committee, *General Comment No 35 (2014): Article 9 (Liberty and security of person) (Article 9 of the International Covenant on Civil and Political Rights)*, UN HRC, 112th session, UN Doc CCPR/C/GC/35 (16 December 2014) para. 20.
[23] Ibid.
[24] *Convention on the Rights of the Child,* opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[25] Ibid art 37 (b), (c) and (d).
[26] Australia signed OPCAT on 19 May 2009. See also, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85 (entered into force 26 June 1987).
[27] The Commonwealth Ombudsman has been appointed as NPM at the Commonwealth level, see further Commonwealth Ombudsman, *Joint Statement – National Preventative Mechanism*, (26 October 2022) <https://www.ombudsman.gov.au/media-releases/media-release-documents/commonwealth-ombudsman/2022/26-october-2022-joint-statement-national-preventative-mechanism>

(c) reintegration of the offender into the community.

These objectives are inextricably connected. There is evidence that releasing offenders on parole in appropriate circumstances promotes reintegration of offenders and reduces recidivism which consequently enhances the protection of the community. In this regard, the Law Council refers to two important large-scale quantitative studies conducted in New South Wales:

- Ooi and Wang (2022) – this study considered a sample size of 35,484 adult offenders who received a full-time prison sentence in a NSW Local Court and who were released from prison between January 2010 and March 2019 and compared parolees sentenced for short term prison sentences and former prisoners who were released from prison unconditionally. This study concluded that being released on parole reduces the likelihood that a former prisoner will re-offend. Furthermore, the reduction in recidivism persists 24 months after release from prison.[28]

- Wan and others (2014) – this study considered a sample size of 7,494 offenders who were released from a NSW correctional centre between 1 January 2009 and 30 June 2010, serving 12 months or less in custody, and compared offenders released on parole with offenders released unconditionally. This study concluded that parolees who received parole supervision took longer to commit a new offence, were less likely to commit a new indictable offence, and committed fewer offences than offenders who were released unconditionally.[29]

Broadly speaking, these two studies appear to support a wider trend demonstrated by scholars in international jurisdictions supporting the effectiveness of parole in reducing recidivism. However, some international studies have noted a more modest benefit,[30] or lack of benefit.[31] One reason for placing weight on studies conducted in Australian jurisdictions is that reference to international comparisons may be significantly affected by variance in parole regimes and significant variance in resourcing and supervision of offenders on parole.

The effectiveness of parole in reducing recidivism has also been supported by the findings of several reviews. In this regard, the Law Council refers to three reports:

- The 2015 New South Wales Law Reform Commission Review into Parole, which stated:

  … we consider that recent and directly applicable evidence gives us good reason to be optimistic about parole's ability to reduce reoffending

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[28] Evarn J Ooi and Joanna Wang, 'The effect of parole supervision on recidivism' (Crime and Justice Bulletin No 245, NSW Bureau of Crime Statistics and Research, February 2022) <https://www.bocsar.nsw.gov.au/Publications/CJB/2022-Report-Effect-of-parole-supervision-on-recidivism-CJB245.pdf>.

[29] Wai-Yin Wan, et al, 'Parole Supervision and reoffending' (Trends & Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014) <https://www.aic.gov.au/publications/tandi/tandi485>.

[30] For a recent summary of relevant international studies, see especially, New South Wales Law Reform Commission*, Parole*, (Report No 142, 2015) table 2.2, 20; the definition of recidivism may prove significant in the conclusion drawn as to the effectiveness of parole, for example, the inclusion of technical breaches of parole conditions alongside re-offending, within the meaning of recidivism may be a key determinant impact the conclusion drawn. See also, Michael Ostermann, Laura M Salerno and Jordan M Hyatt, 'How Different Operationalizations of Recidvism Impact Conclusions of Effectiveness of Parole Supervision' (2015) *Journal of Research in Crime and Delinquency* 1.

[31] See, eg, Michael Ostermann, 'Active Supervision and Its Impact Upon Parolee Recidivism Rates' (2013) 59 *Crime and Delinquency* 487, 504-5.

> … [and we] *consider that there is sufficient evidence to conclude that parole reduces reoffending. On this basis, we consider that parole is in the community interest and brings a long term benefit that outweighs any risk to the community of an offender reoffending when released on parole.*[32]

- The 2016 Queensland Parole System Review Report, which stated:

  > *On balance, the evidence suggests that parole has a beneficial impact on recidivism, at least in the short term. Although its effect upon recidivism may be modest the parole system is in the interest of the community and should be retained.*[33]

- The 2013 Review of the Parole System in Victoria, in which the Hon Ian Callinan AC expressed a more modest view of the effectiveness of parole in achieving the objectives of reintegration and community safety by reducing recidivism, suggesting 'few seem to claim for parole other than a modest benefit over unconditional release.'[34] Nonetheless, the review report recommended retention of the parole scheme, with some amendments.

Sentencing policy, including in relation to parole, is often informed by the assumption that public attitudes are largely punitive towards offenders and not in favour of offender rehabilitation.[35] However, this assumption fails to consider the range and complexity of opinions in the community. A recent study of public opinion, based on nationally representative survey data of 1200 Australian adults, found a heterogeneity of views in relation to parole and offender re-entry, with the largest cohort falling into a mixed group exhibiting a combination of punitive and rehabilitative views about parole. The authors of the study concluded:

> *Our findings provide considerable evidence that the public does not in fact want to 'throw away the key' and instead believes strongly in offenders' redeemability. This indicates that the Australian public is not as punitive or uni-dimensional as commonly depicted in the media or by politicians announcing 'tough on crime' measures, a significant feature of parole policy across Australia in recent years.*[36]

In this regard, the Law Council has previously described in detail the manner in which 'law and order' approaches including mandatory sentencing, tough bail and parole conditions, disproportionately affect, and reinforce disadvantage, for many marginalised groups.[37] In this context, the Law Council has previously advocated for 'measured, evidence-based policy and law-making…which seeks to overcome, rather than further entrench disadvantage.' This can be achieved by having close regard to the likely social impact of proposed laws and policies, and to whether legislative responses are the most appropriate and effective response compared to alternative measures.*[38]*

The Law Council acknowledges that public controversy may arise in individual cases where a federal offender re-offends while on parole. However, these individual cases should not influence an assessment of the effectiveness of the parole system in achieving

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[32] New South Wales Law Reform Commission, *Parole* (Report No 142, 2015) 24.
[33] Walter Sofronoff, *Queensland Parole System Review Final Report* (2016) 38.
[34] Ian Callinan, *Review of the Parole System in Victoria* (2013) 22.
[35] Lorana Bartels, Robin Fitzgerald and Arie Frieberg, 'Public opinion on sentencing and parole in Australia,' (2018) 65(3) *Probation Journal* 269-284.
[36] Robin Fitzgerald, Arie Frieberg and Lorana Bartels, 'Redemption or forfeiture? Understanding diversity in Australians' attitudes to parole,' (2020) 20(2) *Criminology & Criminal Justice* 169-186, 183.
[37] Law Council of Australia, *The Justice Project: Final Report Overarching Themes* (August 2018) 24.
[38] Ibid.

the objectives highlighted above. Addressing these types of public concerns, in his 2016 review of Queensland's parole system, the Hon Walter Sofronoff KC observed:

> *It works to achieve that purpose to a degree; like the criminal justice system itself, it will never fully achieve the goal of eradicating reoffending, even serious reoffending. The only realistic issue is how it can be improved to reduce reoffending by increments and to avoid cases of serious offending on parole. The goal is perfection but perfection will always be out of reach.*[39]

Legislative history

The key reason for the urgency to reform the federal parole system is that the current parole regime, a result of legislative reform in 2012 based on the 2006 ALRC Report, undermines the policy objective of ensuring parity in treatment of federal offenders.

Ensuring parity in treatment of federal prisoners in the context of sentencing and parole, in relation to comparable state offenders, has always been an important policy consideration in the development of a federal parole scheme. For instance, parliamentary debates in relation to the *Commonwealth Prisoners Act 1967* (Cth) illustrate that the first Commonwealth parole scheme was established to ensure Commonwealth offenders might enjoy similar beneficial treatment to state offenders. In his second reading speech, then Attorney-General Sir Nigel Bowen, noting the adoption of requirements on sentencing judges to prescribe minimum periods of imprisonment in Victoria, Western Australia and South Australia, described the need to ensure parity of treatment of federal offenders:

> *In the Commonwealth's view, the system has much to commend it. It enables the Court to make a judgment as to the period that, in the public interest, a prisoner should be required to serve before becoming eligible for release under supervision. It also provides an incentive to the prisoner to make a positive effort to rehabilitate himself and become a useful member of society … The Bill therefore expresses the policy that a person who is being sentenced to imprisonment for an offence against a law of the Commonwealth should be treated in the same way as if he were being sentenced for an offence against the law of the State in which the trial takes place.*[40]

Under Part 1B of the Crimes Act, all parole applications for federal offenders are determined by the Commonwealth Attorney-General.[41] The Attorney-General is supported by an administrative unit within the Department known as the CPO. The power enabling the Attorney-General to determine parole applications was conferred in 2012 by the *Crimes Legislation Amendment (Powers and Offences) Bill 2012* (Cth) (**the 2012 Bill**).

The 2012 Bill conferred a discretionary power on the Attorney-General to determine all parole applications for all federal offenders. Prior to 2012, federal prisoners serving sentences of less than ten years were effectively granted parole automatically.[42] Broadly

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[39] Walter Sofronoff, *Queensland Parole System Review Final Report*, (2016) 2.
[40] Commonwealth, *Parliamentary Debates*, House of Representatives, 20 April 1967, 1559 (Sir Nigel Bowen, Attorney General) (Commonwealth Prisoners Bill Second Reading Speech).
[41] *Crimes Act 1914* (Cth) s 19AL(1). Federal offenders may also be released on licence at any time during their sentence if exceptional circumstances exist to justify the Attorney-General granting a licence: s 19AP.
[42] The pre-2012 system of automatic parole was established by the *Crimes Legislation Amendment Act (No. 2) 1989* (Cth) which sought to implement the recommendations of Australian Law Reform Commission,

speaking, the key rationale for the 2012 bill was to reduce inconsistency in treatment between comparable federal and state offenders. For example, the Explanatory Memorandum for the bill highlighted the undesirable inconsistency in the treatment of child sex offenders in a state and federal context:

> *In particular, State and Territory offenders are encouraged to take part in rehabilitation programs because a failure to do so might adversely affect their chances of parole. A federal offender has no such incentive. For example, under current arrangements, federal child sex offenders serving sentences of less than 10 years imprisonment can refuse to participate in sex offender treatment programs, as they know they will be released at the end of their non-parole period regardless.*[43]

It is noteworthy that the changes in 2012 were justified in terms of the policy objective of ensuring broad equality across Australia in the administration and release of offenders in different jurisdictions. Furthermore, the then Minister for Home Affairs, the Hon Brendan O'Connor MP, observed in his second reading speech that the purpose of the Bill was to implement recommendations from the 2006 ALRC Report.[44]

The 2006 ALRC Report identified parity in treatment of federal and state offenders as a fundamental principle of the criminal justice system and the rule of law that like cases be treated alike:

> *It is a fundamental principle of the criminal law and the sentencing process that like cases should be treated in a like, or consistent, manner. For this reason, many of the recommendations in this Report are aimed at encouraging and supporting greater consistency in the sentencing of federal offenders and equality among federal offenders across Australia.*[45]

The 2006 ALRC Report recommended the establishment of an independent federal parole authority as a key measure to ensure consistent administration and release of offenders across Australia. Relevantly, recommendation 23.1 stated:

> *The Australian Government should establish a federal parole authority to make decisions in relation to parole of federal offenders. The federal parole authority should be established as either: (a) an independent statutory authority to be called the Federal Parole Board; or (b) a division of the Administrative Appeals Tribunal to be called the Federal Parole Division. The authority's decisions should be final and not subject to the responsible Minister's approval. The federal parole authority should also make decisions in relation to the conditions to be attached to release on licence.*[46]

The failure to implement the recommendation for the establishment of an independent federal parole authority was criticised at the time. For instance, the House of

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Sentencing (Report No 44, 1988) 75-100 ('*1988 ALRC Report*'). The 1988 ALRC Report found undue discrepancies between the head sentence, minimum non-parole period and actual time served in prison undermined truth in sentencing because it created confusion and undermined public confidence in the justice system. Accordingly, the 1988 ALRC Report recommended, in relation to prisoners serving sentences under ten years, that there be no discretion not to release a prisoner at the end of the minimum non-parole period.

[43] Explanatory Memorandum, *Crimes Legislation Amendment (Powers and Offences) Bill 2012* (Cth) 123.

[44] Commonwealth, Parliamentary Debates, House of Representatives, 23 November 2011, 13549 (Brendan O'Connor, Minister for Home affairs and Minister for Justice) (Crimes Legislation Amendment (Powers and Offences) Bill 2011 Second Reading Speech).

[45] Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report No 103, 2006) 14.

[46] Ibid 573-4 [23.9].

Representative Social Policy and Legal Affairs Committee noted the absence of any measures to establish an independent federal parole authority:

> *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.*[47]

Difficulties with the current system

The 2012 Bill 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 2012 Bill increased executive power and discretion relating to parole decisions when the ALRC's key recommendation had been to remove exactly this power and discretion by way of the establishment of an independent federal parole authority.

The establishment of a federal parole authority would mitigate many of the difficulties that have been observed in achieving the objectives of parole. These difficulties are set out below.

- **Risk of perceived or real political interference**. The current scheme of federal parole decision making vests a discretionary power to grant parole in the Attorney-General, a member of the executive arm of Government. The Attorney General's role may give rise to the perception that the release of prisoners might be influenced by factors beyond public safety, the risk of recidivism, and the degree to which an individual offender has engaged in rehabilitative programmes.

- **Arbitrary refusal of offenders convicted of certain types of offences**. The Law Council is concerned, based on the publicly available evidence, that there may be a trend of certain types of offenders being treated unfavourably in relation to parole. For instance, between January and October 2021, all parole applications by federal child sex offenders were refused. Furthermore, between 2018 and November 2021 no federal terrorism offender has been granted parole.[48] The Law Council is concerned that this trend may give rise to a perception of political interference undermining public confidence that parole decisions are made solely by reference to the statutory criteria and uninfluenced by political considerations.

- **Inconsistent treatment of state and federal offenders**. Given federal offenders are processed in state corrective service facilities and, most often, in state courts; it is undesirable for there to be significant discrepancies in treatment between federal and state offenders in relation to parole. In this

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[47] 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 [7.73-74]; more recently, the ALRC's recommendation (and its non-implementation) was noted in the 2020 judgment of the New South Wales Court of Criminal Appeal in *Nweke v R* (No 2) [2020] NSWCCA 227, [4]-[5], where McCallum JA, Davies and Button JJ observed that the complexity of Part 1B of the Crimes Act does 'not serve prisoners or busy practitioners and judges well.'

[48] Attorney General's Department, *Documents Released Under Freedom of Information to NSW Legal Aid*, (2021) FOI 21/233.

context, it is noteworthy that all states and territories have implemented parole decision-making schemes that enshrine a degree of independence of primary decision making from the executive.

- **Absence of necessary decision-making expertise to achieve the objectives of the parole system.** The Law Council considers that the absence of broad-based and inter-disciplinary perspectives on parole decision making significantly limits the extent to which the objectives of the parole system can be achieved. The current process does not include representatives who, for example, are able to reflect victims' rights or First Nations perspectives in the parole decision-making process.

- **Inadequacy of legal assistance funding**. Currently, there is no specific funding for legal aid to provide legal services in connection with federal parole applications, and where assistance is provided it is done from within severely limited existing resources. In practical terms, individual prisoners may also have significant difficulties in exercising rights to remedies without access legal aid, particularly if they are unrepresented.

It is acknowledged that administrative law requirements of procedural fairness apply to parole decisions, which are also subject to statutory judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). However, the current institutional design and procedures of the CPO make compliance with these requirements less likely. The CPO generally sends prisoners who are likely to have their parole refused 'adverse comment' or 'show cause' letters on intended decisions to provide an opportunity for these prisoners to respond and address these issues. Anecdotally, the following concerns have been identified.

- **Procedural issues.** Prisoners will often have a very short time (often in the range of one or two weeks) to respond to the letter, which may be insufficient time to obtain legal assistance, assuming that such assistance is available at all. There have been instances of prisoners who were provided with letters over the Christmas holiday period and were unable to obtain assistance. In recent years, many prisoners received letters while in COVID lockdown and were unable to obtain assistance.

- **Access to information.** The CPO position is that procedural fairness requires the disclosure of adverse information only. This means that the prisoner or their legal representative might not be given access to positive information, which may assist them in advocating for release on parole.

- **The content of letters.** Concerns raised by the CPO in these letters do not reflect a concrete understanding of the realities of prison life and the complex mental health and social drivers of criminal offending. By way of illustration, parole has been refused due to the failure of the prisoner to complete a sex offender program in circumstances where the prisoner has been assessed as being at low-risk of re-offending and was therefore ineligible for such programs.