

## Schedule 7

- 7.1 The purpose of Schedule 7 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 (the Bill) is to amend Part 1B of the *Crimes Act 1914* (Cth) (the Crimes Act) to implement recommendations arising out of the Australian Law Reform Commission's 2006 Report: *Same Crime, Same Time: Sentencing of Federal Offenders* (ALRC Report).
- 7.2 The effect of the amendments is to ensure that all parole decisions for federal offenders are able to be made at the Attorney-General's discretion and that adequate parole, licence and supervision periods can be applied to federal offenders as required.

## Existing laws and practices

### Federal offenders

- 7.3 Part 1B of the Crimes Act largely governs the sentencing of federal offenders. Federal offenders are people who have been convicted of a crime against a law of the Commonwealth.
- 7.4 The number of federal prisoners is relatively small. The September 2011 Australian Bureau of Statistics Corrective Services report states that there were 900 federally sentenced prisoners in Australia.<sup>1</sup> This number

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<sup>1</sup> Australian Bureau of Statistics, Cat 4512.0 'Corrective Services, Australia, Sep 2011', <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>> accessed 20 February 2012.

represents approximately three per cent of the Australian prison population.<sup>2</sup>

- 7.5 There are no federal prisons so federal offenders are held in State and Territory prisons. They are subject to the same discipline, use the same amenities and take part in the same activities.
- 7.6 In general, federal offenders are eligible for the same programs as State prisoners such as work release, home detention or pre-release, if these schemes are offered in the State in which they are imprisoned. However, there may be specific conditions that make them ineligible for these programs.

### Non-parole or recognizance release order

- 7.7 If the court hands down a federal sentence to a term of imprisonment that exceeds three years in total, it may fix a non-parole period or make a recognizance release order.
- 7.8 The non-parole period is the minimum time that the offender must serve in prison.
- 7.9 A recognizance release order is an order made under section 20(1)(b) of the Crimes Act and is analogous to a suspended sentence. A court may sentence a person convicted of a federal offence to imprisonment. The court can then direct that the person be released; either immediately or after he or she has served a specific period of imprisonment, upon the giving of security that he or she will comply with certain conditions.<sup>3</sup>
- 7.10 The release of the offender at the end of the non-parole period is on the basis of parole, where he or she is released back into the community under supervision and subject to conditions.
- 7.11 Section 19AU of the Crimes Act provides that decisions on parole are to be made by the Attorney-General.

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2 There were 29 041 persons in full-time custody as at the September quarter 2011. See Australian Bureau of Statistics, Cat 4512.0 'Corrective Services, Australia, Sep 2011' <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/4512.0>> accessed 20 February 2012.

3 *Crimes Act 1914* (Cth) s 20(1)(b).

## Truth in sentencing

- 7.12 The current definition of ‘parole period’ in the Crimes Act varies depending on how long an offender’s sentence is:
- for a federal offender not subject to a life sentence, the parole period is set at a maximum of five years; and
  - for an offender serving a life sentence, the parole period must exceed five years.
- 7.13 Under section 19AP of the Crimes Act, the Attorney-General may grant a licence for a federal offender to be released from prison.
- 7.14 A licence authorises the release of the offender earlier than the date that he or she would be have been eligible for release from prison under the terms of the sentence.
- 7.15 The Attorney-General must not grant a licence unless he or she is satisfied that exceptional circumstances exist which justify the grant of the licence. The exceptional circumstances are at the discretion of the Attorney-General.
- 7.16 Currently, for a federal offender who is not subject to a life sentence, the licence period is capped at a maximum of five years. An example is detailed in the Explanatory Memorandum. A prisoner (not subject to a life sentence or a recognizance release order) could be released under licence, due to exceptional circumstances, five years into a 12 year sentence. Under the current legislation, the maximum licence period is five years. Effectively the prisoner would have served five years in jail, five years under licence and the remaining two years of the sentence imposed by the court would not be enforced.<sup>4</sup>
- 7.17 These maximum licence and parole periods can have the unintended consequence that the total sentence imposed by the court may not be enforced.

## Automatic parole

- 7.18 Section 19AL of the Crimes Act sets out different arrangements for the release on parole of federal offenders depending on the length of their sentence.

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<sup>4</sup> Crimes Legislation Amendment (Powers and Offences) Bill 2011 Explanatory Memorandum, pp. 127-128.

- 7.19 For sentences of 10 years or more where a non parole period has been fixed, the Attorney-General may determine whether or not the prisoner should be released on parole at the expiry of his or her non-parole period.
- 7.20 However, for sentences of less than 10 years where a non-parole period has been fixed by the court, the Attorney-General has no discretion to refuse to release the prisoner on parole. The Attorney-General can only make a parole order directing that the person be released either at the end of the parole period or if appropriate, at a date no earlier than 30 days before the end of the non-parole period. This is referred to as automatic parole.
- 7.21 Automatic parole can be problematic under a range of situations such as where a State or Territory corrective service agency does not support the grant of parole or when the federal offender has committed a further offence while serving a sentence of imprisonment but has not been sentenced.
- 7.22 As an example, State or Territory offenders are encouraged to take part in rehabilitation programs as failure to do so may affect their chances of parole. However, there is no such incentive for federal offenders who will be released whether they take part in rehabilitation programs or not.

## Supervision and licence periods

- 7.23 Supervision refers to the oversight and management of the offender by the relevant State and Territory parole service. The Crimes Act defines 'supervision period' in subsection 16(1).
- 7.24 The 'supervision period' for federal offenders not serving a life sentence is capped at a maximum length of three years.
- 7.25 This cap is arbitrary and can have the unintended effect that federal offenders who may need additional supervision beyond three years during their licence or parole period are unable to access it.
- 7.26 As previously stated, the current legislation states that the licence period for a federal offender who is not subject to a life sentence cannot exceed five years.

## Proposed legislative amendments

### Supervision and licence periods

- 7.27 The proposed amendment repeals the current definition and inserts a new definition of 'licence period'. This definition will vary depending on whether the federal offender who is released on licence is:
- subject to a recognizance release order;
  - serving a federal life sentence; or
  - serving any other type of federal sentence.
- 7.28 Under the new definition of 'licence period' under section 19AP, the prisoner could be granted a licence to be released after five years.
- 7.29 The licence period would then extend to the end of the sentence so that the full sentence originally set by the court is enforced.
- 7.30 The proposed amendment will change the definition of 'supervision period' to mean that the supervision period will start when the offender is released from prison on parole or licence; and end, either at the end of the offender's parole or licence period, or on an earlier date being the day on which the supervision period ends, as specified in the parole order or licence.
- 7.31 In all instances, the 'licence period' commences on the day of release on licence.
- 7.32 Where the offender is subject to a recognizance release order, the 'licence period' ends when the person is eligible for release in accordance with the recognizance release order. This is because offenders released under such orders are generally not under supervision and the only condition is to be of good behaviour for a set period.
- 7.33 Where the offender has been given a federal life sentence, the 'licence period' ends at the day specified on the licence as the day on which the licence period ends.
- 7.34 When the offender has been given any other federal sentence, the 'licence period' ends on the last day of any federal sentence being served or to be served.<sup>5</sup>
- 7.35 These amendments aim to achieve greater 'truth in sentencing'.

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5 For a diagrammatic representation of this phenomenon, refer to Crimes Legislation Amendment (Powers and Offences) Bill 2011 Explanatory Memorandum, p. 128.

## Supervision period as a condition of a parole order

- 7.36 Section 19AN of the Crimes Act deals with the conditions of a parole order.
- 7.37 Subsection 19AN(2) provides that the Attorney-General may, at any time before the end of an offender's parole period, vary or revoke a condition of the parole order or impose additional conditions.
- 7.38 Under a proposed amendment to subsection 19AN(2), the Attorney-General will continue to be able to vary or revoke a condition of the parole order or impose additional conditions, but will also be able to change the day on which the offender's supervision period ends.
- 7.39 The ability to change the day on which an offender's supervision period will end will allow the offender's changing circumstances to be taken into account and will maximise the ability of the licence to promote the offender's reintegration and rehabilitation and better protect the community.

## Abolishment of automatic parole

- 7.40 The proposed amendment will require that before the end of the offender's non-parole period, the Attorney-General is required to either make or refuse to make a parole order directing that the person be released from prison on parole.
- 7.41 Additionally, proposed amendments will address a range of issues including:
- the requirement to reconsider a prisoner's release on parole within 12 months of refusing to make a parole order; and
  - that every parole order must be in writing and specify whether or not the person is to be released subject to supervision.
- 7.42 Amendments will also provide more detail with respect to supervision periods and their duration in relation to parole.
- 7.43 Federal offenders who are eligible for release on federal parole but who are still serving a State or Territory custodial sentence when their federal non-parole period expires will not be released on federal parole until their release is authorised under the State and Territory sentence. This amendment will also take into account the type of sentence that the federal offender is serving.

- 7.44 The new arrangements will apply to all federal offenders who are sentenced to a period of imprisonment, with non parole period, *before, on or after* the commencement of this Schedule for whom a parole order has not been made at the commencement of this Schedule.<sup>6</sup>

## Issues raised in consultation

### Retrospectivity

- 7.45 The Law Council of Australia (the Law Council) supports many of the amendments relating to parole conditions, but opposes the retrospective abolishment of automatic parole. They are of the firm view that 'legislative provisions which create criminal penalties should not be retrospective in their application'.<sup>7</sup> They express alarm that:

Offenders sentenced to less than 10 years imprisonment with a non-parole period will no longer automatically be released on completion of the non-parole period as they would have expected, probably based on the advice of their lawyer according to the law in effect at the time they were sentenced. Such offenders may also be subject to longer periods of supervision than they would have expected.<sup>8</sup>

- 7.46 The Law Council notes that amendments intend to facilitate the use of parole for purposes such as community protection and rehabilitation of offenders, but considers that retrospectivity is not necessary:

Such purposes could still be facilitated by carefully tailoring the conditions in parole orders. For example, rather than using the threat of not granting parole to create incentives for offenders to participate in relevant programs, including sex offender programs, such participation could be made a condition of the parole order itself.<sup>9</sup>

- 7.47 The Law Council further argued that the retrospectivity of the amendments was not supported by the ALRC's recommendations.

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6 Crimes Legislation Amendment (Powers and Offences) Bill 2011 Explanatory Memorandum, p. 149.

7 Law Council of Australia, *Submission 1A*, p. 2.

8 Law Council of Australia, *Submission 1A*, p. 2.

9 Law Council of Australia, *Submission 1A*, p. 3.

7.48 The Human Rights Law Centre noted that:

... the proposed amendments potentially engage the following relevant human rights:

- freedom from retrospective application of criminal laws (contained in article 15 of the International Covenant on Civil and Political Rights, to which Australia is a party); and
- freedom from arbitrary detention (contained in article 9 of the ICCPR).<sup>10</sup>

7.49 However, the Human Rights Law Centre concluded that

... the Bill does not appear to raise any major concerns with the relevant human rights standards and principles.<sup>11</sup>

7.50 The Rule of Law Institute (RLI) stated that

...retrospective legislation is destructive of the rule of law. We all need to know what the law is. In my view, most people want to comply with the law. You destroy the rule of law as soon as you make it retrospective – because how do you comply with it?<sup>12</sup>

7.51 The RLI argued that retrospective laws can be appropriate in ‘extreme situations’, but there must be a compelling need due to the potential for abuse.

... you have got to look at all the circumstances and say: ‘This is so unusual. Am I prepared to take the risk that this involves?’<sup>13</sup>

## Parole at the Attorney-General’s discretion

7.52 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, criticised the amendments for leaving parole decision making ‘open to political influence in sensitive or controversial cases’.<sup>14</sup>

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10 Human Rights Law Centre, *Submission 6*, p. 1.

11 Human Rights Law Centre, *Submission 6*, p. 1.

12 Mr Robin Speed, CEO, Rule of Law Institute, *Committee Hansard*, Canberra, 10 February 2012, p. 26.

13 Mr Robin Speed, CEO, Rule of Law Institute, *Committee Hansard*, Canberra, 10 February 2012, p. 27.

14 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, *Submission 9*, p. 1.



- 7.53 Ms Naylor argued that this was at odds with the recommendation of the ALRC Report. In that report, the ALRC recommended that parole decisions should be made:
- ... through transparent and accountable processes in accordance with high standards of procedural fairness and independently of the political arm of government.<sup>15</sup>
- 7.54 Ms Naylor wrote:
- ... the proposed process does not provide 'equal treatment' for federal prisoners. All other Australian jurisdictions have independently-established parole authorities. Independence from government is recognised to be essential in these jurisdictions, to ensure institutional separation from political influence.<sup>16</sup>
- 7.55 Ms Naylor referred to United Kingdom, New Zealand and Victorian court cases which highlighted 'the importance of perceived and actual independence'.<sup>17</sup>
- 7.56 In this vein, Ms Naylor advocated for the establishment of an independent parole board. She emphasised the necessity of its 'specialist expertise and judicial and community membership, reflecting the varied goals of the parole process.'<sup>18</sup>
- 7.57 Ms Naylor's views were seconded by Lorana Bartels, Senior Lecturer, University of Canberra School of Law.
- 7.58 Ms Bartels found the refusal to establish a federal parole board particularly odd, given that consultations and submissions to the ALRC expressed 'almost universal support for the principle that decisions in relation to parole should be made by a body independent of the executive'.<sup>19</sup>
- 7.59 As a result, she is concerned that the power accorded to the Attorney-General 'would be open to abuse', writing that 'it is inappropriate that this power be granted to the [Attorney-General], rather than an independent authority.'<sup>20</sup>

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15 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, *Submission 9*, p. 1.

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17 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, *Submission 9*, p. 1.

18 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, *Submission 9*, p. 2.

19 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report no 103 (Sydney, 2006) at 23.7.

20 Lorana Bartels, Senior Lecturer, University of Canberra School of Law, *Submission 7*, p. 2.

- 7.60 As such, Ms Bartels deemed the amendments ‘an incomplete response’ to the ALRC’s recommendations’.<sup>21</sup>
- 7.61 The Law Council felt the same. They were ‘disappointed that the Bill does not address the ALRC’s recommendations more holistically’ and support:
- ... the concept of a separate federal sentencing Act and greater federal administrative machinery, including a federal parole board rather than the Attorney-General making decisions about parole.<sup>22</sup>
- 7.62 Civil Liberties Australia claimed the Attorney General’s discretion would:
- ... delay the release of unpopular prisoners, for example sex offenders, who have served their sentences but are deemed insufficiently punished by sectors of the community. This is especially likely around election times when ‘tough on crime’ becomes a popular political catch-cry. Also this could be used to further detain a person who maintains his or her innocence.<sup>23</sup>
- 7.63 The Human Rights Law Centre did not advocate for a separate parole board, but noted the ‘wide ranging impact’<sup>24</sup> of parole on the rights of offenders and the broader community. They did not object to the Attorney-General’s discretion, but outlined principles which should guide the exercise of his discretion:
- considering relevant human rights when exercising discretion;
  - affording procedural fairness to prisoners and parolees;
  - where appropriate, providing legal representation for prisoners and parolees;
  - ensuring access to relevant information for prisoners and parolees; and
  - providing rights of appeal.<sup>25</sup>
- 7.64 Ms Naylor commented on the positive aspects of the parole reforms. She noted that:
- ... prisoners can make a submission and have the submission considered, and that they are provided with a statement of reasons if parole is refused. These rights are important, and should be made uniform across all state boards. In addition, all parole bodies – state, territory and federal – ought to ensure that prisoners are provided with information being relied on

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21 Lorana Bartels, Senior Lecturer, University of Canberra School of Law, *Submission 7*, pp. 2-3.

22 Law Council of Australia, *Submission 1A*, p. 2.

23 Civil Liberties Australia, *Submission 2*, pp. 8-9.

24 Human Rights Law Centre, *Submission 6*, p. 1.

25 Human Rights Law Centre, *Submission 6*, p. 1.

beforehand in order to prepare a response, and should have a clear avenue of appeal, without having to rely on judicial review. These elements of natural justice are provided in a small number of Australian jurisdictions, but are seen as essential human rights protections in jurisdictions such as the United Kingdom and Canada.<sup>26</sup>

## Other minor and technical amendments

7.65 Schedule 7 of the Bill will make a number of minor and technical amendments to the Crimes Act. The proposed amendments will simplify the language used in various sections of the Act and rectify a number of technical drafting issues and inconsistency of terminology.

## Committee comment

7.66 The Committee supports implementation of the reforms recommended by the ALRC Report. The Committee considers the current system of automatic parole to be flawed and supports its abolition. Additionally, the Committee supports the changes to supervision and licence periods to ensure that there is 'truth in sentencing'.

7.67 However, the Committee finds the retrospective abolishment of automatic parole highly troubling.

7.68 According to the Department of Prime Minister and Cabinet's Legislation Handbook, retrospective legislation affecting rights or imposing liabilities must only be introduced in exceptional circumstances and on explicit policy authority.<sup>27</sup>

7.69 The Explanatory Memorandum does not mention any exceptional circumstances or refer to explicit policy. Indeed, there is no clear reasoning given, which is deeply alarming given that the question of people's liberty is at hand.

7.70 Federal prisoners who have been sentenced under the current regime have a legitimate expectation of automatic parole and may have made different decisions in relation to their defence under a different parole regime. The Committee finds that their rights are prejudiced by the retrospectivity of the amendments that would abolish automatic parole for these prisoners.

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26 Bronwyn Naylor, Associate Professor, Monash University Faculty of Law, *Submission 9*, p. 2.

27 Department of Prime Minister and Cabinet, 'Legislation Handbook', 1999, p. 29.

- 7.71 Accordingly, while supporting the prospective reforms, the Committee is not able to support the retrospective application of these amendments.

### **Recommendation 8**

- 7.72 **The Committee recommends the amendment of Item 12 in Schedule 7 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 to remove the retrospective application by deleting the word *before* in section 2(a).**

**This would ensure that amendments made in this Schedule to abolish automatic parole would only apply to persons sentenced after commencement.**

- 7.73 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.
- 7.74 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.

### **Recommendation 9**

- 7.75 **The Committee recommends that the Australian Government give further consideration to establishing a Federal parole board.**