



9 February 2012

The Committee Secretary
House of Representatives Committee on Social Policy and Legal Affairs
PO Box 6021
Parliament House
CANBERRA ACT 2600

By email to spla.reps@aph.gov.au

Dear Secretary,

SUPPLEMENTARY SUBMISSION TO INQUIRY INTO CRIMES LEGISLATION AMENDMENT (POWERS AND OFFENCES) BILL 2011

I refer to the submission made by the Law Council in relation to the *Crimes Legislation Amendment (Powers and Offences) Bill 2011* (the Bill) on 10 January 2012. I note that the submission only related to Schedules 2 and 3 of the Bill due to the short time frame for submissions on the Bill, which contains eight schedules.

Subsequent to making the submission, a particular matter concerning Schedule 7 has come to the Law Council's attention. The Law Council wishes to make a supplementary submission in relation to this particular matter and would be pleased if the Committee is able to accept this submission.

Schedule 7 relates to releasing federal offenders from prison and seeks to implement some of the recommendations of the Australian Law Reform Commission's (ALRC) 2006 report on sentencing of federal offenders.¹

In introducing the Bill, the then Minister for Home Affairs and Justice referred to the ALRC report and noted that at the federal level there is currently no discretion to refuse parole after the completion of a non-parole period for a federal offender serving a sentence of imprisonment of less than 10 years. As noted in the Explanatory Memorandum to the Bill, this type of release of these federal offenders is referred to as 'automatic parole'.

The Law Council notes that the ALRC's recommendation that federal sentencing legislation should repeal the provisions granting 'automatic parole' to federal offenders was one of eleven recommendations concerning release on parole or licence. Three other recommendations relating to commencement and expiry of parole periods, conditions of parole and periods of supervision are also implemented to some extent in the Bill.

¹ Australian Law Reform Commission, *Same Crime, Same Time*, Report 103, April 2006

The Law Council made a submission to the Discussion Paper, which preceded the ALRC's report.² While the Law Council's submission did not specifically address the above issues, it supported 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. While the Law Council understands that further consultations relating to federal sentencing may be undertaken by the Attorney-General's Department during 2012, it is disappointed that the Bill does not address the ALRC's recommendations more holistically.

The particular issue which the Law Council wishes to raise in relation to the Bill concerns Item 12 which, according to the Explanatory Memorandum, provides that the amendments repealing the provisions for 'automatic parole' will apply not just to federal offenders sentenced on after the commencement of Schedule 7 but also to offenders sentenced *before* the commencement of the schedule.

Offenders sentenced *before* the commencement of the schedule will also be affected by amendments relating to conditions for supervision in parole orders which effectively repeal the three year limit on supervision for offenders who have been sentenced to less than life imprisonment and allow the Attorney-General or her delegate to impose a supervision condition up to the end of the parole order.

Providing for the amendments to apply to offenders sentenced *before* the commencement of the schedule effectively provides for retrospective operation of these amendments. 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.

The Law Council recently consolidated the principles it uses to assess draft legislation according to the rule of law in a Rule of Law Principles Policy Statement.³ The Policy Statement provides that legislative provisions which create criminal penalties should not be retrospective in their operation.

The Law Council submits that the failure to release an offender automatically on parole after completion of the non-parole period when that offender had a legitimate expectation that this would occur is in the nature of a criminal penalty. Similarly, imposing supervision conditions for longer than the offender would have expected is also in the nature of a criminal penalty. The Law Council therefore submits that the Committee should recommend that these amendments only apply to offenders sentenced after the commencement of Schedule 7, who will be able to be advised about the effect of the schedule.

The Law Council notes that the discussion in the ALRC report did not suggest that federal sentencing legislation repealing 'automatic parole' should apply retrospectively. Nor did

² Law Council Submission to ALRC Discussion Paper 70, Sentencing of Federal Offenders, 17 March 2006, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=8C769E47-1C23-CACD-2263-810434331EA2&siteName=lca

³ Law Council Rule of Law Principles Policy Statement, March 2011, available at http://www.lawcouncil.asn.au/shadomx/apps/fms/fmsdownload.cfm?file_uid=4858D679-AA9B-27F0-219A-40A47E586C70&siteName=lca

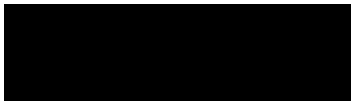
the discussion in the ALRC report suggest that effectively repealing the three year limit on supervision should apply retrospectively.

The Law Council acknowledges that the amendments provide a process for the Attorney-General prior to the completion of the non-parole period to consider the grant of parole and that she may grant a parole order up to 30 days before the expiry of the non-parole period. The Law Council also acknowledges that an offender who is not granted parole may apply for judicial review of that decision and that the Attorney will reconsider the matter after 12 months in any event. The Attorney in considering the supervision conditions in a parole order may in fact not impose supervision beyond three years. However, the Law Council maintains its concerns about the retrospective operation of the amendments and the impact of the amendments on offenders sentenced before they commence operation.

The Law Council also acknowledges that the intention of the amendments is to facilitate the use of parole for purposes such as community protection and rehabilitation of offenders, which the Law Council supports. However, if the amendments were not to apply retrospectively, the Law Council considers that 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. Proceeding in this manner in relation to offenders who have been sentenced prior to the commencement of the schedule would mean that the principle against retrospectivity is not breached but the purposes of parole are still facilitated.

The Law Council hopes that the Committee is able to accept this supplementary submission and the suggestions contained in this submission |

Yours sincerely,

A solid black rectangular box redacting the signature of Margery Nicoll.

Margery Nicoll
Acting Secretary-General