

**Submission to the House Standing Committee on Social Policy
and Legal Affairs on the Crimes Legislation Amendment
(Powers and Offences) Bill 2011**



This submission to the House Standing Committee on Social Policy and Legal Affairs specifically addresses the proposed amendments to the *Crimes Act 1914* contained in Schedule 7 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 to abolish automatic parole. The proposed amendments will also have retrospective application to certain categories of federal offenders. The effect of the proposed amendments is that, in some circumstances, current prisoners serving a sentence of imprisonment and who had an expected automatic parole date may no longer be released on parole on that date if the Attorney General refuses to release them.

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).

Retrospective Application of Criminal Laws

Article 15 of the ICCPR provides that:

1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.
2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

Our preliminary analysis is that the Bill does not appear to raise any major concerns with the relevant human rights standards and principles –

Criminal offence

The proposed amendments do not relate to the conviction of any criminal offence which did not constitute a criminal offence at the time that it was committed and therefore do not raise any concerns with this right.

Heavier penalty

The question to be considered is whether the removal of automatic parole constitutes a “penalty” within the meaning of Article 15(1). The Human Rights Committee, which monitors the implementation of the ICCPR, has generally determined that the imposition of a “higher penalty” relates largely to the head sentence itself. However, in one case the Committee implicitly found that parole conditions could be relevant penalties for the purposes of Article 15.¹

¹ *Van Duzen v Canada* (No 50/1979) see Joseph, Castan and Shultz, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (2nd ed.) (2004) p. 466.

The general approach is that it is necessary to have regard to the object and purpose of the relevant provision. For example, the European Court of Human Rights has listed factors to be taken into account when assessing whether something is a “penalty”, including:²

- whether the measure in question is imposed following conviction for a criminal offence;
- the nature and purpose of the measure in question;
- its characterisation under national law;
- procedures involved in the making and implementation of the measure; and
- the severity of the measure.

Based on the above, we do not consider that the abolition of automatic parole constitutes a “higher penalty”. Even though the effect of the proposed amendments may be that an individual’s non-parole period is extended beyond his or her previously defined automatic parole period, affected individuals are not likely to now face a more far-reaching detriment than that to which they were exposed to at the time of the commission of their crime.

Arbitrary Detention

Article 9(1) of the ICCPR provides, relevantly, that:

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.

We do not consider that the extension of an individual’s non-parole period beyond the previous automatic parole period as a result of the proposed amendments breaches the right to be free from arbitrary detention.

Detention will be arbitrary if it is either “unlawful” or “arbitrary”. In the present circumstances, detention is lawful because it is prescribed by law – federal offenders are serving a sentence of imprisonment on the basis of a conviction under relevant federal criminal laws. We also do not consider that detention is likely to be arbitrary because:

- any continued detention under the proposed amendments will still be within the period of the head sentence; and
- any decision regarding whether to grant parole is required to take into account relevant factors, ensuring that an individual’s particular circumstances are considered.

Broader Human Rights Considerations Relating to Parole Procedures

Decisions regarding the granting of parole potentially have a wide ranging impact on the human rights of offenders - and indeed the human rights of members of the broader community. As a result, it is important that, in undertaking his or her functions under the relevant legislation, the Attorney-General’s discretion is guided by or subject to the following principles:

- considering relevant human rights when exercising discretion;

² *Welch v The United Kingdom* (Application number 17440/90). See also *Jamil v France* (1995) 21 EHRR 65 at 80, para 31.

- 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.

The HRLC considers that respecting these principles – and ideally incorporating them into the relevant legislation - will improve decision-making and ensure that decisions relating to whether to grant parole are compatible with human rights.

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