

12 August 2022

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Dear Dr Popple

**ESTABLISHMENT OF A FEDERAL PAROLE AUTHORITY: CONSULTATION ON PREFERRED MODEL**

I refer to the invitation to participate in consultation on the preferred model for the Establishment of a Federal Parole Authority, received from the Law Council of Australia on 22 July 2022 (**Memorandum**).

The Law Society of Western Australia does not wish to provide a detailed submission on this matter, other than to state our position that the current Federal parole system should not remain in place.

The Law Society agrees in principle with the preferred model of an independent statutory authority as proposed in the Memorandum primarily because an independent body whose membership consists of professionals with a wide variety of skills, experience and knowledge is better placed to determine the parole of an offender than the Commonwealth Attorney General.

Yours sincerely



Rebecca Lee  
**President**

# Memorandum



**To:** Directors  
Presidents – Constituent Bodies  
CEOs – Constituent Bodies  
Chairs – National Criminal Law Committee, National Human Rights Committee

**From:** Margery Nicoll, Acting Chief Executive Officer

**Date:** 22 July 2022

## Establishment of a Federal Parole Authority: Consultation on Preferred Model

### Action Request

Input is requested by **COB 12 August 2022** in relation to a policy advocacy project, led by the Law Council's National Criminal Law Committee (**NCLC**), to the Commonwealth Government, non-government parliamentarians, and potentially the wider public, seeking the establishment of a federal parole authority.

To inform the Law Council's potential advocacy in relation to the establishment of a federal parole authority, Constituent Bodies are invited to comment on the following matters:

1. if the preferred model is supported, and the more detailed elements of the structure and features of the proposed federal parole authority;
2. views on the composition of the proposed federal parole authority including the qualifications and background of the members; and
3. views on a proposed Office for the Management of Federal Offenders (**OMFO**) within the Attorney-General's Department to monitor and regularly report on all federal offenders.

### Key Issues

Under Part 1B of the *Crimes Act 1914* (Cth) (**Crimes Act**), all parole applications for federal offenders are determined by the Commonwealth Attorney-General.<sup>1</sup> The Attorney-General is supported by an administrative unit within the Attorney-General's Department (**Department**) known as the Commonwealth Parole Office (**CPO**).

On 25 June 2022, the Law Council Board of Directors endorsed the recommendation of the NCLC that the Law Council undertake a policy project advocating for the establishment of an independent federal parole authority.

This position followed a memorandum issued by the Law Council to Constituent Bodies on 4 May 2022 which generated responses from the Law Society of New South Wales, the Law Society of South Australia, the Queensland Law Society, the Law Institute of Victoria, the New

<sup>1</sup> *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.

# Memorandum



South Wales Bar Association and the Law Society of Western Australia. Each of these respondents expressed explicit support for the establishment of a federal parole authority as the independent decision-maker on parole applications by federal offenders.

Broadly speaking, many of the submissions from Constituent Bodies raised similar concerns around the need for parole decisions to be made in a transparent and independent manner free from perceived or real political interference. Many of the submissions positively considered the recommendations made by the Australian Law Reform Commission (**ALRC**) in its 2006 report, *Same Crime, Same Time: Sentencing of Federal Offenders (ALRC Report)*. The writers of the ALRC Report crystallised these concerns in the following terms:

*Because such decisions affect an individual's liberty, they should be made through transparent and accountable processes in accordance with high standards of procedural fairness and independently of the political arm of the executive. The current arrangements lack adequate transparency and independence.*

*While parole decisions are made by the executive rather than the judicial branch of government, these decisions form part of the administration of criminal justice. In that context, transparency requires that justice should be done and be seen to be done. The criminal justice process should be transparent, not only to the offender and the bureaucracy, but to the community at large. Transparency provides safeguards for the offender and the community, and ensures they can see that decisions are made impartially and not arbitrarily.<sup>2</sup>*

## **The Preferred Model – Independent Statutory Authority**

The NCLC prefers a federal parole authority that is established as a separate agency to the Attorney-General and the CPO, which sits within the Department. In addition, the federal parole authority should not be subject to any direction in its decision-making. To this end, the NCLC is supportive of establishing a federal parole authority as an independent statutory body, comprising an agency head who is appointed by the Governor-General (subject to statutory protections to ensure their independence and expertise) and dedicated staff who are employed directly under the governing Act. 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.

Constituent Bodies are invited to consider input on the critical features of the federal parole authority. In particular, feedback is sought in relation to Recommendations 23-1, 23-2 and 23-3 of the ALRC Report which provide a helpful starting point in considering the key features of a federal parole authority.

Recommendation 23-1 of the ALRC Report provides:

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<sup>2</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, April 2006), 573-4 [23.9].

# Memorandum

- 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.

Recommendation 23-2 of the ALRC Report proposes amendment to Federal sentencing legislation to provide that:

- a) 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;
- b) federal offenders are allowed legal or other representation before the federal parole authority;
- c) federal offenders have the benefit of an appropriately qualified interpreter where necessary;
- d) the federal parole authority has access to the same information and reports currently considered by state and territory parole authorities and that it has power to require the production of such information;
- e) the federal parole authority has power to require persons to appear before it for the purpose of carrying out its functions;
- f) registered victims of crime be given the opportunity to provide input into the deliberations of the federal parole authority;
- g) the federal parole authority publish reasons for its decisions; and
- h) the federal parole authority prepare an annual report on its operations, which must be tabled in the Australian Parliament.

Finally, comment is sought on Recommendation 23-3 of the ALRC Report which proposes that decisions of the federal parole authority should be subject to the rules of natural justice and to judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) but **not** merits review.

## Composition

Input is also sought in relation to the composition of a federal parole authority, including:

- **qualification of members** - members should be appointed for fixed terms and should include a legally qualified chair and deputy chair and members with relevant expertise, for example, in the areas of psychology, psychiatry and social work;
- **ethnic diversity** of parole applicants is reflected in decision making. For example, the Law Society of South Australia proposed "the authority should also be staffed with experts in the field of effective community corrections operations for Aboriginal people including drug and alcohol rehabilitation, returning to country, reconnection with kin and community and the means to avoid recidivism, and preventing offenders from returning to the same social conditions that gave rise to the crime initially"; and
- **perspectives of victims of crime** and the need to include persons with lived experience of victimisation in such a body.

# Memorandum

## Office for the Management of Federal Offenders

Input is requested in relation to Recommendation 22-4 of the 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 functions of the OMFO include:

- (a) maintaining an up-to-date case management database in relation to all federal offenders;
- (b) providing secretariat or other support to the proposed federal parole authority, depending on the model adopted for establishing the authority;
- (c) establishing and maintaining a victim notification register;
- (d) liaising with the states and territories in relation to federal offenders, including special categories of offenders;
- (e) 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;
- (f) 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;
- (g) ensuring the treatment of federal offenders complies with Australia's international obligations;
- (h) 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;
- (i) providing advice to federal offenders about the administration of their individual sentences, including information about interstate and international transfer;
- (j) providing advice to the Australian Government on the interstate and international transfer of federal offenders in individual cases;
- (k) providing general policy advice to the Australian Government in relation to federal offenders and relevant aspects of the federal criminal justice system;
- (l) providing advice to the Australian Government about funding, including priorities for special programs for federal offenders;
- (m) providing advice to the Australian Government about state and territory compliance with federal minimum standards in relation to victim impact statements and pre-sentence reports;
- (n) providing advice to the Australian Government in relation to state and territory sentencing options and pre-release schemes, including whether they should be picked up and applied in relation to federal offenders;
- (o) performing all of the above in relation to young federal offenders and federal offenders with a mental illness or intellectual disability.

Finally, Recommendation 22-7 of the ALRC Report proposes that 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.

Views on the establishment and function of an OMFO are welcome at this stage.

## Discussion of Alternative Models

It is proposed that the Law Council will not recommend the two other alternatives models for federal parole decision making suggested by the ALRC Report:

- delegating decision-making authority in relation to federal offenders to existing state and territory parole authorities (**Delegated Model**); and
- establishing a parole division within the Administrative Appeals Tribunal (**AAT Division Model**).

The rationale for this approach is set out below.

### Delegated Model

Some of the critical problems with the Delegated Model were identified by the ALRC Report writers including:

- **inconsistency** in decision making across different state jurisdictions; state parole decision makers are expert in applying state sentencing principles and may come to different conclusions on the application of federal sentencing principles from other jurisdictions;<sup>3</sup>
- **political accountability** – federal decision makers should be accountable for applying federal sentencing law principles and take responsibility for the decision to release federal offenders into the community prior to the expiration of their sentence;<sup>4</sup> and
- **shortcomings in State transparency requirements** – for example, the ALRC Report writers noted “a number of state and territory authorities are not bound by the rules of natural justice and their decisions are not subject to judicial review”.<sup>5</sup>

### AAT Division Model

Some submissions from Constituent Bodies indicate reservations about the AAT Division Model. For instance, the Queensland Law Society noted “where the primary role of the AAT is the independent merits review of a range of federal administrative decisions, we do not consider it the most appropriate body to make federal parole decisions”.

By way of summary, some key concerns with the AAT Division Model include:

- **qualification of members** – existing AAT members may lack the legal knowledge required to apply complex federal sentencing principles;

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<sup>3</sup> Australian Law Reform Commission, Same Crime, Same Time: Sentencing of Federal Offenders (Report 103, April 2006), 573-4 [23.16].

<sup>4</sup> Ibid.

<sup>5</sup> Ibid, 573-4 [23.17].



# Memorandum

- **tenure of members** – some AAT members are appointed on a part-time basis this would fail to address the risk of political interference highlighted earlier as a key rationale for reform; and
- **primary institutional expertise** – the predominant area of AAT jurisdiction is the merits review of federal administrative decisions and it does not have significant expertise in original decision making.<sup>6</sup>

However, if the Department prefers the AAT Division Model to reduce the cost of a federal parole decision maker and utilise existing resources; the key concerns listed above can be partially addressed by ensuring:

- appointments to the federal parole division are for substantial time periods; and
- broad representative membership, including members with relevant expertise, for example, in the areas of psychology, psychiatry and social work.<sup>7</sup>

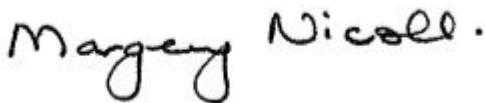
## Procedural Fairness Standards and Practices

It is proposed that advocacy for a federal parole authority initially focus on securing in-principle support for the establishment of a federal parole authority. There will be further consultation with Constituent Bodies in relation to the practices and procedures of a federal parole authority that will best comply with standards of procedural fairness and natural justice at a later date.

It is noted that the initial consultation illustrated shortcomings in the practical operation of current federal parole decision making including concerns around procedural issues, access to information and the content of letters advising prisoners of adverse information relevant to parole decisions. We anticipate providing a second stage of submissions to the Department regarding these issues at a later date.

## Contact

Please contact Shounok Chatterjee, Policy Lawyer, at [shounok.chatterjee@lawcouncil.asn.au](mailto:shounok.chatterjee@lawcouncil.asn.au) or (02) 6246 3703 if you would like further information or to provide comment.



**Margery Nicoll**  
Acting Chief Executive Officer

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<sup>6</sup> It is noted that the AAT does exercise some original decision-making functions including issuing of telecommunications interception warrants under the *Telecommunications (Interception) Act 1979* (Cth) and the conduct of compulsory examinations in connection with confiscation proceedings under the *Proceeds of Crime Act 2002* (Cth).

<sup>7</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders* (Report 103, April 2006), 573-4 [23.23].