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16 February 2012

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

I wish to provide comment on the proposal in Schedule 7 of the Crimes Legislation Amendment (Powers and Offences) Bill 2011 regarding parole release of federal prisoners.

The proposal is to remove the current arrangement of automatic parole, leaving the decision to be made by the Minister. The new s.19AL(1) would require the Attorney General to decide whether and when a federal prisoner is to be released on parole.

This proposal is open to criticism on at least two grounds. First, it leaves parole decision making open to political influence in sensitive or controversial cases. As the ALRC stated very clearly in its 2006 Report *Same Crime, Same Time*, 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. [23.10]

Second, 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.

The importance of perceived and actual independence has been highlighted in recent litigation in the UK, NZ and Victoria.

In the UK, the power of the Secretary of State to give directions to the parole board was held in *R (Brooke) v Parole Board* [2008] 3 All ER 289 to breach the requirement for independent and impartial decision-making, under both common law and art 5(4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. UK commentators subsequently proposed that the board be located outside the Home Office, for example as one of the tribunals comprising the UK's Tribunal Service. In New Zealand, *Miller and Carroll v NZ Parole Board* [2010] NZCA 600, and in Victoria *Kotzmann v Adult Parole Board (Vic)* [2008] VSC 356, reiterated the importance of independence of parole decisions.

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An additional feature of many parole boards is that they include specialist expertise, and judicial and community membership, reflecting the varied goals of the parole process. This would not be provided in the proposed procedure. I would strongly support inclusion of such contribution to the process, as also proposed by the ALRC (see para [23.13]).

The new s.19AL(2) does however enhance existing common law rights by ensuring the 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 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 UK and Canada.

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