



PRISONERS' LEGAL SERVICE INC.

Justice Behind Bars

LAPCSESC
Law Reform
Submission 011

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Research Director
Legal Affairs, Police, Corrective Services and Emergency Services Committee
Parliament House
George Street
Brisbane Qld 4000

Per email lapcsesc@parliament.qld.gov.au

Dear Committee members,

Re: Law Reform Amendment Bill 2011

We write in order to make submissions to the LAPCSES Committee in relation to the abovementioned Bill.

About Us

1. Prisoners' Legal Service (hereafter PLS) is a community legal service providing advice to prisoners and their families about matters related to incarceration. We have been operating for 26 years. PLS exists to promote justice, equity and the rule of law in the administration of punishment. We provide and promote access to justice through:
 - legal advice, information and assistance to prisoners and their families;
 - community legal education;
 - law reform and policy development.
2. PLS offers free legal advice, information, assistance, and referrals to Queensland prisoners and their families on matters relating to their imprisonment. Most relevantly to this enquiry, we operate a Gradual Release Assistance Program providing prisoners with assistance drafting parole applications, including relapse prevention and reintegration plans. As such, we hold a large amount of expertise in relation to parole and other gradual release mechanisms.

3. It is our experience that prisoners represent a group with extremely high needs, often evidencing a cross section of mental illness, addiction, homelessness and poverty as demonstrated by the following:
 - Over 70% of prisoners have not attained a grade 10 level education and many are functionally illiterate.
 - The rate of female prisoners in Queensland with a mental illness is 66%. NSW statistics for male prisoners statistics suggest the presence of a psychiatric disorder amongst this group is as high as 74%.
 - Aboriginal and Torres Strait Islander people make up approximately 30% of the prison population as compared to only 3.5% of the general population.

Minimum Standard Non-Parole Periods

4. The focus of these submissions is the inadequacy of proposed new sentencing regime introducing minimum standard non-parole periods (hereafter SNPPs). Our organisation is strongly opposed to the introduction of such a regime. We seek instead to promote the enhanced use of parole and other gradual release mechanisms as a vital stepping stone between prison and ultimate liberty. Such a stepping stone is essential for the goal of community safety.
5. The explanatory notes to the Bill state that the change “*arguably punishes the offender to a greater extent than was authorised by the former law.*” Further the regime is said to be justified in order to ensure that the punishment “*fits the severity of the crime and communicates the wrongfulness of their actions*”. Finally, the regime is said to protect the community from such offenders.¹
6. It is our strong belief that there is no evidence that the community will be protected by SNPPs. Rather, a punitive approach will detract essential resources from effective crime prevention strategies. The contradiction between punitive incapacity and long term rehabilitation described by Professor Toni Makkai, former director of the Australian Institute Criminology:

“One way that Australian correctional authorities can safeguard the community is by incapacitating offenders and keeping them away from potential victims. The community can also be protected in the longer term by minimising the likelihood of ex-prisoners reoffending after they are released...This approach is gaining prominence in Australia and internationally.”²

¹ Page 11, Explanatory Notes to the Law Reform Amendment Bill 2011, Qld Parliament.

² Toni Makkai in Baldrey, E. and Borzycki, M, Promoting Integration: The Provision of Prisoner Post-release Services. Trends and Issues in Crime and Criminal Justice, No 262, 2003.

7. This extract highlights the temporary nature of punitively motivated solutions designed to increase sentences and physically separate people who commit crimes from society. It contrasts such an approach with a longer term and more visionary attitude including reform and rehabilitation initiatives. It highlights a trend towards permanent, effective solutions to crime that is gaining prominence. In this context, parole is an important strategy for protecting the community in the longer term by minimising the likelihood of ex-prisoners reoffending after they are released.
8. This submission will consider various academic and evidence based critiques of SNPPs, in particular considering the extensive work on this exact question already performed by the Queensland Sentencing Advisory Council. The potential costs of SNPPs will be examined in further detail, demonstrating the erroneous nature of the statement that costs will be able to be met within current resources.³
9. Finally, alternatives to the current proposal will be offered, including resourcing crime prevention and treatment mechanisms and promoting an enhanced, or at least equivalent, gradual release system, including but not limited to parole.

Critiques of SNPPs

10. The current consultation follows on from extensive consultation and research conducted by the Queensland Sentencing Advisory Council. The functions of this body include:
 - if requested by the Attorney-General, to advise the Attorney-General on matters relating to sentencing;⁴
 - to research matters relating to sentencing and publish the results of the research;⁵
11. Following extensive consultation and research, the majority of the council clearly rejected the introduction of any form of SNPPs, commenting:

“The absence of strong evidence that minimum standard non-parole period schemes are effective, and achieve better sentencing outcomes than existing approaches, has led the Council to question the merits of introducing a minimum standard non-parole period scheme in this State.

While the scheme presented in this report is the preferred scheme of the full Council, a majority of members do not support the introduction of a new standard non-parole period scheme of any form in Queensland.”⁶

³ Page 7, Explanatory Notes to the *Law Reform Amendment Bill 2011*, Qld Parliament.

⁴ Section 200 (1)(a) *Penalties and Sentences Act 1992* (Qld)

⁵ Section 200 (1)(d) *Penalties and Sentences Act 1992* (Qld)

“In particular, a majority of the Council is concerned there is limited evidence of the effectiveness of SNPP schemes in meeting their objectives, beyond making sentencing more punitive and the sentencing process more complex, costly and time consuming.”⁷

12. Given the resources committed to researching SNPPs by this relevant body, these well articulated comments and concerns should be considered with the utmost gravity.
13. Of most serious concern is the absence of any evidence of effectiveness where similar schemes have been experimented with in other jurisdictions. SNPP schemes operate in New South Wales (*Crimes (Sentencing Procedure) Act 1999*), the Northern Territory (*Sentencing Act 1995*), South Australia (*Criminal Law (Sentencing) Act 1988*), and for certain Commonwealth offences. SNPPs or similar regimes operate in other countries including Canada and New Zealand.
14. Of these jurisdictions, only NSW has embarked on an evaluative exercise in relation to the regime. This 2010 evaluation investigated whether the use of full-time imprisonment increased; whether the lengths of non-parole periods and head sentences increased; and whether greater consistency in sentencing was achieved.⁸ This evaluation *“confirmed the early claims that there would be an increase in the severity of penalties imposed and the duration of sentences of full-time imprisonment.”*⁹
15. The Queensland Sentencing Advisory Council, summarised the evaluation of the NSW regime, as follows:

“There are concerns that this form of scheme does not deliver what victims of crime and the members of the public were hoping for – clarity, transparency and predictability in sentencing; nor has it led to reduced rates of serious crime or improvements in community safety.”
16. Whilst useful in addressing the important aspect of increasing prison numbers, the NSW evaluation did not ask pertinent questions such as: was the regime effective in preventing crime? Did it have positive rehabilitation results? Did it increase public confidence or victim satisfaction with the criminal justice system?

⁶ pX, Sentencing Advisory Council (Qld). *Minimum standard non-parole periods: final report*, Qld, 2011.

⁷ P20, Sentencing Advisory Council (Qld). *Minimum standard non-parole periods: final report*, Qld, 2011.

⁸ P1, Sentencing Advisory Council (Qld). *Minimum standard non-parole periods: final report*, Qld, 2011.

⁹ P60, Sentencing Advisory Council (Qld). *Minimum standard non-parole periods: final report*, Qld, 2011.

17. These are the questions that need to be answered before adopting the NSW approach. If this amendment bill intends to protect the community, there must be evidence that this aim will be advanced by SNPPs. To date, there has been no evidence based evaluations of SNPPs in any jurisdiction to determine their effectiveness in stopping crime.

18. However, it is not only the NSW example that sounds alarm bells. When considering the introduction of SNPPs to the federal jurisdiction the Law Council of Australia warned,

“The better approach is to allow sentencing courts wide discretion in setting non-parole periods ... While the setting of a ‘benchmark’ of two-thirds of the head sentence may sound like a reasonable aim, the Law Council is not convinced that this should (or even could) be done in federal sentencing legislations.”¹⁰

19. Similar concerns were expressed recently by the Queensland Law Society, commenting that judicial discretion, exercised within the bounds of precedent *“is the most appropriate means by which justice can be attained on a case by case basis.”¹¹*

20. The High Court has considered the curtailment of judicial discretion and dismissed encroachments on the institutional integrity of the court in cases such as *Kable v NSW DPP*¹². A strong reasoning behind this decision was that it was necessary to maintain public confidence in the courts. The shift in sentencing discretion from judges to politicians and from the judicial to the executive branch of government encroaches on the checks and balances of our democratic system. Such an encroachment was upheld by the majority in *Baker v The Queen*, but accompanied by a chilling warning that the issue is only a dead letter *“until a future time perceives its importance for the protection of fundamental rights in this country.”¹³* We would argue that the time for the protection of fundamental rights has now arrived.

21. We are concerned that SNPPs will open the floodgates to an increasing politicisation of the sentencing process and reduction of public confidence in the courts. Each new newspaper headline will result in calls for SNPPs to be increased or expanded to additional offences. It is only by explicitly rejecting SNPPs that such floodgates can remain closed.

¹⁰ P12, Sentencing Advisory Council (Qld). Minimum standard non-parole periods: final report, Qld, 2011.

¹¹ QLS Submission to Sentencing Advisory Council, 22 July 2011.

¹² (1996) 189 CLR 51.

¹³ Kirby J (dissenting) *Baker v The Queen* [2004] HCA 45, at 142..

22. Although some articulations of popular opinion may be that parole is equivalent to freedom without consequences, the reality is very different to this. Parole is very restrictive, challenging, tough and demanding. In many ways the challenges of finding and maintaining accommodation, employment and subsistence while being under constant supervision is more challenging than prison life. In contrast to longer periods of time in prison and shorter parole periods, the importance of gradual release mechanisms, such as parole is paramount. This importance is highlighted by comments from prisoner representatives to our service:

“To release someone from a high security environment, after years of incarceration, without progression through a less structured environment, where an offender can adjust to increasing amounts of personal responsibility, is allied to inciting maladjusted, unacceptable community behaviour; criminal activity.”

“They make us institutionalised. They break our dreams. Then when it comes time to be released they say ‘you’re institutionalised, we can’t let you out.’”

“Long termers need progression more than short termers”

“I’m coming from a culture in here into a different culture out there. It is a foreign culture.”¹⁴

23. The importance of allowing a person to adjust to an increasing amount of personal responsibility over their life must be prioritised as an essential aspect of de-institutionalisation. The prisoners who will be affected by proposed SNPPs will be spending more than five years without any personal autonomy over their lives. This means that for five years they have had no responsibility for decisions ranging from simple things, such as when to wake up in the morning, to more complex challenges such as organising accommodation, bills and work. The group of prisoners affected by this legislation are longer term prisoners having committed serious offences. Such prisoners have an even greater need for de-institutionalisation processes. Importantly, parole is often the first time where people face challenges such as exposure to drugs and old associates and the real life circumstances that they have discussed in an academic sense during offence based programs. As such, it is vitally important that the period of time supervised on parole is lengthy.

24. An additional risk for shorter parole periods is that where a relapse occurs, there will be limited opportunity for further parole following a return to custody. This means that the people who need supervision and support the most will

¹⁴ Page 10, *Report on Queensland Prisons 2010*, Prisoners’ Legal Service and Catholic Prison Ministry.

be released at their full time date without a parole officer, relapse prevention or reintegration plan.

25. It is our opinion that the criticisms and concerns by academics, prisoners, advisory bodies and courts should be heeded. SNPPs should not be introduced unless there is evidence of their effectiveness. To adopt this regime without such evidence, is to follow blindly in the footsteps of other jurisdictions without consideration of the merits of their system. Queenslanders deserve better from their government.

Impact on Aboriginal and Torres Strait Islander Queenslanders

26. The Queensland Government has very recently committed to reducing the numbers of Aboriginal and Torres Strait Islanders entering the criminal justice system in the highly endorsed *Just Futures* strategy.¹⁵ If this strategy is to be interpreted as a commitment to the principle of reducing incarceration rates, each new potential law must be considered in the light of this commitment. Introducing SNPPs would demonstrate a failure to action this promise to the Aboriginal and Torres Strait Islander peoples of Queensland.

27. There were numerous references to concerns about SNPPs increasing incarceration rates for Aboriginal and Torres Strait Islander people throughout the final report produced by the Sentencing Advisory Council.¹⁶ These community concerns were echoed in the final opinions of the Council.

“The Council is further concerned that there are possible policy tensions between the objectives of a Queensland SNPP scheme and the policy objectives of other Queensland and Commonwealth government initiatives including the National Indigenous Law and Justice Framework 2009–2015, the proposed Queensland Aboriginal and Torres Strait Islander Justice Strategy 2011–2014 and the National Disability Strategy 2010 –2020; the potential of a SNPP to support the objectives of these strategies would appear to be limited. For example, one of the objectives of the National Indigenous Law and Justice Framework 2009 –2015 developed by the Standing Committee of Attorneys-General Working Group on Indigenous Justice is to increase the use of effective diversionary options and other interventions for Aboriginal and Torres Strait Islander offenders; this includes a strategy to ‘expand and implement the range of diversionary options and other interventions for Indigenous adults and youth: first-time offenders, offenders beginning to develop offending cycles, and habitual offenders’.

A form of SNPP scheme that would have the result of increasing rates of Aboriginal and Torres Strait Islander imprisonment and time spent in prison,

¹⁵ Just Futures 2012-2015

¹⁶ At pages 5, 19, 20, 57, 89, 96. Sentencing Advisory Council (Qld). Minimum standard non-parole periods: final report, Qld, 2011.

*without a reduction in rates of re-offending, would also appear to be contrary to the objectives of the Queensland government's draft Aboriginal and Torres Strait Islander Justice Strategy 2011–2014.*¹⁷

28. This clearly identified tension becomes more acute now that the draft strategy has been adopted as finalised government policy in the *Just Futures 2012-2015* commitment.

29. One consultation from the Sentencing Advisory Committee report caught our attention, highlighting that,

*"If Aboriginal people receive longer sentences as a result of the introduction of SNPPs then there is a risk that prisoners will become institutionalised and 'conditioned' to prison life. Some of those consulted gave examples of offenders released from prison who had become so conditioned by prison life that they could not cope with life back in the community. After a short time, they reoffended to return to prison."*¹⁸

30. This is sadly a story that our office is all too familiar with. The process of institutionalisation is especially acute for long term prisoners, such as those who have committed the serious offences targeted by the SNPP scheme. For such prisoners, the importance of a substantial parole period as a stepping stone towards ultimate liberty is paramount.

31. Sentencing Advisory Committee report comments that the proposed scheme will affect a lower proportion of Aboriginal and Torres Strait Islander people than others. With respect, this is beside the point as Aboriginal and Torres Strait Islander people comprise between 2-3% of the overall population and should be affected to this extent or less. Instead, 30 Aboriginal and Torres Strait Islander Queenslanders out of 180 people per year will be affected¹⁹ which equates to 16%.

32. Proceeding with SNPPs in full knowledge that it will disadvantage Aboriginal and Torres Strait Islanders can be seen as a blatant disregard for equality and human rights for our fellow Queenslanders. If the commitments in *Just Futures 2012-2015* are to be more than empty promises, the impact of SNPPs on Aboriginal and Torres Strait Islander incarceration rates must be a deciding factor in the introduction of the scheme, not a by-product to be evaluated and monitored after hundreds of prisoners and their families have been tragically affected.

¹⁷ P20, Sentencing Advisory Council (Qld). [Minimum standard non-parole periods: final report](#), Qld, 2011.

¹⁸ P19, Sentencing Advisory Council (Qld). [Minimum standard non-parole periods: final report](#), Qld, 2011.

¹⁹ P91, Sentencing Advisory Council (Qld). [Minimum standard non-parole periods: final report](#), Qld, 2011.

Increasing costs associated with SNPPs

33. The explanatory notes state that “*The costs associated with the implementation of this Bill will be met within existing resources.*”²⁰ We find it difficult to comprehend how an increase in prison population will not increase costs, given that the total net operating expenditure and capital costs to incarcerate a person for one day is \$280.04.²¹ The Australian Productivity Commission Reports on Government Services consistently demonstrate that an increase in prisoner numbers coincides with an increase in the cost of managing offenders.
34. A comparative analysis of sentences before and after the introduction of SNPPs in NSW found that “*the length of the non-parole period and the full terms of sentence increased for these offences.*”²²
35. An earlier NSW briefing paper on parole highlights the broader economic advantages of parole, commenting that reducing recidivism will reduce the economic burden on the criminal justice system at all levels.²³
36. This is a finding that was echoed by the Sentencing Advisory Council,
- “Whatever scheme is introduced in Queensland, it is highly probable it will have cost implications across the criminal justice system, including due to some offenders spending longer periods in prison.”*²⁴
37. The costs of increased incarceration will detract from resources that could otherwise be spent on investment in rehabilitation services and effective crime prevention measures.

Sentencing Aims

38. Aside from community safety, this Bill has been justified to increase punishment and communicate the wrongness of the scheduled crimes.
39. Punitive sentencing has repeatedly proven to be ineffective in preventing and deterring crime, particularly where it involves simply increasing periods of incarceration.²⁵ Rather, increasing sentences of incarceration will increase the overall cost to the community of prisons and reduce available resources

²⁰ Page 7, Explanatory Notes to the *Law Reform Amendment Bill 2011*, Qld Parliament.

²¹ Table 8A.7, Report on Government Services 2011, Australian Productivity Commission.

²² P56 Judicial Commission of NSW, *The Impact of the Standard Non-Parole Period Sentencing Scheme on Sentencing Patterns in New South Wales* (2010, Research Monograph 33).

²³ Page 3, Simpson, R *Parole, an Overview*, Briefing Paper No 20/99, NSW Parliamentary Library Research Service 1999

²⁴ P90, Sentencing Advisory Council (Qld). *Minimum standard non-parole periods: final report*, Qld, 2011.

²⁵ Page 1, Submission on Sentencing of Child Sex offenders, Sisters Inside, 2011

which may be applied towards effective, evidence-based prevention initiatives.

40. Rather than simply increasing sentence lengths, effective alternatives to prison at the front and back end of a sentence should be sought with a rehabilitative focus. Examples of such alternatives include enhanced gradual release mechanisms, specialist courts and early intervention therapeutic programs.
41. Such alternatives will allow for targeted responses to the diverse and complex circumstances leading to the occurrence of these offences. In particular they will be able to target solutions to particular groups such as people with a mental illness, people with addiction issues, Aboriginal and Torres Strait Islander people, young people and women.
42. We urge that effective, evidence based solutions to crime prevention be explored as an alternative to increasing incarceration periods.

Evidence Based Alternatives

43. It is our opinion that lengthening the period of time spent on parole, or at the very least maintaining current lengths, would have a positive effect on community safety. In addition, barriers to accessing parole, particularly for Aboriginal and Torres Strait Islander people and people with a disability should be urgently addressed.
44. Parole is one of the only remaining mechanisms for gradual release since, over the last decade, the tools available to tailor gradual release programs to individual circumstances have been reduced. The gradual release tools that have been reduced or eliminated in Queensland over the last decade include:
 - additional classifications (40% decrease in classification options);
 - Reintegration leave;
 - Resettlement leave;
 - Home detention;
 - Weekend leave;
 - Remissions;
 - Education leave²⁶;
 - Leave to work outside the perimeter.
45. Furthermore, many of the remaining gradual release options have been restricted for certain categories of prisoners who fall within the current discussion, such as sex offenders who are not able to progress to low security facilities or work camps. For such people, the benefits of a lengthy

²⁶ Available through s 72 (1) (c) but anecdotal experience indicates that it is rarely utilised.

period of time on parole are especially important, as the effects of institutionalisation will be especially acute. If someone has spent many years in a high secure environment, parole allows them to practice and demonstrate a willingness and capacity to live a crime free life while still under the supervision and control of their sentence.

46. The benefits of parole and gradual release have been widely recognised by governments, including in Queensland as demonstrated by the following extracts:

*"The fundamental aim of parole is to provide the prisoner with an incentive for rehabilitation through the prospect of early release, and perceived benefits of parole stemming from this prospect include increased likelihood of reform of prisoners and better overall prisoner discipline. Other benefits of parole include easing the transition from prison to the community through supervision, which reduces the risk of recidivism (re-offending)."*²⁷

*"Gradual release is considered the best-practice mechanism to allow for rehabilitation of offenders and community safety,"*²⁸

47. Academic research also promotes the use of gradual release tools such as parole to enhance community safety:

*"The best way of assisting prisoners to reintegrate into the community is to release them gradually, providing them with less supervisions and less support over time so they may become progressively acquainted with community life."*²⁹

*"Parole boards are in a unique position to influence the post-release experiences of prisoners and although much attention has been devoted to their punitive function, parole boards are also well placed to proactively promote rehabilitation and integration, for example by setting conditions relating to programs that parolees must participate in post-release."*³⁰

48. Despite the positive role parole plays in release planning, there remain many barriers to parole in Queensland. The proportion of Aboriginal and Torres Strait Islander people on parole is regrettably low at 9.6% as compared to 24% of the prison population.³¹ People with a disability or low literacy also face barriers to parole because the only way to apply for parole is by way of a written application. In 1985 Sir David Longland recommended that Parole

²⁷ Page 1, Simpson, R *Parole. an Overview*. Briefing Paper No 20/99, NSW Parliamentary Library Research Service 1999

²⁸ Attorney-General and Minister for Justice the Honourable Kerry Shine, *Media Release*, 26 August 2008.

²⁹ Page 9, T. Walsh, *INCorrections Report*, QUT, 2004.

³⁰ Page 6, Kinner, S. *Post Release Experiences of Prisoners in Queensland: Implications for Community and Policy*, QUT, 2006.

³¹ Page 89 Cunneen, C et al, *Evaluation of the Queensland Aboriginal and Torres Strait Islander Justice Agreement*, Institute of Criminology, University of Sydney Law School, 2005.

Units be established within all prisons to overcome the problem of ignorance of the system by prisoners and enhance the quality of information provided to the Parole Board.³² For a period of time, community corrections officers visited the prisons and fulfilled this role.

49. Parole assistance is a task that sits awkwardly in the lap of corrective services as the Agency is responsible for impartially assessing the application. Prisoners are more likely to feel comfortable accurately disclosing their fears about release to community organisations than to prison officers. PLS has 1.5 funded workers to provide assistance state-wide to prisoners who need help with parole. With over 8000 prisoners released per year, this funding is insufficient to meet demand. More assistance is needed with the preparation of relapse prevention and reintegration plans to ensure viable parole plans that are successful in gaining release maintaining support and supervision in the community in order to stop further criminal acts.

50. Parole is an important stepping stone between prison and unsupervised life in the community. Its importance in a sentence should be emphasised to prisoners and the community. Parole is not freedom and usually comes with severe limitations on liberty for people who have been convicted of serious offences. Parole is tough, but it is vitally important to provide this challenge prior to unsupervised release.

51. Also contained within the Sentencing Advisory Council report is the recommendation that there should be an adequate level of investment in rehabilitation services.³³ In order to achieve adequate investment in rehabilitation, gradual release and throughcare, the increased costs associated with introducing SNPPs should be redirected towards proven crime prevention measures. At the rate of \$280.04 per person, per day, this amount would make a positive inroad to achieving community safety.

Conclusion

52. The impact of SNPPs is at best, unknown and at worst a threat to community safety. This is demonstrated by widespread and diverse criticism and evidence, an increase in costs and the viability of alternatives to ensure community safety. Queensland should not be blindly following in the footsteps of other jurisdictions without any demonstration of the effectiveness of SNPPs, especially considering the strong warnings of the Sentencing Advisory Council that SNPPs do not deliver transparency, reduce crime or improve community safety.

Thank you for this opportunity to comment in relation to these proposed changes.

³² Longland, 1985 Report.

³³ Page xxiii, Sentencing Advisory Council (Qld). Minimum standard non-parole periods: final report, Qld, 2011.