Queensland Law Society

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Office of the President

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Committee Secretary
Legal Affairs and Safety Committee
Parliament House
George Street
Brisbane Qld 4000

By email: lasc@parliament.qld.gov.au

Dear Committee Secretary

Police Powers and Responsibilities and Other Legislation Amendment Bill 2021

Thank you for the opportunity to provide feedback on the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021. The Queensland Law Society (**QLS**) appreciates being consulted on this important piece of legislation.

This response has been compiled with the assistance of the QLS Criminal Law Committee, Occupational Discipline Law Committee and Human Rights and Public Law Committee, whose members have substantial expertise in this area.

Amendments to the Police Powers and Responsibilities Act 2000

Court removal orders for sentenced or remanded prisoners to assist police

The Bill incorporates amendments to the *Police Powers and Responsibilities Act 2000* (Qld) ('**PPRA**') which will allow police to apply to a magistrate for a removal order to remove a sentenced or remanded prisoner from police custody to voluntarily provide information to assist the police.

Proposed section 411J deals with circumstances where the prisoner withdraws consent to help the police. In our view, section 411J(2) should be strengthened to not only require the police officer to return the person to the watch house as soon as practicable, but also to cease any and all questioning of the person about any matter for which the person was removed from custody to provide information or assistance pursuant to a police assistance order, immediately upon withdrawal of consent.

Banning notices for unlawful possession of a knife

The Bill also proposes to amend the PPRA to expand the scope of the existing banning notice regime in the PPRA so that it applies to a person who possesses a knife in contravention of

section 51 of the *Weapons Act* 1990 (Qld) ('**Weapons Act**') in a relevant public place, that being, licensed premises, a public place in a safe night precinct and a public place at which an event is being held and alcohol is being sold for consumption..

The proposed amendments will provide the police with the power to impose an initial ban of 10 days for a person who is in possession of a knife in contravention of the Weapons Act.[1].

QLS has previously expressed concerns about the operation of banning orders for a range of reasons. In particular, our members have raised concerns about the administration of police banning notices, which can have unintended and undue impacts. For example, members of the public subject to bans are unable to access service providers who operate in safe night precincts such as doctors and support workers. We have been advised of instances where clients have been charged for breaching notices when they were going into the area during the day for medical or other support purposes. Similarly, the banning notice may affect persons who have to travel through a stated area to get to work, attend school or for another legitimate purpose. Given that designated safe night precincts include a number of major CBDs including Brisbane CBD, we consider that expanding the scope of banning notices may unduly fetter the right to freedom of movement for affected persons.[2]

We also hold concerns about the use of banning notices in relation to homeless persons.

The banning order would apply to persons who possess a knife in contravention of the Weapons Act in a relevant public place.[3] There may be a reasonable excuse for possessing a knife that have not been considered at the time of issuing the banning notice. While there are options for review in section 602N of the PPRA, these may not be easily accessible to vulnerable persons including those persons who may have a defence with respect to the knife possession offence but may otherwise be sanctioned with a banning order

In our view, the existing banning order regime is already sufficiently broad to capture the types of behaviour targeted by the banning order scheme. According to the explanatory notes to the Safe Night Out Legislation Amendment Bill 2014 which introduced the scheme, the types of conduct which were originally targeted by these provisions are disorderly, offensive, threatening or violent behaviours that pose a risk to the safety of persons or disrupt the reasonable enjoyment of licensed premises, events and people within a Safe Night Precinct.[4] Section 602C(3)(a) already provides police with the power to issue an initial police banning notice where the respondent has behaved in a disorderly, offensive, threatening or violent way. In our view this provision already provides for banning orders to be issued for threatening or violent behaviours associated with knife possession in addition to any proceedings that may be commenced for the unlawful possession of a knife.

For these reasons, we do not support expanding the current banning regime as proposed.

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[1] Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 clause 38, new section 602C(3)(a) examples.

[2] *Human Rights Act 2019* (Qld) s 19; we note that this concern was raised by the Victorian Scrutiny of Acts and Regulations Committee. See Alert Digest No 14 of 2010 (5 October 2010) pages 12-15, available at: https://www.parliament.vic.gov.au/archive/sarc/Alert_Digests_10/Alert%20Digest%20No%2014%20of%202010.pdf

[3] Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 clause 34, new section 602C(3)(a) examples.

[4] 5 Explanatory Notes to the Safe Night Out Legislation Amendment Bill 2014, available at: https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2014-1827

Independently monitoring surveillance devices by police employees

Clauses 39 and 44 of the Bill propose to amend the PPRA and Police Powers and Responsibilities Regulation 2012 ('**PPRR**') to make it clear that a person, authorised by the senior officer to whom the warrant was issued, can use the monitoring equipment whether or not a police officer is present while the person is using the equipment..

The Bill amends section 14 of the PPRR to the effect that an authorised monitor may enter the premises whether or not a police officer is present while 'the person' is using the monitoring equipment. Authorised monitor means 'a person' authorised by the senior officer to whom the warrant was issued. While the Explanatory notes state that the Bill proposes to ensure that civilian QPS employees and contracted translators can monitor surveillance devices, the proposed amendments do not qualify who that 'person' may be (for example, by limiting it to QPS employees and/or contracted translators).

Given the significant privacy implications for the monitored person or persons (who may have no relationship to any alleged offending or criminal activity), in our view, there should be further safeguards around who can be permitted to enter premises used to monitor a person subject to a surveillance device warrant when a law enforcement officer is not present.

Amendments to the *Corrective Services Act 2006*

Parole decision-making for persons convicted of multiple murders or murder a child

The Bill introduces a new framework for parole decisions about life-sentenced prisoners convicted of multiple murders, the murder of a child or for a conviction of murder where another offence of murder is taken into account. Under the proposed framework, the President of the Parole Board Queensland (**'the Parole Board'**) will have the power to declare that a prisoner in this cohort must not be considered for parole for a period of up to ten years **('restricted prisoner declarations')**.[5]

The Bill also introduces a new presumption against parole as well as a higher threshold for exceptional circumstances parole for this prisoner cohort.

QLS acknowledges the devastating impacts of these types of offences on communities. We support proportionate legal responses to serious offending, and appropriate legal responses that respect fundamental principles of necessity, legality and proportionality.

However, the effect of the proposed amendments is that prisoners may be subject to rolling consecutive periods of up to 10 years additional imprisonment without parole, potentially providing for conditions of indefinite imprisonment of a prisoner who has not committed any further offence. Vesting such powers in the President of the Parole Board is particularly problematic as it stands contrary to fundamental rights to have criminal charges or proceedings decided by an open and transparent court or tribunal. We note that if the President of the Parole Board makes a restricted prisoner declaration, the declaration must state the reasons for the decision. However, the Parole Board is not required to publish their decisions which undermines public accountability in circumstances where applicants for parole are not entitled to legal representation nor oral hearings.

We note that there may be scope for the publication of such decisions in light of proposed section 235A which seeks to insert a new power to prescribe parole decisions that must be

[5] Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 clause 7, new section 175D.

published on the Board's website, although the classes of decisions that will be prescribed by the regulations is unclear. We outline additional considerations regarding the publication of certain parole decisions below.

Whilst we do not believe that any sufficient justification for the proposal has been made out, if it is determined that there is a need to implement restricted prisoner declarations, we submit that these powers should only be vested in a court. This would ensure that such decisions with serious implications for individual liberty are made in a way that ensures transparency and procedural fairness.

Given the significant consequences of the restricted prisoner declaration on a prisoner's liberty, we consider that the lack of legal representation available to these prisoners raises significant access to justice issues. In our view, legal representation should be afforded as of right to prisoners who are subject to decision-making about a restricted prisoner declaration. We note that many prisoners who are the subject of these declarations would not be in a position to privately fund legal representation and Legal Aid funding would not typically be available for such decisions. As such, if restricted prisoner declarations are introduced, the scheme should be accompanied by additional funding to Legal Aid to specifically ensure legal representation is available to prisoners subject to these decision-making processes.

Retrospective application

We are also concerned that the amendments will have a retrospective application. Laws that create offences or change legal rights and obligations with retrospective application undermine the rule of law and significantly disadvantage those affected by the legislation.

Murder currently carries a mandatory minimum non-parole period of 20 years, which is extended to 30 years for a person sentenced for more than one murder or a person with a previous conviction for murder.[6] A sentencing court can increase, but not decrease, this minimum non-parole period.[7] Vesting the President of the Parole Board with the power to refuse parole for a further 10 years after a person's parole eligibility date passes contravenes the principle in the *Human Rights Act 2019* (Qld) section 35(2) that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.[8] QLS has long advocated that a strong argument is required to justify the adverse effect of laws that change legal rights and obligations retrospectively.

In our view, there are already substantial powers within the Criminal Code Act 1899 (Qld) (**'Criminal Code'**), the *Penalties and Sentences Act 1992* (Qld) and the *Corrective Services Act 2006* (Qld) to appropriately respond to these prisoners on a case by case basis. As noted

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[6] Criminal Code s 305(2) and Corrective Services Act 2006 9 Qld) s 181(2)(a).
[7] PSA s 160C and 160D(3); Criminal Code s 305(2) and 305(4).
[8] We note that the Victorian Scrutiny of Acts and Regulations Committee had similar reservations with respect to amendments to the Victorian No body, no parole scheme, which provided for a denial of parole to prisoners serving a prison sentence for murder or conspiracy to murder who fail to assist authorities to locate the remains of their victims. The Committee considered that to the extent that the amendments applied to prisoners who were sentenced for a murder prior to its commencement, the amendment may engage the Victorian Charter of Human Rights and Responsibilities Act 20016, particularly the right against double jeopardy and retrospective punishment by effectively converting a sentence with a parole period to one without a parole period. See Alert Digest No 3 of 2016 (8 March 2016) page 3. Available at: https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert_Digests/Alert_Digest_No_3_of_2016.pdf

above, such offenders are already subject to mandatory life sentences with minimum non-parole periods of 20-30 years, which can be extended if considered appropriate by a sentencing court. Further, the Parole Board is not bound by a sentencing court's recommendation or parole eligibility date if the board receives information about the prisoner that was not before the court at the time of sentencing and thereafter considers that the prisoner should not be released on parole at the time recommended or fixed by the court.[9] These provisions already ensure that prisoners convicted of serious offences will not be released unless the Parole Board is satisfied that the prisoner is suitable for parole when determining whether to grant the parole order.

Drafting

Finally, we hold reservations about the proposed drafting of the new provisions.

In particular, we note that section 175H(2)(c) requires the President of the Parole Board to consider the *likely effect* of the prisoner's release on an eligible person or a victim. We consider that this section may be unduly prejudicial to the prisoner. Release of a prisoner on parole will have the likely consequence of causing distress to victims and eligible persons, and it is unclear from the drafting whether causing distress to an affected person is a sufficient basis to refuse parole nor whether this is a necessary consideration to determine parole. In our view, the provision is drafted in broad terms and does not reflect the purposes of parole; including to reduce the risks of reoffending and to manage serious offenders more intensely.[10]

Further, there does not appear to be any requirement or right under the proposed section 175G for the prisoner to be given a copy of the 'restricted prisoner report' prior to commencement of the 21 day timeframe to respond to the notice. In our view, the prisoner should be entitled to a copy of the report, so that they know the reasons upon which the declaration is being proposed before they provide a written submission and relevant material. Given the consequences for the prisoner of such a declaration, these decisions should be made with complete transparency and afford affected prisoners with sufficient time to consider the report and seek legal assistance. The same applies to the 'no-cooperation declaration' with respect to no body-no parole prisoners and the commissioner's report under section 175M.

Finally, proposed section 175J(2) does not include an express requirement for reasons of the decision to be given, only notice. If reasons are not required to be given, we consider that there should be an ability for the prisoner to request written reasons.

Presumptions against parole

The Bill proposes to introduce a new section 176A into the CSA. The provision creates a presumption against parole for prisoners subject to a restricted prisoner declaration unless the Board is satisfied that the prisoner, as a result of a diagnosed disease, illness or medical condition is in imminent danger of dying and not physically able to cause harm to another person or is incapacitated to the extent that they are unable to cause harm to another person. The Board must also be satisfied that the prisoner has demonstrated that they do not pose an unacceptable risk of harm to the public and the parole order is justified in the circumstances. This significantly increases the threshold of exceptional circumstances parole for this particular cohort.

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[9] See e.g. Corrective Services Act s 192.
[10] See Queensland Parole System Review Final Report November 2016 (premiers.qld.qov.au) from page 37.

Further, the proposed new section 193AA(5) creates a presumption against parole in circumstances where a restricted prisoner declaration is *not* in force with respect to that prisoner, that is that the Board starts from the basis that it must refuse a prisoner's parole application. In our view, prisoners who are not subject to a restricted prisoner declaration should not be subject to such a presumption.

The purpose of parole is to allow an offender to serve an appropriate portion of their sentence in the community in order to successfully and safely reintegrate the prisoner into the community and minimise the likelihood of an offender reoffending. In our view, the presumptions against parole contained in the proposed sections 176A and 193AA(5) undermine this purpose.

Extension of time to not consider a further application for parole for a life sentenced prisoner

The Bill proposes to amend section 193 of the CSA to extend the period of time within which the Board may decide not to consider a further application for parole made by a life sentenced prisoner (following a refusal of their application), from 12 months to no more than 3 years.

We reiterate our concerns stated above that such measures undermine the purposes of parole to facilitate the safe reintegration of a prisoner into the community. We consider that there has not been sufficient justification advanced to support such a substantial change.

Amendments to the No Body No Parole scheme

The Bill provides a new discretion for the Parole Board to consider a prisoner's cooperation at any time after sentencing. The amendments include a new definition of 'victim's location' in clause 7 of the Bill. The definition provides, *inter alia,* that 'victim's location' means the 'location, or the last known location, of every part of the body or remains of the victim of the offence'. Consideration should be given to clarifying this definition to stipulate whose knowledge of the last known location the definition is intended to cover. For example, the definition should clarify whether it refers to the last location as known by the prisoner, or whether it has a broader operation.

While we understand that this Bill does not seek to make significant amendment to the No Body No Parole scheme, QLS still holds serious concerns about the scheme which were set out in our submission to the Legal Affairs and Community Safety Committee on the Corrective Services (No Body, No Parole) Amendment Bill 2017.[11]

Temporary extension of parole consideration timeframes

The Bill provides for the temporary extension of parole consideration timeframes under section 193(6) for a period of six months. The extension will provide an additional 60 days from

[11] See: https://documents.parliament.qld.gov.au/com/LACSC-4B8C/CSNBNPAB20-3BB9/submissions/00000001.pdf . We further note that to the extent it applies to prisoners serving a life sentence, the No Body, No Parole scheme may also engage the prohibition on torture and cruel, inhuman or degrading treatment in the Human Rights Act 2019 (Qld) section 17. The effect of the scheme is that prisoners serving a life sentence of murder who did not cooperate sufficiently in their investigation to identify the location of the victim's remains cannot be released on parole. In 2013, the European Court of Human Rights held that there is clear support in European and international law for the principle that all prisoners, including those serving life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved (*Vinter v UK* [2013] ECHR 645, [114].).
See Victorian Scrutiny of Acts and Regulations Committee, Alert Digest No 3 of 2016 (8 March 2016) at: https://www.parliament.vic.gov.au/images/stories/committees/sarc/Alert Digests/Alert Digest No 3 of 2016.pdf

receipt of a parole application for the Board to make a decision with commencement of the temporary extended timeframes to commence by proclamation.

The extended timeframes will also have retrospective application as prisoners who have applied for parole before the commencement of these amendments will be subject to the new temporary timeframes. That is, existing parole applications must be decided within the following periods after the application was received by the board:

(a) for a decision deferred under section 193(2) – 210 days (where it is currently 150 days); and

(b) otherwise – 180 days (where it is currently 120 days).

The temporary provisions are inconsistent with the recommendations of the 2016 Queensland Parole System review report[12] which noted that the statutory timeframes allowed for the making of a decision as to a grant of parole (at that time) were too long. The review recommended that the Parole Board should be required to decide applications for parole within 120 days of the application being made.

Whilst we acknowledge that the timeframes are intended to be extended temporarily, in our view, the proposal coupled with existing delays in parole applications and suspensions will mean that more prisoners will be held in custody for longer than they should otherwise. QLS has previously made submissions about the impact on human rights and the wellbeing of prisoners and the community which arise from failures to meet the existing statutory timeframes in the CSA.

We note that KMPG was engaged to conduct an independent review of the Board and that steps have been taken to reduce the current backlog of parole applications past their eligibility date, including the establishment of an additional team to increase the Board's capacity. QLS considers that the proposed amendments are premature without stakeholder consultation on the outcome of the KPMG review. In this regard, we would welcome the opportunity to consider a copy of the report.

QLS has previously made a number of recommendations including proper resourcing to ensure that the Parole Board can make decisions within the statutory time frame. We remain of the view that ongoing delays undermine the benefits of parole in providing prisoners with a supported transition back into the community with implications not only for the wellbeing and safety of the person in prison, but also their family and the broader community and are concerned that the amendments will do little to address the systemic issues which are contributing to parole delays.

Publication of prescribed parole decisions

As noted earlier in our submission, the Bill provides a new power for a regulation to prescribe certain parole decisions that must be made public. QLS supports the amendment to the extent that it will facilitate transparency and public accountability of Parole Board decisions.

We note, however, that the purpose of parole is to support the reintegration of a prisoner into the community. Accordingly, provision should be made so that published decisions remove identifying particulars. This will ensure that information that may undermine the prisoner's ability

[12] Recommendation 51, available at https://parolereview.premiers.qld.gov.au/assets/queensland-parole-system-review-final-report.pdf.

to reintegrate and sensitive information, including for example medical information, is not widely accessible. Prisoners who are to be released on parole should also have the opportunity to request that certain aspects of a decision might be redacted in appropriate circumstances. A protocol around the publication of parole decisions may be of assistance to support consistency in decision-making in this regard.

Amendments to the *Police Services Administration Act 1990*

The Bill proposes to create a new indictable offence (section 10.21 BA) in the *Police Services Administration Act 1990 (Qld)* (**'PSA'**) for wilfully and unlawfully killing or seriously injuring a police dog or horse. The new offence would be punishable by a maximum penalty of 5 years' imprisonment.

In our view, there is already sufficient provision in the existing law to capture such behaviour in Queensland. We note that section 10.21B of the PSA already provides an offence for killing or injuring police dogs and police horses, which carries a maximum penalty of 40 penalty units or two years' imprisonment. Where the offending behaviour is serious enough to warrant a higher penalty, section 242 of the Criminal Code provides for the offence of serious animal cruelty, which proscribes unlawfully killing or causing serious injury or prolonged suffering to an animal with the intention of inflicting severe pain or suffering. Section 242 carries a maximum penalty of 7 years' imprisonment.

We consider that these offences adequately address circumstances in which a police animal is injured or killed.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) .

Yours faithfully

Elizabeth Shearer
President