



Police Powers and Responsibilities and Other Legislation Amendment Bill 2021

Submission to Legal Affairs and Safety Committee

Queensland Parliament

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Introduction

1. Thank you for the opportunity to make a submission to the Committee's consideration of the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (the Bill).
2. The Queensland Human Rights Commission (the Commission) has functions under the *Anti-Discrimination Act 1991* and the *Human Rights Act 2019* to promote understanding, acceptance and discussion of human rights in Queensland, and to provide information and education about human rights.

Summary of this submission

3. In summary, this submission contends that further justification is necessary to assess the compatibility with human rights arising from the significant limitations on rights contained in the Bill. The Commission supports any effective measures to make our community safer and better protect the rights of victims. The Commission agrees that the right to security for victims is a critical consideration in the criminal justice system. However, the rights of prisoners and victims are not always mutually exclusive, and victims and the broader community will benefit from an effective corrections system that releases rehabilitated prisoners back into the community at the appropriate time.
4. The Victorian Law Reform Commission's 2016 Report, *The Role of Victims of Crime in the Criminal Trial Process* noted that the state's control of all elements of the criminal process has resulted in a focus on how to address the power imbalance and 'equality of arms' with the accused. This focus has eclipsed the recognition of the victim's inherent interest in the response by the criminal justice system to the crime. The report notes that the Victorian *Charter of Rights and Responsibilities Act 2006*, substantially similar to the HRA, reinforces several rights of the accused relevant to receiving a fair trial. This however does not prevent the interests of the victim being considered:

The legitimate rights of the accused should be protected and fulfilled. So too the rights of the community. The legitimate rights of victims, properly understood, do not undermine those of the accused or of the community. The true interrelationship of the three is complementary. There is a public interest in ensuring that trials are fair. This interest can be served not only by safeguarding the rights of the accused and the objectivity of the prosecution but also by acknowledging the victim's interest.¹

5. With this mind, we suggest that further justification is needed to ensure these amendments will achieve their goals of not re-traumatising victims and improved community safety in a human rights compatible way:

¹ Victorian Law Reform Commission, *The Role of Victims of Crime in the Criminal Trial Process* (Report, August 2016), 29.

- The proposed power of the President of the Parole Board to delay parole applications for life sentenced multiple murder or child murderers indefinitely (for up to 10 years at a time);
 - Changes to the no body, no parole framework that could result in prisoners being detained indefinitely without parole reviews;
 - A lack of explanation as to why some changes cannot be determined by the Parole Board after a usual hearing;
 - The proposed new power for the Parole Board to extend the period between parole applications for life prisoners from 12 months to 3 years, including why the Bill does not include criteria for when and how this power should be exercised;
 - Temporary extension of the statutory timeframe for the Parole Board to make decisions;
 - Amendments to broaden who may be permitted to monitor surveillance devices without police supervision.
6. The Commission's feedback on the Bill is primarily concerned with whether it may limit human rights, and if any limitation is compatible with human rights under sections 8 and 13 of the *Human Rights Act 2019* (HRA). Key considerations under these provisions include the importance of the purpose of a limitation and if the proposed limitation is the least restrictive way of achieving that purpose.

Changes to parole

7. The Bill makes a range of changes to the Queensland parole system via amendments to the *Corrective Services Act 2006* (CSA), including to extend the potential time between parole applications and to encourage prisoners to co-operate to locate a homicide victim's remains.
8. A frequently cited purpose of these changes is community safety. That is an important purpose consistent with the right to life and right to security of all members of our community. However, the changes delay (in some cases indefinitely) the ability for a prisoner to apply for parole. The safety of the community is already a key consideration in the assessment of whether an individual prisoner will be released on parole, and is arguably already safeguarded through that process. Parole also provides an incentive for rehabilitation and a process to facilitate reintegration into the community. Removing that incentive and process risks undermining community safety. The Commission questions if delaying the assessment adds any further 'protection' compared with the individualised parole application process. If there is some failure to properly consider community safety in that process, then the Bill should seek to correct that, rather than delaying the application completely.
9. The Parole Board's submission to the Queensland Productivity Commission (QPC) *Inquiry into Imprisonment and Recidivism* noted:

- At that time, a 27% increase in receipt of parole applications since establishment;
- Increasingly complex work in having to apply no body, no parole legislation and links to terrorism legislation;
- A shortage of suitable accommodation for prisoners leaving custody.
- Inadequate re-entry and through-care support which contributes to recidivism;
- That the Board recommended a system of internal review of parole decisions with recourse to Supreme Court for merits review.²

10. In its submission to the same review, the Anti-Discrimination Commission Queensland (the predecessor to the Commission) noted that Queensland prisons are overcrowded and that the government should move to a justice reinvestment focus, including improving the ability of prisoners to be released on parole.

11. In its final report dated August 2019, the QPC concluded ‘Queensland prisons are overcrowded – across all prisons, capacity is currently at 130 per cent.’ Despite new cell capacity planned by 2023, the QPC stated that ‘without further investments or changes to policy, prisons are likely to remain significantly overcrowded.’³ Further, that ‘overcrowding of prison facilities increases the costs of the system and undermines the ability of the corrections system to rehabilitate offenders, making the community less safe over the longer term.’⁴ Since 2000, the most significant legislated change to impact on prison numbers was the move to court-ordered parole in 2006.⁵

Increased investment in the corrections system, including the prison system, may not be the best solution to addressing overcrowding in state prisons. It is possible that measures in other parts of the criminal justice system, or even outside the criminal justice system, would constitute more effective and efficient responses to prison overcrowding. However, current decision-making processes, operating in the context of a criminal justice system populated with distinct and siloed agencies, make it difficult to effectively explore these options.⁶

12. The QPC’s recommendations also included:

- Increased expenditure on community supervision and support for prisoners on parole, including housing (Rec 23 - 25)
- The Queensland Government should provide clearer directions on how to manage technical breaches of parole, consistent with objectives in relation to reintegration and rehabilitation. (Rec 27).

² Parole Board Queensland Submission, *Queensland Productivity Commission: Inquiry into Imprisonment and Recidivism* (Report, 27 April 2019)

³ Queensland Productivity Commission, *Final Report: Inquiry into Imprisonment and Recidivism* (Report, August 2019) xxi.

⁴ *Ibid*, 106

⁵ *Ibid*, 44.

⁶ *Ibid*, 108.

13. The Government response to the report indicated that it 'is committed to implementing a whole of system approach to criminal justice system reform that brings agencies together to drive the necessary changes in policies and practices.'
14. The Commission suggests those issues and recommendations should be considered along with these proposals. Indeed, some of these proposals appear contrary to the findings of the QPC report and the government response to it.
15. The Commission understands that KPMG was recently engaged to conduct an independent review of the Parole Board. The Commission suggests the KPMG report should be released publicly to aid assessment as to whether these amendments are appropriate.

New parole framework for life sentenced multiple murder or child murderers

16. As the statement of compatibility notes, the *Penalties and Sentences Act 1992* provides that the penalty for the offence of murder is either imprisonment for life or an indefinite sentence. This penalty cannot be varied or mitigated, and an offender receiving a life sentence will be under the supervision of Queensland Corrective Services (QCS) for the remainder of their life, during their time in prison, or if they are granted release on parole.
17. The Bill introduces a new framework for parole decisions about life-sentenced prisoners convicted of multiple murders or the murder of a child. Under this framework, the President of the Parole Board will have the power to declare that a prisoner in this cohort is a 'restricted prisoner' and must not be considered for parole for a period of up to ten years. The criteria for declaring a prisoner to be a restricted prisoner under proposed s 175H is:
 - the offence, or each offence, which the restricted prisoner was sentenced to imprisonment for;
 - any risk the prisoner may pose to the public if the prisoner is granted parole;
 - the likely effect that the prisoner's release on parole may have on an eligible person or a victim;
 - the restricted prisoner report about the prisoner provided by QCS;
 - any submission from an eligible person or the prisoner; and
 - any relevant remarks made by a court that sentenced the prisoner.
18. The President will consider declaring a prisoner restricted when:
 - A report is received from the chief executive of QCS, apparently made on their own motion at any time (s 175F); or
 - When a relevant prisoner applies for parole (s 193AA).
19. This would suggest that the President could consider such a declaration regardless of how the prisoner has behaved in prison. There is no apparent prompt for why QCS would put the issue of restriction before the Board.

20. The effect of such a declaration is that:
- A restricted prisoner may not be considered for parole for up to 10 years;
 - A presumption against parole for the prisoner's release on exceptional circumstances parole other than in very limited circumstances (e.g. imminent danger of dying or significant incapacitation).⁷
21. Where a restricted prisoner declaration is not in force, the Board must refuse to grant a restricted prisoner's parole application unless it is satisfied the prisoner does not pose an acceptable risk to the community.
22. The statement of compatibility acknowledges that these changes engage several rights including:
- the right to protection from torture and cruel, inhuman or degrading treatment (section 17(a) and (b) of the HRA);
 - the right to liberty and security of person, in particular the right not to be detained arbitrarily (section 29);
 - the right to humane treatment when deprived of liberty (section 30),
 - the right to a fair hearing (section 31);
 - rights in criminal proceedings, in particular, the protection from self-incrimination (section 32(2)(k));
 - the right not to be punished more than once (section 34); and
 - right not to receive increased penalty (section 35(2)).

Are rights limited?

23. The Commission has identified limited case law from other human rights jurisdictions which considers similar changes to those proposed, some of which is cited in the statement of compatibility.⁸
24. Some general principles may be gleaned from the European Court of Human Rights, United Kingdom, and New Zealand when considering delays in granting parole and/or indeterminate sentences. It should be noted that some of these cases considered life sentences with no prospect of parole at all:⁹
- The overall sentence of the court essentially renders the detention lawful and it will not be arbitrary provided there are continuing and appropriate public safety assessments (by the Parole Board);
 - This includes that prisoners have the possibility of review and a sufficient prospect of release. Review of a sentence is necessary because the grounds for detention (punishment, deterrence, public protection and rehabilitation) may change in relevance during lengthy imprisonment;

⁷ Proposed sections 176A and 175I

⁸ It appears only Western Australia has introduced a similar model: Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 29 September 2021, 4 (Chief Supt Humphreys)

⁹ *Vinter and Others v United Kingdom* Applications Nos 66069/09, 130/10 and 3896/10. *Miller and Another v New Zealand Parole Board and Another* [2010] NZCA 600. *Hall and Another v Parole Board of England and Wales* [2015] EWHC 252.

- Detention in such circumstances will be arbitrary (and therefore unlawful) if there is no longer a causal link between the detention and the objectives of the sentence, which is the safety of the community;
 - Parole boards should operate according to the rules of natural justice and this includes scope for judicial review of determinations; and
 - The state must offer programs of treatment and rehabilitation, and the failure to do so or a delay in doing so may make continued detention arbitrary.
25. For the protection from cruel, inhuman or degrading treatment under s 17(b) of the HRA, it suggests this right is not limited as the possibility of review is retained.
26. In relation to the right not to be punished more than once in s 34 of the HRA, the statement of compatibility cites the Canadian Supreme Court decision of *Canada (Attorney-General) v Whaling* [2014] 1 SCR 392. The statement suggests this case demonstrates ‘an extension of a period of parole ineligibility, when an offender’s individual circumstances are considered and with procedural safeguards in place, may not amount to “punishment” for the purposes of the right not to be punished more than once’. It is perhaps relevant to consider the facts and outcome of that case. The case was brought by first-time, non-violent prisoners affected by a retrospective change that abolished a simplified, accelerated parole review. This resulted in them having to wait longer to become eligible for parole. The prisoners challenged the law on the basis it breached the right not to be punished again for an offence.
27. The Supreme Court noted that the protection against double jeopardy may be triggered by criminal, quasi-criminal and non-criminal proceedings that result in a sanction with true penal consequences.¹⁰ Retrospective changes to the parole system that affect a prisoner’s expectation of liberty to such an extent may amount to new punishment, while others that have a more limited impact will not trigger the protection.¹¹ Generally speaking, the court suggested that indicators of lower impact changes less likely to constitute double punishment would include a process in which an individualised decision-making focussed on the offender’s circumstances continues to prevail and procedural rights continue to be guaranteed.¹² While the protection against being punished again in s 11(h) of the Charter was

...not directly concerned with procedural safeguards, the presence or absence of such safeguards is relevant in considering the likelihood of the punishment’s severity being increased. As I mentioned above, the dominant consideration will be the extent to which the offender’s settled expectation of liberty has been thwarted. A change that directly results in an extension of the period of incarceration without regard to the offender’s individual circumstances and without procedural safeguards in the assessment process will clearly violate s. 11(h).¹³

¹⁰ *Canada (Attorney-General) v Whaling* [2014] 1 SCR 392, 411 [44] (Wagner J for the court)

¹¹ *Ibid*, 418-19 [59] to [60]

¹² *Ibid*, 420-21 [63]

¹³ *Ibid*

28. The court was concerned about some comments made during the parliamentary debate that were suggestive of ‘unconstitutional purposes’ being denunciation, deterrence and punishment.¹⁴ However, it ultimately accepted that the purpose of the reform was rehabilitation, reintegration, public safety and confidence in the administration of justice, and that the retrospective application was to apply the same rules to all offenders. The government had a legitimate concern to ensure uniformity of parole administration and maintain confidence in the justice system.¹⁵ Nonetheless, while the intent of the policy may not have been punitive, in effect it was punishment applied retrospectively. It had the effect of thwarting some offenders’ settled expectation of liberty by automatically lengthening their period of incarceration.¹⁶
29. The court found the government did not discharge its burden of proving there was no less intrusive alternative to retrospective application. Having the repeal apply only prospectively was an alternative means available that would have still attained the objectives of reforming parole administration and maintaining confidence in the justice system without violating the rights of offenders who had already been sentenced.¹⁷
30. Based on the reasoning of the Canadian Supreme Court the Commission suggests the right not to be punished more than once in s 34 of the HRA is engaged by this proposed amendment.

Are limitations on rights reasonable?

31. The purpose of these changes is ‘to protect victims’ families, friends and the broader community from further trauma caused by restricted prisoners being considered for parole at ongoing short intervals. This purpose ultimately serves to protect and promote the human rights of victims and the broader community.’¹⁸ The Commission agrees that victims have a right to ‘physical and psychological integrity’ as an aspect of the right to privacy in section 25(a) as well as a right to security of the person in s 29 of the HRA. The protection of these rights are important purposes.
32. However, while the system introduced by the Bill has some of the positive features identified by the court in *Whaling* such as individualised assessment and procedural safeguards, it has a different purpose. The Bill does not seek to apply a uniform set of rules in the furtherance of the administrative of justice and to promote rehabilitation. It seeks to apply different criteria to a cohort of prisoners for the purpose of not re-traumatising victims.
33. The statement of compatibility acknowledges that other rights are limited by the changes including the right to liberty, and humane treatment while deprived of

¹⁴ Ibid, 422-23 [66] – [68]

¹⁵ Ibid, 427-28 [78]

¹⁶ Ibid, 419 [60]

¹⁷ Ibid, 428-29 [80]

¹⁸ Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld) 25.

liberty. These limitations are justified on the basis that there is a rational connection to the purpose and that several safeguards have been incorporated

34. As already noted, the proposed exceptional circumstances parole test is very narrow for a restricted prisoner. The Commission is also concerned that a failure to regularly consider a prisoner's access to rehabilitation and assess their risk to community safety, for as long as 10 years (or many more if there are consecutive declarations), may at some point mean their detention becomes arbitrary. The statement of compatibility acknowledges that 'a prisoner may even suffer a sense of hopelessness that they cannot be released for a period of up to 10 years even if they rehabilitate themselves in that time.'¹⁹ This is particularly so when currently there are well documented delays in the work of the Parole Board.
35. The Commission agrees that the rights of victims are a significant factor to be considered in the parole process. However, under the CSA and associated ministerial guidelines, the Parole Board must essentially weigh up the importance of community safety and the prevention of crime already.²⁰ This will include the consideration of the rights of the community and victims (including rights to life (s 16) and security (s 29)) against the applicant's rights. The justification for this proposal must therefore include why this existing balancing exercise is not adequate to achieve the stated purpose of not re-traumatising victims. The statement of compatibility acknowledges that 'it may be argued that the framework is not rationally connected' to the purpose 'because the Board already considers the risk to the community in parole applications', however:

An additional barrier provides additional protection to the community.²¹

36. The Commission submits this assertion is insufficient justification for the limitation.
37. Further, there is no discussion in the accompanying material as to why this purpose is not already satisfied by the earlier assessment by a court of a no parole date (or otherwise under s 183(2) of the CSA). It would seem particularly relevant that the sentencing court may have considered a victim impact statement in sentencing. In *Whaling*, the Canadian Supreme Court noted that 'the fact that parole eligibility can be imposed in the sentencing process confirms my view that restrictively imposing delayed parole eligibility on offenders who have already been sentenced constituted punishment'.²²
38. Also, while less restrictive options are considered in the statement of compatibility, these do not include options such as:
- Rather than the President, the Parole Board at the conclusion of a normal assessment of parole, could determine an appropriate period to delay the next application. This could be on the same or modified criteria to that

¹⁹ Ibid, 27.

²⁰ Based in particular on the Queensland Parole Board, *Decision Making Manual* <<https://www.pbg.qld.gov.au/wp-content/uploads/2020/06/Parole-Board-Queensland-Decision-Making-Manual.pdf>> 22-23.

²¹ Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld), 26.

²² *Canada (Attorney-General) v Whaling* [2014] 1 SCR 392, 420 [62]

proposed to be considered by the President, perhaps particularly focussed on the impact on victims of frequent applications, the likelihood of risk of harm to the community and the extent of the prisoner's rehabilitation to date;

- The removal of the presumptions against parole, currently included in proposed sections 176A and 193AA(5). The justification for these in the statement of compatibility includes these being the only reasonable available options to 'protect the community'. However, that justification does not appear to consider that these presumptions are being introduced in the context of the Bill which places other restrictions and delays on parole.

39. Overall, the Commission is concerned that insufficient justification has been provided for the proposed changes. While the circumstances of this Bill may be different from those arising in *Whaling*, at a minimum, the Commission suggests further justification is necessary to demonstrate why this change cannot apply prospectively as suggested by the court in that case. As noted during the public briefing, these changes would affect 72 prisoners at present.²³

Further restrictions on 'no body, no parole' prisoners

40. The Bill amends the No Body, No Parole (NBNP) framework so that the Board may consider a 'no body, no parole' prisoner's cooperation at any time after sentencing, rather than waiting for a parole application. The Board may make a no cooperation declaration, the effect being that the prisoner may not apply for parole during the period stated in the declaration. For a prisoner serving a life sentence, this means they may never be released from prison.
41. The statement of compatibility acknowledges that these changes engage the rights in sections 17, 29, 30 and s 32(2)(k) in the HRA.
42. The purpose of the Bill is to support the original intention of the NBNP policy, which is to alleviate the distress to victims' families experienced where the victim's body or remains are not located. The statement asserts that this 'situation is an affront to basic human values surrounding the dignified disposal of a deceased person's remains and robs families of their opportunity to honour and properly grieve their deceased loved ones. Long after the offence has been committed, and the offender brought to justice, this situation acts as a continued source of trauma for the victim's family.'²⁴
43. The NBNP policy addresses this indignity by making parole release for homicide prisoners contingent upon the prisoner providing satisfactory co-operation in locating the victim's remains. It serves the dual purposes of reducing trauma for a victim's family and incentivising prisoners to cooperate in locating a victim's remains. It sends a tough message that prisoners who choose not to cooperate should not be able to access the privilege of parole. It may also promote the cultural rights of deceased victims' families protected in sections 27 and 28 of the

²³ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 29 September 2021, 4 (Chief Supt Humphreys)

²⁴ Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld) 33.

HRA by allowing victim remains to be appropriately laid to rest. The Commission agrees these are significant and important purposes.

44. The statement of compatibility notes that since commencing in 2017, the NBNP policy has been applied and finalised in relation to nine prisoners, as at 31 July 2021. In five finalised matters, the Board determined the prisoner had cooperated satisfactorily in the investigation of the offence. This is despite the victim's remains in these matters not being located. This information is cited as apparent evidence for the success of the scheme. It is not however clear why, in light of these outcomes, the current policy must be strengthened.
45. The Victorian Parliament's Scrutiny of Acts and Regulations Committee (SARC) previously considered similar legislation.²⁵ In its report, SARC appeared to reach some different conclusions compared to those set out in the statement of compatibility for this Bill regarding limitations on rights.

Right to liberty and security and humane treatment in detention

46. The SARC agreed with the assessment in the statement of compatibility accompanying the Victorian Bill, that by not changing the head sentence imposed by the court, the limitation on the right to liberty was likely reasonable. Nonetheless, the Committee expressed concerns about a prisoner being indefinitely denied parole:

...because clause 4 applies even in the event that a convicted murderer continues to deny his or her guilt for the offence, it may render any such person (including a wrongly convicted person) permanently ineligible for parole.²⁶

47. The statement of compatibility for this Bill acknowledges that the effect of the NBNP policy is that the prisoner may never be released from prison if they do not provide cooperation, even where the prisoner has taken other steps towards rehabilitation. It is accepted this limits section 30(1) by imposing additional constraints on their prospect of parole release not experienced by other prisoners. It is also accepted that this engages the right to liberty in section 29 by raising the question of whether this refusal of parole is arbitrary.
48. This is justified on the basis that 'it must be remembered that prisoners do not have a human right to be released from prison regardless of the risk they present to the community'.²⁷ Further that, 'cooperation has always been linked to parole suitability because it forms part of a prisoner's rehabilitation' and that because the impact on the right not to be detained arbitrarily is not disproportionate, the impact is therefore not arbitrary'.
49. The Commission is concerned that this assertion does not properly acknowledge the right for a prisoner not to be indefinitely detained without adequate and regular reviews. This is particularly important for prisoners who continue to argue they

²⁵ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 3 of 2016, 8 March 2016) 1-4. See also the Statement of Compatibility, Corrections Amendment (No body, no parole) Bill 2016 (Vic).

²⁶ *Ibid*, 2.

²⁷ Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld) 35.

have been wrongly convicted. Further, the change would not make cooperation one of several factors considered, but rather it is proposed to be the dominant factor in considering if a prisoner has the opportunity to even seek parole.

Cruel, inhuman and degrading treatment

50. The statement argues that the protection from cruel, inhuman and degrading treatment is not limited by the amendments as the proposed changes ‘keep open the possibility for the prisoner to seek review’.
51. The SARC also suggested that the right against cruel, inhuman and degrading punishment may be limited, citing some of the comparative case law identified above, because:

the effect of clause 4 is that prisoners serving a life sentence for murder who did not cooperate sufficiently in their investigation to identify the location of the victim’s remains cannot be released in any circumstances. In 2013, the European Court of Human Rights held that ‘there is... now 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’

52. Relevantly, clause 193A of the Bill similarly states that ‘if a no cooperation declaration is in force for the prisoner, the board must refuse the application’. Therefore, the Commission suggests that the right in s 17 is limited by the proposal and should be justified further.

Self-incrimination

53. The statement of compatibility for the Bill states that as ‘NBNP is predicated on a previous finding of the prisoner’s guilt of a homicide offence. Further, the prisoner is not required to provide any information, and may choose to continue not cooperating. For these reasons this right is not limited by NBNP’.
54. In considering the Victorian Bill, SARC concluded the right against self-incrimination was limited:

...to the extent that it requires an accused to reveal information that may expose him or her to further criminal punishment, clause 4 may engage the Charter’s rights against compelled self-incrimination. The Committee notes that cooperating satisfactorily in a murder investigation to identify the location of the remains of the victim may require the accused revealing information that may expose him or her to future criminal punishment, e.g. for additional crimes connected to the murder, or in the event that the present conviction is quashed and a new trial ordered. The Committee observes that, while a parole board’s mere consideration of the accused’s cooperation in an investigation does not engage such rights, United States judges have held that mandatory longer incarceration for mere non-cooperation limits that nation’s constitutional prohibition of compelled self-incrimination.²⁸

²⁸ Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 3 of 2016, 8 March 2016), 3.

Double jeopardy and retrospective criminal punishment

55. SARC also noted that for prisoners sentenced prior to these changes, the rights against double jeopardy and retrospective criminal punishment may be limited and may be inconsistent with the purposes of sentencing:

The Committee notes that the effect of clause 4 may be to impose a new punishment (converting a sentence with a parole period to one without a parole period) for a convicted murderer's further act of failing to cooperate in an investigation to identify the location of the victim's remains. The Committee observes that the purpose of clause 4 may differ from the purposes of sentencing set out in s. 5 of the *Sentencing Act 1991* and the paramount purpose of parole set out in s. 73A of the *Corrections Act 1996*.²⁹

56. These rights are not considered in the statement of compatibility.

Further justification

57. The statement of compatibility considers some less restrictive options and notes the safeguards in the Bill including that the Board may consider at any time whether the prisoner has capacity to cooperate. The statement also notes that process for decisions also ensures procedural fairness for the prisoner, for example ensuring the prisoner can put matters to the Board for their consideration and retaining the prisoner's right to seek judicial review of a decision by the Board.
58. The Bill provides a broad discretion on the President or Deputy President to permit a prisoner's cooperation to be reconsidered. This includes where the prisoner has provided additional information, their capacity to provide cooperation has changed or it is otherwise in the interests of justice to consider the matter again. This approach leaves open the incentive for the prisoner to cooperate and ensures they are never permanently deprived of the prospect of parole.
59. However, the analysis by SARC of similar legislation raised limitations and issues not sufficiently justified in the statement of compatibility. This included concerns that the right to liberty may be arbitrary, an issue not addressed in detail by the statement of compatibility including by reference as to why the existing NBNP is not sufficient to meet the purpose.
60. The Commission submits compatibility of the Bill cannot be assessed without further information.

²⁹ The Minister responded to the Committee, disagreeing that these rights were limited see Scrutiny of Acts and Regulations Committee, Parliament of Victoria, *Alert Digest* (Digest No 4 of 2016, 22 March 2016), 16.

Fair trial and procedural fairness considerations

61. Some of the proposed amendments provide that declarations are made by the President alone, rather than the Board as a whole (noting the quorum for a meeting is 3 board members) on written material only. The criteria to be applied by the President seems to overlap with the same criteria the whole board would apply in ordinarily determining an application for parole.³⁰ Generally decisions about a person's liberty should be made by a court or tribunal, after a fair hearing.
62. The Commission also suggests that proposed sections 175G and 175M include an express requirement that a prisoner is to be given a copy of the restricted prisoner report or NBNP report is provided to a prisoner to ensure natural justice and procedural fairness.

Extending time to not consider a further application

63. The Bill amends 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 from 12 months to no more than 3 years. The statement of compatibility suggests this change is to reduce the stress and trauma on family and friends arising from regular parole applications, and to protect the broader community.
64. As statement discusses, this proposal also limits the right to liberty and to humane treatment in detention, although arguably not to the same extent as the NBNP and restricted prisoner amendments because the possibility of more frequent reviews. The statement of compatibility states:

The setting of this period follows a decision by the Board to refuse the prisoner's parole application. The decision on the length of the restriction would consider the individual circumstances of the prisoner, and likely success of a future parole application in setting an appropriate length... The amendment gives a discretion to set a period up to three years, with no minimum period that must be set. This allows the individual circumstances to be considered for each matter and an appropriate period determined by the Board.³¹
65. This justification emphasises the significant limitation on rights arising from the other parole changes and raises the question as to why this less restrictive option is not the preferred way of achieving the purposes of the other changes regarding NBNP and restricted prisoners.
66. Nonetheless, there is still a risk that an extended period of detention may become arbitrary, particularly as there is no clear criteria for how the Board should make its decision as to an appropriate period of delay (of this extended period of up to 3

³⁰ See the Queensland Parole Board, *Decision Making Manual* <<https://www.p bq .qld.gov.au/wp-content/uploads/2020/06/Parole-Board-Queensland-Decision-Making-Manual.pdf>> 22-23.

³¹ Statement of Compatibility, Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Qld) 40, 43.

years). The Commission recommends that the Bill be amended to at least include criteria for how the Board should assess this period.

Temporary extension of parole decisions

67. Proposed section 351I and 351J temporarily extend the time in which the Parole Board must decide new and existing applications:

- for a decision deferred under section 193(2)—210 days (from 150 days)
- otherwise—180 days (from 120 days).

68. The statement of compatibility acknowledges that extending this time may limit rights to liberty and fair hearing, but justifies this on the basis the changes would not result in arbitrary detention. This is on the following basis:

The earliest a prisoner can apply for parole is 180 days prior to their parole eligibility date. Even if the Board grants parole, a prisoner cannot be released before their parole eligibility date. If a prisoner applies at the earliest time possible, under the extended timeframes, the Board would still be required to decide the application within 180 days, so there would be no arbitrary detention. If the Board defers the matter and takes up to 210 days to make the decision this is because the Board requires additional material to decide the prisoner's application. This similarly would not be arbitrary detention because the Board is still considering the prisoner's suitability for release.

69. That is one scenario in which a prisoner may not be subject to prolonged detention. However, there are other possible scenarios. For example, if a prisoner applied for parole 120 days before their parole eligibility date, they could be released on their eligibility date under the current legislation. After the amendments are passed, it would appear there may be an additional 60 days after this date for parole to be granted. Another may be that discussed in the Parole Board's 2019-20 Annual Report, where it observed a prisoner held in lengthy pre-sentence custody may be granted immediate parole eligibility, but that prisoner would still have to wait for the application to be processed. The Board has mitigated this through the Court Ordered Immediate Parole Eligibility Project but extending the statutory timeframes risks this cohort also being detained for longer.³²

70. Of further concern, the statement of compatibility does not provide a purpose for this change, necessary to consider compatibility under s 13. It is at least arguable that the proposed change may result in arbitrary detention and so the potential limit on s 29 of the HRA should be justified. The Explanatory Notes do not appear to provide a purpose for this amendment either. During the public briefing for the Committee, officials suggested this change was part of a package of amendments that would have a net positive effect on the Board's workload. It was suggested this change specifically would 'assist the board by reducing some of the pressure that it is currently experiencing as a result of judicial review applications for

³² Parole Board Queensland, *Parole Board Queensland Annual Report 2019-20* (Report, 2020), 6, 13-15.

essentially being out of time on its decision-making'.³³ If that is the purpose, the Commission anticipates that justification must detail why less restrictive options, such as providing the board with further resources, cannot be implemented.

71. The Commission is also particularly concerned that this change is applying to parole applications already made. As discussed above, the Canadian case of *Whaling*, cited in the statement of compatibility, noted the right not to be punished again will be limited by thwarting of some offenders' settled expectation of liberty by automatically lengthening their period of incarceration. This is not discussed in the statement of compatibility and the Commission suggests further justification is needed to explain why this change must apply retrospectively.

Independent monitoring of surveillance

72. Part 7 of the Bill proposes to allow QPS staff members and translators to monitor surveillance devices in the same way they are currently used to monitor intercepted telecommunications under a telecommunications warrant. The purpose of these changes concern the translation of foreign languages.
73. It is proposed to amend the *Police Powers and Responsibilities Regulation 2012* (PPRR) to remove any doubt that a person engaged by the QPS to monitor a surveillance device can do so without being in the constant presence of a police officer. The statement of compatibility notes that the changes limit the right to privacy and reputation (s 25).
74. This limitation is justified on the basis of increased pressure and inefficiencies in the requiring a police officer to sit in the monitoring room for extended periods while a civilian employee or contracted translator interpret a foreign language being transmitted by a surveillance device.
75. The statement suggests that the impact on the human right to privacy by this amendment is minimal. Surveillance device warrants are existing provisions in the PPRA and PPRR that permit QPS civilian employees and contracted translators to assist with monitoring. QPS civilian employees and translators will continue to be supervised under the amended provisions, but that supervision will not need to be carried out constantly by a police officer.
76. These limitations may be reasonable, however the proposed amendments appear to go beyond translators and allow 'any other person the authorised person permits to be in the premises for helping in the investigation'. The statement of compatibility does not justify why such a breadth of potential persons is needed.

Conclusion

Thank you for the opportunity to comment on the Bill.

³³ Evidence to Legal Affairs and Safety Committee, Queensland Parliament, Brisbane, 29 September 2021, 7-8 (Chief Supt Humphreys)