Parliamentary Committees



Corrective Services (No Body, No Parole) Amendment Bill 2017

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Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

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Acknowledgements

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Abbreviations

Attorney-General	Attorney-General and Minister for Justice and Minister for Training and Skills
the Bar Association	Bar Association of Queensland
Corrective Services Act or CSA	*Corrective Services Act 2006*
DJAG/department	Department of Justice and Attorney-General
the Guidelines	Ministerial Guidelines to the Queensland Parole Board
JR Act	*Judicial Review Act 1991*
Penalties and Sentences Act	*Penalties and Sentences Act 1992*
QCS	Queensland Corrective Services
QCCL	Queensland Council of Civil Liberties
Parole Board	Queensland Parole Board
Parole System Review Report	Queensland Parole System Review Report, Mr Walter Sofronoff QC, November 2016
PSA	*Penalties and Sentences Act 1992*

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Corrective Services (No Body, No Parole) Amendment Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles – that is, to consider whether the Bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

The committee has recommended that the Bill be passed.

On behalf of the committee, I thank those individuals and organisations who lodged written submissions on the Bill. In particular, I would like to acknowledge the efforts of Mrs Fiona Splitt for her advocacy in relation to this very important issue. I also thank the committee's secretariat, the Department of Justice and Attorney-General and Queensland Corrective Services.

I commend this Report to the House.

Mr Duncan Pegg MP

Chair

Recommendations

Recommendation 1 **2**
The committee recommends the Corrective Services (No Body, No Parole) Amendment Bill 2017 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility are:

- Justice and Attorney-General
- Training and Skills
- Police, Fire and Emergency Services, and
- Corrective Services.

Section 93(1) of the *Parliament of Queensland Act 2001* provided that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Corrective Services (No Body, No Parole) Amendment Bill 2017 (Bill) was introduced into the Parliament by the Attorney-General and Minister for Justice and Minister for Training and Skills (Attorney-General) and referred to the committee on 23 May 2017. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the committee to report to the Legislative Assembly by 24 July 2017.

1.2 Inquiry process

On 25 May 2017, the committee wrote to the Department of Justice and Attorney-General (DJAG or the department) seeking advice on the Bill, and invited stakeholders and subscribers to lodge written submissions.

The committee:

- received four submissions on the Bill (see Appendix A for a list of submitters)
- held a public briefing with representatives from DJAG and Queensland Corrective Services (QCS) on 14 June 2017 (see Appendix B for a list of witnesses)
- held a public hearing in Brisbane on 19 June 2017 (see Appendix B for a list of witnesses), and
- received a written brief from DJAG on 8 June 2017, answers to questions taken on notice at the public briefing on 19 June 2017, and further advice from DJAG in response to matters raised in submissions on 23 June 2017.[2]

1.3 Policy objectives of the Corrective Services (No Body, No Parole) Amendment Bill 2017

The objective of the the Bill is to amend the *Corrective Services Act 2006* (Corrective Services Act) to introduce the policy that is colloquially referred to as, 'No Body, No Parole', in Queensland. The policy is predicated on the notion that by making parole release for particular prisoners contingent on them

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1 *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

2 Advice received from DJAG has been published on the committee's webpage.

satisfactorily cooperating in the investigation of an offence to identify a victim's location, it will encourage and provide incentive for these prisoners to assist in finding and recovering the body or remains of a victim.[3]

1.4 Consultation on the Bill

As set out in the explanatory notes, 'preliminary discussions have taken place with the Queensland Law Society and some of the victims' advocacy groups, including the Queensland Homicide Victim Support Group, about the approach to progressing a No Body, No Parole policy in Queensland'.[4]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend the Bill be passed.

After examination of the Bill, including the policy objectives which it will achieve and consideration of the information provided by the department and from submitters, the committee recommends that the Bill be passed.

Recommendation 1

The committee recommends the Corrective Services (No Body, No Parole) Amendment Bill 2017 be passed.

[3] Explanatory notes, p 1.

[4] Explanatory notes, p 4.

2 Background to the Bill

2.1 Existing parole framework for the Criminal Code offences of murder and manslaughter

DJAG provided the following advice to the committee on the existing parole framework for the Queensland Criminal Code offences of murder and manslaughter.

- Under Queensland's Criminal Code (sections 302 and 305 read together), the offence of murder carries mandatory life imprisonment or the imposition of an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (Penalties and Sentences Act).
- The Criminal Code, read in conjunction with the Corrective Services Act, sets mandatory minimum non-parole periods for the offence of murder; that is, the minimum period an offender must spend in prison before they become eligible to apply for parole release.
- A prisoner serving life imprisonment for an offence of murder committed after 29 August 2012 is subject to a mandatory minimum non-parole period of 20 years imprisonment. Where the offence was committed prior to 29 August 2012, the previous non-parole period of 15 years imprisonment applies. A higher non-parole period applies in the case of multiple murder convictions or the murder of a police officer. When sentencing an offender convicted of murder, the Supreme Court may fix a parole eligibility date longer than the mandatory minimum period (but not less than).
- An offender convicted for the Criminal Code offence of manslaughter (sections 303 and 310 read together) is liable to a maximum penalty of life imprisonment. A mandatory minimum non-parole period does not apply to the offence. The ordinary parole provisions under the Penalties and Sentences Act, read in conjunction with the Corrective Services Act, apply.
- A parole eligibility date does not mean the offender is automatically released to parole on that date. A prisoner serving life imprisonment (or any prisoner who has a parole eligibility date set as part of the sentence imposed), must apply for parole to the Queensland Parole Board (Parole Board), an independent decision-making body, and if granted parole, remains under the supervision of an authorised corrective services officer for life (or for the duration of their sentence for those other prisoners with a head sentence less than life imprisonment).[5]

2.1.1 Consideration of a No Body, No Parole policy in Queensland

2015 petition

DJAG advised the committee that the proposed No Body, No Parole policy was brought to the attention of the Queensland Government on 13 October 2015 in an e-petition (2473-15) to the Clerk of the Parliament seeking that the House amend the Corrective Services Act to provide that an application for parole not be processed where a prisoner has been sentenced for the murder and the remains of the victim have not been found.[6]

Queensland Parole System Review

Mr Walter Sofronoff QC (as he then was) undertook a review of the Queensland parole system, which reported to the government on 1 December 2016 and was tabled in the Parliament on 16 February 2017. The 'Parole System Review Report' made 91 recommendations for the complete reform of Queensland's parole system.

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5 Correspondence dated 8 June 2017, p 1.

6 Correspondence dated 8 June 2017, p 2.

Recommendation no. 87 reads as follows:

> *The Queensland Government should introduce legislation, similar to that in South Australia, which requires the Parole Board to consider the cooperation of a prisoner convicted of murder or manslaughter and not release the prisoner on parole unless the Board is satisfied that the prisoner has satisfactorily cooperated in the investigation of the offence, including, when relevant, by assisting in locating the remains of the victim of the offence.*[7]

In making the recommendation, the Parole System Review Report considered the South Australian legislation and the Northern Territory legislation and concluded:

> *1198. The 'no body, no parole' legislation is designed to help victims' families and to provide a strong incentive for offenders to cooperate with authorities. A system similar to South Australia's, which focuses more broadly on cooperation with the investigation, has the potential to provide more benefit to the community in incentivising cooperation of all kinds, including the location of the body.*
>
> *1199. Withholding the location of a body extends the suffering of victim's families and all efforts should be made to attempt to minimise this sorrow.*
>
> *1200. As a matter of theory, such a measure is consistent with the retributive element of punishment. A punishment is lacking in retribution, and the community would be right to feel indignation, if a convicted killer could expect to be released without telling what he did with the body of the victim. The killer's satisfaction at being released on parole is grotesquely inconsistent with the killer's knowing perpetuation of the grief and desolation of the victim's loved ones.* [8]

Government response to the Queensland Parole System Review recommendation

On 16 February 2017, the Queensland Government tabled its response to the recommendations made in the Parole System Review Report including a commitment to introduce 'No Body, No Parole' legislation during 2017. In response to recommendation 87 the government stated:

> *Legislative provisions will be introduced in 2017 to give effect to the "No Body, No Parole" policy which prevents a murderer from being granted parole where s/he has not revealed where the victim's body is located. A number of models, including that which has been introduced in South Australia (better known as a "no cooperation, no parole" system), exist and could be adopted in Queensland. The Government will determine the best model to introduce to give effect to this recommendation.*[9]

2.1.2 'No Body, No Parole' or 'No Cooperation, No Parole' legislation in Australian jurisdictions

The explanatory notes advised that the Northern Territory (section 4B of the *Parole Act*), South Australia (section 67 of the *Correctional Services Act 1982*) and Victoria (section 74AABA of the *Corrections Act 1986*) have enacted legislation to deliver a No Body, No Parole policy or No

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7 Queensland Parole System Review – Final Report by Walter Sofronoff QC, November 2016, p 235.

8 Queensland Parole System Review – Final Report by Walter Sofronoff QC, November 2016, pp 234- 235.

9 Queensland Parole System Review – Final Report by Walter Sofronoff QC, November 2016, government response tabled on 16 February 2017, response to recommendation 87.

Cooperation, No Parole' policy and Western Australia recently introduced legislation (Sentence Administration Amendment Bill 2017) to implement such a policy.[10]

Following a request from the committee, DJAG provided a cross-jurisdictional comparison table of legislation in each jurisdiction and advised that a common factor is that the Parole Board, when assessing the level of co-operation by a prisoner, must have regard to a report from the Police Commissioner, and all jurisdictions have applied the provisions with some retrospectivity.[11]

Northern Territory

The Northern Territory legislation, which commenced on 5 August 2016, applies to a prisoner convicted of murder and it requires:

- that the Parole Board must not make a parole order unless the Board considers the prisoner has cooperated satisfactorily with the investigation of the offence to identify the location, or the last known location, of the remains of the victim of the offence
- the Board to take into account any report tendered by the Commissioner of Police evaluating the prisoner's cooperation in the investigation of the offence, and
- the Commissioner of Police, in preparing a report to evaluate the nature and extent of the prisoner's cooperation; the timeliness of the cooperation; the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and the significance and usefulness of the prisoner's cooperation.[12]

South Australia

The South Australian legislation, which commenced on 11 February 2017, applies to the "offence of murder" meaning an offence of conspiracy to murder; and offence of aiding, abetting, counselling or procuring the commission of murder. The legislation:

- provides that the Parole Board must not release the prisoner on parole unless the Board is satisfied that the prisoner has satisfactorily co-operated in the investigation of the offence
- provides that the Parole Board must obtain and consider a report from the Commissioner of Police which provides an evaluation of the prisoner's co-operation in investigations, and
- requires that the report from the Commissioner of Police must include the nature and extent of the prisoner's cooperation; the timeliness of the cooperation; the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and the significance and usefulness of the prisoner's cooperation.[13]

The Parole System Review Report noted that in South Australia any non-disclosure of the location of a victim's remains is only one element of co-operation and the Parole Board is required to be satisfied that the prisoner has satisfactorily co-operated in the investigation of the offence, whether that cooperation occurs before or after the prisoner was sentenced, bearing in mind that a person has a right to plead not guilty to an offence.[14]

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10 Explanatory notes, p 3; and DJAG correspondence dated 8 June 2017, attachment 1, p 5.

11 Correspondence dated 8 June 2017, p 2 and attachment 1.

12 DJAG, correspondence dated 8 June 2017, attachment 1; and DJAG correspondence dated 19 June 2017, p 1.

13 DJAG, correspondence dated 8 June 2017, attachment 1; and DJAG correspondence dated 19 June 2017, p 1.

14 Queensland Parole System Review – Final Report by Walter Sofronoff QC, November 2016, pp 233-234.

Victoria

The Victorian legislation, which commenced on 14 December 2016, applies to the offences of murder, conspiracy to murder, accessory to murder and manslaughter. The legislation requires:

- that the Parole Board must not make a parole order unless the Board considers the prisoner has cooperated satisfactorily in the investigation of the offence to satisfy the location, or the last know location, of the remains of the victim of the offence and the place where the body of the may be found
- that the Board must have regard to a report by the Commissioner of Police evaluating the cooperation in the investigation of the offence; a report from the Department about whether the prisoner is suitable for release on parole; the capacity of the prisoner to cooperate in the investigation of the offence (expressly provides examples such as mental infirmity); the record of the court in relation to the offending, including sentencing remarks; and other information about whether the body/remains was recovered as a result of the prisoner's cooperation; and any submission to the Board by a victim, and
- that the report from the Commissioner of Police must include the nature and extent of the prisoner's cooperation; the timeliness of the cooperation; the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and the significance and usefulness of the prisoner's cooperation, including but not limited to the information from the Crown's case at trial that includes reference to whether the prisoner was acknowledged to have information relevant to location or place of the body or remains.[15]

Western Australia

The Sentence Administration Amendment Bill 2017 was introduced into the Western Australian (WA) Legislative Assembly on 17 May 2017.[16] The Bill seeks to amend the *Sentence Administration Act 2003* (WA) to introduce No Body, No Parole provisions which would apply to homicide related offences, including the now repealed offences of 'wilful murder' and 'infanticide'. The Bill proposes:

- to require the Prisoners Review Board to not make a release order or release recommendation unless satisfied that the prisoner has cooperated with a member of the WA Police Force in the identification of the location, or last known location of the remains of the victim of murder (subsection 66B(1)(a))
- that the Board does not need to assess the cooperation of the prisoner if it is satisfied that a member of the Police Force knows the location of the remains of the homicide offence (subsection 66B(1)(b)), and
- proposes that the Board's determination be informed by the Commissioner of Police's report which must include the nature and extent of the prisoner's cooperation; the timeliness of the prisoner's cooperation; the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and the significance and usefulness of the prisoner's cooperation; and whether a member of the WA Police Force knows the location of the victim of the homicide offence (section 66C).[17]

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15 DJAG correspondence dated 8 June 2017, attachment 1; and DJAG correspondence dated 19 June 2017, p 1.

16 Parliament of Western Australia, www.parliament.wa.gov.au/parliament/bills.nsf/BillProgressPopup?openForms&ParentUNID=0184F0A2E4FC157A48258123000778DA <site accessed 21 June 2017>

17 Explanatory memorandum, Sentence Administration Amendment Bill 2017 (WA), p 4; and DJAG, correspondence dated 8 June 2017, attachment 1.

The explanatory memorandum to the WA Bill noted that the requirements proposed under 66B(1)(a) 'is broadly worded so that a relevant prisoner who does not know the location, or the last know location, of the remains of the victim, can nevertheless be found to have cooperated with a member of the Police Force'.[18]

[18] Explanatory memorandum, Sentence Administration Amendment Bill 2017 (WA), p 3.

3 Examination of the Bill

3.1 Section 193 of the Corrective Services Act (Decision of Parole Board)

3.1.1 Amendments proposed in the Bill

Clause 4 of the Bill proposes to insert a new section 193A into the Corrective Services Act to provide that the Parole Board must refuse an application for parole for a prisoner serving a period of imprisonment for a 'homicide offence' and the body or remains of the victim have not been located, or because of an act or omission of the prisoner or another person, part of the body or remains of the victim has not been located unless the Parole Board is satisfied the prisoner has cooperated satisfactorily in the investigation of the offence to identify the victim's location.

Proposed section 193A(8) outlines the offences that are defined as 'homicide offences'. They include a Criminal Code offence of murder, manslaughter, accessory after the fact to murder or conspiring to murder; or an offence of counselling or procuring the commission of, or conspiring to commit any of these Criminal Code offences.[19]

Proposed section 193A(3) provides that the cooperation by the prisoner may have happened before or after the prisoner was sentenced for the homicide offence.

Proposed sections 193A(4) to 193A(6) require the Parole Board, following a parole application, to make a written request to the Commissioner of Police to provide a report about the prisoner's cooperation and that the report be provided at least 28 days before the stated date for the parole hearing.

The Commissioner of Police report is required (proposed section 193A(6)) to include an evaluation of:

- the nature, extent and timeliness of the prisoner's cooperation
- the truthfulness, completeness and reliability of any information or evidence provided by the prisoner in relation to the victim's location, and
- the significance and usefulness of the prisoner's cooperation.

Proposed section 193A(7) provides that in deciding whether the Parole Board is satisfied about the prisoner's cooperation it must have regard to:

- the report provided by the Commissioner of Police
- any information the board has about the prisoner's capacity to give the cooperation
- the transcript of any proceedings against the prisoner for the offence, including any relevant remarks made by the sentencing court, and

It may also have regard to any other information the Parole Board considers relevant.

The definition of 'victim's location' is defined in section 193A(8) to mean the location or the last known location, of every part of the body or remains of the victim of the offence; and the place where every part of the body or remains of the victim of the offence may be found.

The explanatory notes advised that by including section 193A(1)(b) 'an act or omission of the prisoner or another person, part of the body or remains of the victim has not been located' this will:

[19] Explanatory notes, p 2 and p 5.

> *…. capture, for example, instances where the prisoner may have dismembered the body of the victim and deposited the parts of the body at various locations; or the prisoner may have taken a part of the victim as a trophy or souvenir of their killing.*[20]

DJAG also advised the committee that the inclusion of this 'express provision to ensure that the No Body, No Parole policy extends to situations where parts of the body of the victim are unable to be located, is unique to the Queensland approach'.[21]

Clause 3 of the Bill proposes to amend section 193 (Decision of Parole Board) of the Corrective Services Act, consequential to the insertion of section 193A to ensure that where the Parole Board refuses to grant an application for parole because of section 193A the Parole Board must include a statement in the written reasons for refusal (required under existing section 193(5)(a)) that the Parole Board is not satisfied that the prisoner has cooperated.

DJAG advised that in practical terms, the policy of the Bill would be enlivened where the body (or its parts) of the victim have not been located at the time of the parole hearing:

> *That is, if the victim is missing at the time of sentence (noting that cooperation may have already begun on behalf of the prisoner upon conviction but the body is yet to* [be] *found by the time of the sentence); and if the victim is still missing at the time of the parole application (noting that cooperation may have been given by the prisoner yet the victim is unable to be found e.g. because of the passage of time or environmental factors or subsequent interference with the remains by someone else or an animal), the No Body, No Parole policy will be enlivened.*[22]

3.1.2 Stakeholder views

Ms Fiona Splitt advised in her submission that she 'wholeheartedly' supported the Bill:

> *The loss of a loved one is never easy to deal with, but the grief can be even harder to overcome, when you cannot lay them to rest. When families lose a loved one, to the callous act of murder, the heartache and pain is overbearing, but to not know where your loved one is, or be given the opportunity to have closure and say good-bye, causes constant unbearable pain and suffering to victim's families.*[23]

The Queensland Law Society, the Queensland Council for Civil Liberties (QCCL), and the Bar Association of Queensland (the Bar Association) supported the intended outcome of the proposed legislation in incentivising eligible parolees to provide information on the location of the victim's remains and acknowledged that this may provide some comfort to the families of victims.[24] For example:

> *The Queensland Law Society understands the concerns that have driven the preparation of this bill, particularly having regard to the very human need to retrieve, honour and properly grieve those who have been lost often in mysterious circumstances which gives rise to fear and horror. Naturally, people imagine the suffering their loved ones must have endured in their final*

[20] Explanatory notes, p 5.

[21] Correspondence dated 8 June 2017, p 3.

[22] Correspondence dated 8 June 2017, p 4.

[23] Submission 2, p 2.

[24] See submissions 1, 3 and 4.

moments. In dealing with their loss, the return of the remains of loved ones is an important step in the process of psychological healing.[25]

However, the Queensland Law Society, the QCCL and the Bar Association opposed the amendments proposed in the Bill:

- the Queensland Law Society opposed the Bill on the basis that 'there are a number of inherent flaws in the proposed legislation, including considerable problematic obstacles that, in our view, will limit its success'[26]
- the QCCL submitted 'this Bill has the capacity to lead to serious miscarriages of justice and that cannot be outweighed by the objectives of the Bill',[27] and
- the Bar Association 'opposes the Bill in its current form and opposes any retrospective application of such a scheme'.[28]

The specific concerns raised in each of the submissions are discussed below.

3.1.3 Circumstances where compliance may not be possible

The Queensland Law Society submitted that there are numerous circumstances within which it would not be possible for an offender to provide accurate information about a victim's location, including where:

- an offender is not aware of the location of a body - 'natural events, including floods, rain, changes in topography, as well as where a body has been disposed of at sea, would prevent a convicted person from accurate information', and
- a person who has maintained their innocence, and is in fact innocent, despite being convicted (such as the well-known Lindy Chamberlain case).[29]

Wrongful conviction

The submission from the QCCL raised a concern that those who are wrongfully convicted of homicide offences due to miscarriages of justice would never be able to be released and provided evidence that wrongful convictions do occur.[30] At the public hearing on the Bill, the QCCL quoted a 2014 article by David Hamer of the University of Sydney faculty of law, which estimated that as many as three per cent of convictions in Australia are wrongful convictions.[31]

The QCCL submission stated:

An innocent person, who had no involvement in the death of the deceased cannot provide to authorities the location of that body. The only cooperation the prisoner can possibly offer is to be a model prisoner, which is not sufficient to overcome the hurdle posed by the proposed laws.

Those who are wrongfully convicted of homicide offences are inherently disadvantaged to successfully appeal the conviction. In conjunction with the finality principle applying to jury

25 Public hearing transcript, 19 June 2017, p 8.

26 Submission 1, p 1.

27 Submission 3, p 3.

28 Submission 4, p 4.

29 Submission 1, pp 1-2.

30 Submission 3, p 2.

31 Public hearing transcript, 19 Jun 2017, p 1.

decisions and the depleted resources available to the prisoner, the law must provide additional protections to vulnerable prisoners.[32]

The submission from the QCCL stated that if a person is wrongfully convicted of a crime they did not commit, that is a significant miscarriage of justice and 'if this is exacerbated by the fact that they are further detained because they are unable to meet the requirements suggested by the Bill, we submit that this is an unacceptable risk and is not overcome by any potential benefits'. [33]

The Bar Association provided the following evidence at the public hearing:

We are not talking about a great number of people because we are not talking about a great number of situations where the body is irrecoverable. Of course, both putting together the Crown case and refuting the Crown case is more difficult where the body has not been discovered in that you get a lot of forensic evidence when you find remains. I would think that the possibility of a wrongful conviction is probably higher in the case where there has been no body. We are not talking about a great deal in number of people, but because you do not have all of that evidence it is probably higher.

Just as it is terrible to think of the victim's family never being able to finally grieve because the body has never been found, it is also not nice thinking about the person who has been wrongfully convicted where the key has basically been thrown away and the one thing they could do to get the key back they cannot do because they had nothing to do with the murder in the first place. I do not know whether it is a statistical thing that we are dealing with there, but it is a concern.[34]

DJAG responded to the concern about wrongful conviction by advising that while the Bill does not expressly provide for those instances where the prisoner claims innocence and therefore claims they cannot provide cooperation in locating the remains of the victim because they simply do not know, 'for those prisoners, it is anticipated that the existing criminal justice mechanisms would be relied upon in terms of appealing or pardoning their conviction for the offence'.[35]

The department also advised that the Bill does not provide an absolute rule that the Parole Board cannot grant parole unless the body is in fact recovered, therefore a failure to locate the body does not equate to 'never to be released':

Rather, decision-making about release must be informed by a range of factors including: the report of the Commissioner of Police and any Court records relevant to the offence (including remarks at sentence) in order for the Parole Board to determine whether the prisoner has cooperated satisfactorily. The Bill is sufficiently broad to allow for the release of a prisoner to parole in circumstances where the body cannot be recovered for a variety of reasons, including for example, those who cooperate but it is an impossibility that the body or remains will ever be found (e.g. due to a loss of capacity on behalf of the prisoner or decomposition of the remains to the point where they are no longer recoverable).[36]

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32 Submission 3, p 2.

33 Submission 3, p 2.

34 Public hearing transcript, 19 June 2017, p 12.

35 Correspondence dated 23 June 2017, p 2.

36 Correspondence dated 23 June 2017, p 2.

Prisoner may not be aware of the location of the victim's remains

At the public hearing the Queensland Law Society observed that Queensland has a harsh climate and a body left on the surface of the ground 'is obliterated within a very short period of time, not merely by putrefaction but by animals such as wild pigs, in the north and estuarine areas by crocodiles, by ants, by dingoes, by birds of prey - kites in particular' and further:

> *At least in my experience—I can say I have been pig shooting once—very large bodies can be disposed of and obliterated down to nothing within the space of sometimes as little as one or two weeks. In the case of a child—and the Azaria Chamberlain case is apposite and has been quoted here several times—a body would not last 24 hours. How a person with all of the best intentions—however that may be gauged, because it is not really able to be determined—can find a body is really, quite frankly, almost impossible in some cases.*[37]

At the public briefing DJAG outlined another possible scenario where the commission of the offence was done by more than one person with the person who killed the person not being responsible for disposing of the remains:

> *The person who killed the person may legitimately not know where the body was disposed of but they would have information that they can give the police to say where they last saw the body and who the other person was, and that would be the full extent of the cooperation that person could give.*[38]

DJAG advised that the amendments contemplate those cases where it is an impossibility for the body to be recovered, such as the circumstance where the body may have been completely disposed of or has since been interfered with by another person or animals:

> *The framework in the bill does not impose an absolute rule that the body must in fact be recovered but, rather, seeks to evaluate the prisoner's cooperation in determining the last known location and place of the victim's remains.*[39]

3.1.1 Section 193A(3) – timing of cooperation

Proposed section 193A(3) provides that the cooperation by the prisoner may have happened before or after the prisoner was sentenced for the homicide offence.

The submission from Ms Splitt recommended that that this section be amended to require the prisoner to cooperate within two years from sentencing and that for prisoners already in jail, the Bill should provide a period of one year from the date of commencement, within which to provide the cooperation.[40] At the public hearing Ms Splitt explained that she made this recommendation on the basis that at the two year mark there is less likelihood for environmental damage to have occurred to the remains, and it would provide earlier closure for families, and would stop the appeal process being dragged out. However, Ms Splitt recognised that if this was introduced there would be no incentive for a prisoner to cooperate at a later date and stated that her proposed amendment may need some clarification.[41]

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37 Public hearing transcript, 19 June 2017, p 8.

38 Public briefing transcript, 14 June 2017, p 4.

39 Public briefing transcript, 14 June 2017, p 2.

40 Submission 2, p 3.

41 Public hearing transcript, 19 June 2017, pp 4-5.

DJAG responded that the Bill is consistent with the approach recommended in the Parole System Review Report and the approach taken in other jurisdictions, and:

> *The fundamental policy underpinning the Bill is that by making parole release for particular prisoners contingent on them satisfactorily cooperating in the investigation of the offence to identify the victim's location, it will encourage and provide incentive for these prisoners to assist in finding and recovering the remains of the victim. This will in turn, it is hoped, offer some comfort and certainty to the families of the victims.*
>
> *For this cohort of prisoners, it may be that the encouragement and incentive to cooperate does not become tangible until their potential release date is upon them; rather than them providing cooperation as a reflection of their remorse and consciousness of guilt.*[42]

In response to a question from the committee at the public briefing, DJAG advised that Ms Splitt's proposal regarding a time limitation on cooperation is not consistent with any of the models in other jurisdictions:

> *Essentially, the way it has been framed is that the cooperation can happen at any time, effectively, post conviction up until parole hearing. That in part reflects that some prisoners may not provide any cooperation until they have the pressure of parole and therefore they will receive a tangible benefit to themselves, as opposed to operating to effectively ease the grief of the family.*
>
> *That is really the policy foundation—to locate the body or the remains or, if not, to try to identify the last known place. Whether that is earlier or later in that parole period, that would still be taken into account.*[43]

3.1.2 Section 193A(8) – definition of victim's location

The definition of 'victim's location' is defined in proposed section 193A(8) to mean the location or the last known location, of every part of the body or remains of the victim of the offence; and the place where every part of the body or remains of the victim of the offence may be found.

The submission from Ms Splitt recommended that this section should be amended to add a part (c) and a part (d) as follows:

> *(c) the location, or the last known location, of the belongings of the victim, that were with the victim at the time of the offence; and*
>
> *(d) the location of any weapons / forearms / restraints or other objects connected with the offence, that may have been disposed of with the body.*[44]

The department responded that while it has noted the suggested amendment, the fundamental policy underpinning the Bill is:

> *… that by making parole release for particular prisoners contingent on them satisfactorily cooperating in the investigation of the offence to identify the victim's location, it will encourage and provide incentive for these prisoners to assist in finding and recovering the remains of the*

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42 Correspondence dated 23 June 2017, p 4.

43 Public briefing transcript, 14 June 2017, p 3.

44 Submission 2, p 4.

victim. This will in turn, it is hoped, offer some comfort and certainty to the families of the victims.[45]

3.1.3 Capacity to cooperate

At the public briefing the committee considered whether factors such as intellectual disability would be taken into account as one of the factors when the Parole Board assessed the prisoner's capacity to cooperate (see section193A(7)(ii)). DJAG advised that the Queensland legislation is drawn from the Victorian approach which is the only jurisdiction that has express regard to this issue:

The thinking behind that was that we may have a situation where there is a prisoner who is willing to cooperate and wants to cooperate but, because of factors outside of their control, they do not have the capacity to cooperate. That is particularly so in the case, for example, of a murderer who is sentenced to mandatory life—and they will be in prison for at least 15 or 20 years or longer before they are even eligible for parole. Things may occur in the intervening 20 years, whether it is dementia or assaults that might occur in prison that could affect their cognitive capacity. That is exactly what that provision is referring to. If the prisoner does not have the cognitive capacity to provide the cooperation that is a matter the Parole Board can take into account in assessing whether that particular prisoner has satisfactorily cooperated.[46]

3.1.4 Measure of cooperation

The submission from Ms Splitt raised a concern that the proposed legislation does not contain a clear definition of what constitutes 'cooperation', in particular where no remains or belongings are found.[47]

The Queensland Law Society also raised a concern about the subjectivity of the test of cooperation:

What is the measure of cooperation? What is genuine cooperation in all the circumstances? The cooperation, particularly after the passing of a significant period of time, may be meaningless in circumstances where the body is obliterated and the body cannot be found. The point of it is that it may encourage people whose parole period is coming up to effectively make up things. That is where the problem lies. I understand it fully, but we have significant doubts as to whether it will work and, as in the Lindy Chamberlain scenario, it may in fact cause a significant injustice to be continued. [48]

In this regard, the Bar Association noted at the public hearing:

… if the bill were to proceed, there should be a review on the merits, on that level as to whether cooperation occurred or not, via judicial officer because it is such a hard thing to decide. You do not want an unaccountable official like the Parole Board to be making those decisions. Any degree of due process would require a review on the merits with regard to that because if I am the Police Commissioner and we find nothing I am going to say that the cooperation was not genuine. That is something that a judge, who can look properly at both sides of the story, has to decide.[49]

At the public hearing the Queensland Law Society stated:

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45 Correspondence dated 23 June 2017, p 5.

46 Public briefing transcript, 14 June 2017, p 4.

47 Submission 2, p 4.

48 Public hearing transcript, 19 June 2017, p 10.

49 Public hearing transcript, 19 June 2017, p 10.

The difficulty is: who knows if they were lying? Were they telling the truth? Were they doing their best? We do not know, but there are temptations for people seeking to get out of jail who will not be able to find the bodies or will misdirect authorities and make up things.

The end effect of it is that the satisfaction which my president referred to—the natural grieving process—rather than being effectively assisted, may be frustrated even with the best intentions in the world by, effectively, people lying to get out.[50]

In response to the Queensland Law Society concern that prisoners may 'cooperate' by providing deliberately erroneous or misleading information, the department advised that the requirement that the Parole Board be informed by the report of the Commissioner of Police in evaluating the utility of the cooperation, 'means that this can be reflected in the decision making outcome (i.e. it may underscore that satisfactory cooperation was not provided in which case the application for parole must be refused)'.[51]

At the public briefing DJAG explained that the government cannot necessarily legislate against a prisoner who might cooperate by providing deliberately erroneous information 'knowing full well that the police will then be sent on, effectively, a wild goose chase', however:

The provisions as framed allow the Commissioner of Police to provide a report and, equally, his report would outline the level of cooperation, whether that was in fact bogus or not, and that is something that the Parole Board would be able to take into account in making its assessment as to whether that prisoner had in fact satisfactorily cooperated. It is framed quite broadly in terms of that, and that is how we envisage those scenarios would be taken into account. It is hard to know until we see it in practice, but we certainly turned our mind to that.[52]

Determination of whether the prisoner has the knowledge required to cooperate

The Bar Association submitted that a necessary preliminary step to the implementation of a No Body, No Parole scheme should be a finding of fact by the sentencing judge that the prisoner has knowledge of the location of the victim's remains:

Such a finding will, of course, often be difficult in the many cases where the prisoner has not given evidence. Nevertheless, this decision would be better made by a judge, apprised of the admissible evidence, at the time of sentencing, than by a Parole Board, informed solely by a report from the Commissioner of Police, many years after the victim's disappearance.[53]

At the public hearing the Bar Association added that procedurally, this requirement would allow additional evidence to be called by the Crown at the sentence hearing, after the finding of guilt by the jury or the guilty plea, which seeks to establish that precise and specific fact:

It is, we say, very important because you are talking about life imprisonment without parole. You are talking about that not because of the heinousness of the original crime but because of the failure to cooperate—essentially, a failure to show sufficient remorse. It may be because the person is still afraid of other people who may have been involved in the crime. We have seen that

50 Public hearing transcript, 19 June 2017, pp 8-9.

51 Correspondence dated 23 June 2017, pp 2-3.

52 Public briefing transcript, 14 June 2017, pp 4-5.

53 Submission 4, p 1.

recently in a couple of famous trials before the court. We would suggest that this sort of provision needs to be accompanied by very high standards of procedural fairness.[54]

The department responded to the Bar Association recommendation by advising that the Bill provides that the Parole Board must refuse to make a parole order unless it is satisfied the prisoner has cooperated satisfactorily in the investigation of the offender to identify the victim's location and:

The principle will be enlivened when the body of the victim of the offence has not been located at the time of the parole application. The Parole Board, when making its decision must take into account information from a variety of sources including and relevant remarks by the sentencing court.

The High Court decision in Crump v New South Wales (2012) 247 CLR 1 establishes that States have a broad power to alter the conditions which a person who has been sentenced must meet to be eligible for parole. That is, legislation that alters the conditions on which parole will be available does not interfere with the judicial order sentencing the person to imprisonment. Once the sentence is imposed, and the appeal processes exhausted, the exercise of judicial; power is spent.

The sentencing order does not create any right or entitlement in the prisoner to the release on parole; or that their entitlement to parole would be determined based on the parole system as in force at the time of sentence.

The Bill does not purport to set aside, vary, alter or otherwise stultify the effect of the judgement, decree or sentence of the court; albeit it may alter 'the statutory consequences of the sentence'.[55]

3.1.5 Prisoner review and appeal rights in relation to a Parole Board proceedings

Section 193(5) of the Corrective Services Act provides that if the Parole Board refuses to grant the application, the board must—

(a) give the prisoner written reasons for the refusal; and

(b) if the application is for a parole order other than an exceptional circumstances parole order—decide a period of time, of not more than 6 months after the refusal, within which a further application for a parole order (other than an exceptional circumstances parole order) by the prisoner must not be made without the board's consent.

The QCCL raised a concern that the Bill does not provide for adequate accountability measures as it does not allow the prisoner to challenge any adverse findings in the report issued by the Commissioner of Police to the Parole Board and recommended that the prisoner should be legally represented which would require an amendment of section 198 of the Corrective Services Act.[56] The submission recommended that 'any amendments to the Bill ought to include a provision that allows time for the prisoner to consider the Report and to bring before the Parole Board any evidence or submissions to the contrary'.[57]

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54 Public hearing transcript, 19 June 2017, p 6.

55 Correspondence dated 23 June 2017, pp 8-9.

56 See submission 3, p 3 and public hearing transcript, 19 Jun 2017, p 1.

57 Submission 3, p 3.

DJAG responded that the existing *Ministerial Guidelines to the Queensland Parole Board* (the Guidelines) provide for the disclosure to the prisoner of material or factors adverse to the prisoner in the decision-making process:

> *While new Guidelines must be issued upon proclamation of the Corrective Services (Parole Board) and Other Legislation Amendment Bill 2017, it is envisaged that such a requirement would be retained under the new Guidelines given its importance in ensuring natural justice to the applicant.*
>
> *As such, the Commissioner's report would be required to be disclosed to the prisoner (subject to any exceptions listed in the new Guidelines, for example perhaps where the information may put another person at risk.*[58]

The revised 'Ministerial Guidelines to Parole Board Queensland' were issued by the Minister for Police, Fire and Emergency Services and Minister for Corrective Services on 3 July 2017. Section 3 (Disclosure) of the Guidelines state:

> *At a minimum, the principles of procedural fairness require that the substance of the material or main factors adverse to the prisoner be disclosed (including the proper disclosure of documents to the prisoner which may be relied upon in coming to a decision), and the prisoner be given an opportunity to comment before a decision is made.*[59]

At the public hearing the QCCL made a number of additional recommendations, including:

- in the interest of procedural fairness and due process, the Bill should include a provision similar to that contained in the *Dangerous Prisoners (Sexual Offenders) Act 2003* which provides the prisoner with a right to an annual right of review
- where a person convicted of murder provides information they should be totally immune from further prosecution, and
- there should be a right of appeal from the Parole Board to the Court of Appeal in the same manner as there is a right of appeal from a single judge of the Supreme Court on a *Dangerous Prisoners (Sexual Offenders) Act 2003* hearing.[60]

The Bar Association also recommended that any finding by the Parole Board that the prisoner has not cooperated satisfactorily should be reviewable on the merits by a judge:

> *We see lots of judicial review of Parole Board decisions but, as you would know, judicial review is about procedure and errors of law; it is not a review on the merits. We say that in these circumstances, if the Commissioner of Police has reported and the Parole Board has examined the material and come to a particular point of view, there should be a review on the merits by the court if the prisoner seeks that with regard to cooperation. It may be a very vexed issue. A person may have taken the police out to areas and nothing may have been found. All of the evidence needs to be considered by an independent person on review or appeal. We say that those two safeguards need to be built into any legislation of this kind.*[61]

The committee considered the review of Parole Board decisions in its report no. 53 on the Corrective Services (Parole Board) and Other Legislation Amendment Bill 2017 which was tabled on 28 April

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58 Correspondence dated 23 June 2017, pp 6-7.

59 Ministerial Guidelines to Parole Board Queensland, dated 3 July 2017, p 4.

60 Public hearing transcript, 19 Jun 2017, p 2.

61 Public hearing transcript, 19 Jun 2017, pp 6-7.

2017.[62] The committee noted that the decisions of the Parole Board could be subject to judicial review, which is provided by the *Judicial Review Act 1991* (JR Act) as the Act applies to administrative decisions of government departments, local authorities, quasi-government agencies and statutory authorities.[63]

The committee also noted that the JR Act provides that a court can make any or all of the following orders in respect of decisions:

- quashing or setting aside the decision
- referring the matter to the person who made the decision for further consideration subject to directions such as time limits for the further consideration and preparatory steps
- declaring the rights of the parties, and
- directing any of the parties to do or not do anything that the court considers necessary to do justice to the parties.[64]

The new Ministerial Guidelines to Parole Board Queensland confirm that Parole Board Queensland's decision making is open to review by the Supreme Court of Queensland under the provisions of the JR Act and provide:

> *During the decision making process, when considering which documents should be disclosed to a prisoner, a primary consideration for Parole Board Queensland is ensuring that the prisoner is afforded procedural fairness taking into account the requirements of the Judicial Review Act 1991.*[65]

The Bar Association argued that while judicial review of a Parole Board decision is available, this review process is limited – 'It mainly goes to errors in the law or procedural errors. It does not review things like merits, so that would not be sufficient to give due process if the law were enacted, in our view'.[66]

3.1.6 Purpose of parole and parole decisions

The Queensland Law Society submission raised a concern about the impact of the proposed legislation on the decision-making process of the Parole Board. In particular, the fact that cooperation of the prisoner is not necessarily reflective of the threat the offender poses to the community:

> *Decisions around parole should more appropriately be determined following an assessment of patterns of offending, likelihood of recidivism, compliance with previous conditions of release, risk posed to the community and medical, psychological, behavioural or risk assessment reports, as set out in current legislation and policy.*[67]

The QCCL submission also raised an issue that the proposed legislation is not connected to the primary purpose of parole, which is the protection of the community and the rehabilitation of offenders.[68]

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62 www.parliament.qld.gov.au/work-of-committees/committees/LACSC/inquiries/current-inquiries/CSPBAB2017

63 Department of the Premier and Cabinet, www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbooks/welcome-aboard/member-duties/judicial-review.aspx <site accessed 28 June 2017>

64 Legal Affairs and Community Safety Committee report no. 53 on the Corrective Services (Parole Board) and Other Legislation Amendment Bill 2017. p 12.

65 Ministerial Guidelines to Parole Board Queensland, dated 3 July 2017, p 3.

66 Public hearing transcript, 19 Jun 2017, p 11.

67 Submission 1, p 2.

68 Submission 3, p 2.

DJAG noted this concern but pointed out that the framework of the Bill is generally consistent with other jurisdictions and the new legislation will operate alongside the existing parole framework:

> *Currently, in considering an application for release to parole, the Parole Board holds community safety as paramount. When considering the level of risk a prisoner may pose to the community, the Parole Board will have regard to all relevant factors, including patterns of offending and the potential for reoffending.* [69]

The submission from the Bar Association recommended that the only prisoners for whom a No Body, No Parole scheme could be considered appropriate are those prisoners serving sentences of life imprisonment, rather than the lesser term for manslaughter or some lesser offence:

> *The ultimate effect of a No Body, No Parole scheme applying to prisoners serving finite sentences of imprisonment would be to have violent offenders, who have not cooperated in the way the Bill contemplates, being released at the end of their sentences without the support and supervision that parole provides.*
>
> *Additionally, if a prisoner knows that their lack of cooperation will result in their never being granted parole, there would be no incentive for them to participate in rehabilitative programs. This would mean that such prisoners serving finite sentences could ultimately be released, not only without parole supervision but without the benefit of rehabilitative treatment in in custody.* [70]

The department responded that the introduction of the proposed laws is a policy decision of Government and the extension of the No Body, No Parole policy beyond prisoners serving a sentence of mandatory life imprisonment is consistent with the recommendation of the Queensland Parole System Review and with the approach taken in Victoria. [71]

The Queensland Law Society submitted there are strong public policy interests against the introduction of the legislation:

> *If the issue of cooperation were extended through further legislative reform, it could include a requirement for other forms of cooperation in order to be granted parole, for example, implicating others or providing information on the whereabouts of property or money taken as part of the offence.* [72]

DJAG responded that upon commencement, new section 193A would operate alongside the existing parole framework and 'currently, in considering an application for release to parole, the Parole Board holds community safety as paramount. When considering the level of risk a prisoner may pose to the community, the Parole Board will have regard to all relevant factors, including patterns of offending and the potential for reoffending'. [73]

At the public briefing the committee asked whether consideration had been given to the possibility that the proposed policy could be extended in future to require information about property or money with regard to other offences to be considered at Parole Board hearings 'obviously failing the standard

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69 Correspondence dated 23 June 2017, p 6.

70 Submission 4, p 2.

71 Correspondence dated 23 June 2017, p 9.

72 Submission 1, p 2.

73 Correspondence dated 23 June 2017, p 3.

relating to protection from self-incrimination'.[74] In response, the department advised it had considered this issue and that the fundamental premise underpinning a No Body, No Parole policy is that the policy is not intended to undermine the right to silence or the privilege of against self-incrimination:

> *The policy is aimed at incentivising cooperation in terms of the location of the body because of the horrendous impact on a family of not knowing where their loved one rests. That is one potential consequence of no-cooperation no-parole.*
>
> *Also, a model like that, if you have a convicted prisoner, in particular a murderer, the utility of assessing their cooperation otherwise in terms of the investigation, when it is not anchored to trying to find the body which remains outstanding, arguably does not have much weight when it comes time for parole other than in terms of assessing their remorse and their overall cooperation. Whether they cooperated 20 years ago with the investigation of the offence as opposed to cooperated in terms of locating the body is very different in terms of assessing their parole release. For that reason, we anchored this policy very firmly to locating the body, because the policy is all about trying to ensure that those families find their loved ones as well as the community's expectation. As noted in the Sofronoff report, it is arguably offensive to the community that you would have a convicted murderer who knows the location of the body and refuses to cooperate but is released to parole, yet the family is trapped in the cycle of grief by not knowing. That is the policy underpinning it.*[75]

3.1.7 Mandatory sentence of life imprisonment for the offence of murder

The Bar Association submission stated that maintaining a mandatory sentence of life imprisonment for the offence of murder would mean that sentencing judges dealing with offenders who offer that cooperation prior to sentence are unable to take it into account as part of the sentencing process:

> *The Association reiterates its opposition to mandatory sentences of any type including for murder. The maintenance of a mandatory sentence of life imprisonment for offences of murder limits the proper exercise of judicial discretion and discourages any cooperation with the administration of justice.*[76]

In response, the department advised that the Bill does not amend the existing penalties applicable to the offence of murder and under the Bill, as framed, there is no intersect between new section 193A and the sentencing order, and therefore the Bill does not interfere with that sentencing order and:

> *Further, the Bill does not interfere with the factors to which the sentencing court may have regard in structuring the appropriate penalty for a convicted murderer (i.e. whether to impose the mandatory minimum non-prole period a longer period).*[77]

At the public hearing the Bar Association provided further information relating to its concerns about mandatory sentencing including that the 'criminality of an act of murder varies greatly from an over-the-top response to intense provocation which may have occurred over years, particularly the domestic violence cases that have gone to trial, to the merciless sexual predatory behaviour of a serial killer'.

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74 Public briefing transcript, 14 June 2017, p 5.

75 Public briefing transcript, 14 June 2017, p 5.

76 Submission 4, p 2.

77 Correspondence dated 23 June 2017, p 9.

Sentencing for murder should, we say, reflect society's varying condemnations of those varying criminal acts. We say also in that regard that the defences of self-defence and provocation only cover a very small area where there is real mitigation of the guilt in that respect. The relevance to today is that remorse is a key element in sentencing. Even a perpetrator of the most horrid crime may be motivated to show remorse if some credit is given for that display. Assisting to discover the remains is perhaps one of the best ways of showing remorse where those remains have not been discoverable up to that point in time. Such a law would provide a strong motivation for murderers to assist in this process at a much earlier stage than this law is likely to achieve or encourage. It would also avoid the procedural and rule of law difficulties to which this bill is prone.[78]

3.2 New Part 12, Chapter 7A – Transitional provisions – retrospective application

Clause 5 of the Bill inserts a new Part 12 (relating to transitional provisions) into chapter 7A of the Corrective Services Act. The Bill proposes to retrospectively apply the new provisions in section 193A to certain prisoners through the insertion of proposed new sections 490U and 490V. It is proposed that the new policy apply to all parole applications regardless of when the prisoner was convicted or sentenced or the homicide offence, including where the prisoner:

- is convicted and sentenced for the homicide offence before commencement of the Bill
- was convicted of the homicide offence before commencement but sentenced for the offence after commencement of the Bill
- was convicted and sentenced for the homicide offence before commencement of the Bill and the application for parole is made after commencement of the Bill; or was made before commencement but it not yet determined at the time of commencement of the Bill, or
- was convicted, sentenced and released to parole but returned to prison, whether before or after commencement of the Bill, and the parole order is cancelled.[79]

The explanatory notes advised that in practice, the only prisoners to which the proposed amendments would not apply are those that are already on parole in the community at the time of commencement of the Bill as long as they are not returned to prison and have their parole order cancelled.[80]

Under proposed new section 490V(2), in situations where existing parole applications have not been decided at the time of commencement, the Parole Board may not extend the period within which the parole application must be decided by more than 50 days.

The explanatory notes advised that while the Bill proposes to apply the amendments retrospectively, a parole date eligibility is not a guarantee that the prisoner will be granted parole on that particular date or that the prisoner's entitlement to parole will be determined based on the parole system as in force at the time of the sentence. The explanatory notes provided the following justification for retrospective application:

Although the Bill provides for new section 193A to apply retrospectively, it is not removing a prisoner's right to receive parole. Rather, the Bill applies an obligation on the Parole Board to evaluate the prisoner's cooperation in locating a victim's body or remains. Gathering such information is designed to help victims' families and to provide a strong incentive for prescribed prisoners to cooperate. The No Body, No Parole policy will only apply to a very small cohort of

78 Public hearing transcript, 19 June 2017, p 7.

79 Explanatory notes, p 3.

80 Explanatory notes, p 3.

prisoners; and is reserved for those who commit very serious criminal offences (murder, manslaughter, accessory after the fact to murder or conspiring to murder etc.). The retrospective application of new section 193A is considered justified for the above reasons and on public interest grounds.[81]

3.2.1 Retrospective application

Ms Splitt advised in her submission that she supported the retrospective application of the proposed legislation.[82]

The Bar Association advised that it was opposed to the creation of retrospective legislation that has the potential to significantly affect the right to liberty of individuals:

It is easy to imagine a prisoner who has been incarcerated for a long time (perhaps even decades) and has made genuine and impressive efforts towards rehabilitation in the hope of parole. Such a prisoner could suddenly become ineligible for parole owing to the effect of the Bill and the passage of time upon their memory or even the state or the location of the missing remains.[83]

The Queensland Law Society also submitted that the proposed legislation contradicts fundamental legislative principles as it fails to protect against self-incrimination and imposes obligations retrospectively.[84]

DJAG responded that the Bill's consistency with the fundamental legislative principles was addressed in the explanatory notes and the retrospective application of the policy is generally consistent with the approach taken in other jurisdictions that have legislated for a No Body, No Parole or No Cooperation policy.[85] The department also reiterated that the Bill expressly provides that when assessing whether the prisoner has satisfactorily cooperated, the Parole Board must take into account any information the Parole Board has about the prisoner's capacity to give the cooperation.[86]

The QCCL submission opposed the retrospective application of the amendments stating 'that by applying this condition on those who have already applied for parole prior to the commencement of the Bill, but who have a decision pending is unnecessary and removes the opportunity and thereby incentive for prisoners to cooperate with authorities'. The QCCL recommended that the transitional provisions should be amended to remove those prisoners with a pending parole decision.[87]

The department responded to the QCCL recommendation by advising that the approach taken in the Bill is consistent with that taken in Victoria and that the proposed restriction of the period for a parole application to be decided (by not more than 50 days) 'will enable time for the report of the Commissioner of Police to be obtained and considered by the Parole Board (including disclosure if the report to the prisoner)'.[88]

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81 Explanatory notes, p 4.

82 Submission 2, p 2.

83 Submission 4, p 3.

84 Submission 1, p 2.

85 Correspondence dated 23 June 2017, p 3.

86 Correspondence dated 23 June 2017, p 10.

87 Submission 3, p 3.

88 Correspondence dated 23 June 2017, p 7.

3.2.2 Number of current prisoners captured by retrospective application of the legislation

In response to a question from the committee about the number of current prisoners currently in custody for offences listed in the No Body, No Parole legislation and therefore potentially captured by the proposed amendments, DJAG advised:

> *QCS does not currently keep a searchable electronic record detailing whether the location of the victim of the prisoner's offence is known. However, QCS has commenced a manual review of the information held regarding this particular prisoner cohort by examining court transcripts, information from staff in correctional centres and media searches, to identify prisoners convicted of a homicide offence whose victims' remains may not have been located.*
>
> *QCS has advised that as of 31 May 2017, there are 427 prisoners in custody who have been convicted of a homicide offence, as defined under the Bill.*
>
> *The individual circumstances of 200 of these 427 cases have been reviewed so far and 24 sentenced prisoners have been identified as likely to be captured by the provisions in the Bill.*[89]

The department advised that the QCS anticipates the review of the remaining 227, of the 427 cases identified, to be completed by 14 July 2017.[90]

[89] Correspondence dated 19 June 2017, p 3.

[90] Correspondence dated 19 June 2017, p 3.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the House.

4.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

Current eligibility for parole (murder or manslaughter offences)
Under Queensland's Criminal Code (ss 302 and 305), the offence of murder carries mandatory life imprisonment or the imposition of an indefinite sentence under Part 10 of the *Penalties and Sentences Act 1992* (PSA).

The Criminal Code, read with the *Corrective Services Act 2006* (CSA), sets mandatory minimum non-parole periods for the offence of murder. That is, the minimum period that must be served before an offender is eligible to apply for parole.

A prisoner serving life imprisonment for murder committed after 29 August 2012 is subject to a mandatory minimum non-parole period of 20 years imprisonment. Where the offence was committed prior to 29 August 2012, the previous non-parole period of 15 years imprisonment applies. A higher non-parole period applies in the case of multiple murder convictions or the murder of a police officer.

When sentencing an offender convicted of murder, the Supreme Court may fix a parole eligibility date longer than the mandatory minimum period (but not less than).

An offender convicted of manslaughter (Criminal Code ss 303 and 310) is liable to a maximum penalty of life imprisonment. A mandatory minimum non-parole period does not apply to the offence. The ordinary parole provisions under the PSA and CSA apply.

Summary of provision

Clause 4 of the Bill inserts a new section 193A into the CSA which applies to applications for a parole order from prisoners serving a period of imprisonment for a *homicide offence* where the body or remains of the victim of the offence have not been located; or because of an act or omission of the prisoner or another person, parts of the body or remains of the victim have not been recovered.

For the purposes of new section 193A, a homicide offence refers to the Criminal Code offences of murder, manslaughter, accessory after the fact to murder or conspiring to murder; as well as to an offence of counselling or procuring the commission of, or conspiring to commit, any of these Criminal Code offences.

Under proposed section 193A(2) the parole board must refuse to make the parole order unless the Board is satisfied the prisoner has cooperated satisfactorily in the investigation of the offence to identify the *victim's location. "Victim's location"* is defined in new s 193A(8) to mean:

> *… the location, or the last known location, of every part of the body or remains of the victim of the offence; and the place where every part of the body or remains of the victim of the offence may be found.*

Proposed section 193A(7) provides that when assessing whether the prisoner has cooperated satisfactorily, the Board *must* have regard to a range of matters, including: a written report of the Commissioner of Police which evaluates the prisoner's cooperation; the capacity of the prisoner to cooperate; and the court transcripts for the offence (including any relevant sentencing remarks). In addition, the board *may* also have regard to any other information it considers to be relevant.

The report from the Commissioner of Police must state whether the prisoner has cooperated, and, if so, an evaluation of firstly, the nature, extent and timeliness of the prisoner's cooperation; secondly, the truthfulness, completeness and reliability of any information or evidence provided by the prisoner in relation to the victim's location; and thirdly, the significance and usefulness of the prisoner's cooperation.

Potential FLP issue

The reasonableness and fairness of the treatment of individuals is considered when deciding if legislation has sufficient regard to the rights and liberties of individuals.

On whether there is a "right to parole" the department's response to submissions noted that the High Court in *Crump v New South Wales* (2012) 247 CLR 1:

> *Establishes that the States have broad power to alter the conditions which a person who has been sentenced must meet to be eligible for parole. That is, legislation that alters the conditions on which parole will be available does not interfere with the judicial order sentencing the person to imprisonment. Once the sentence is imposed, and the appeal processes exhausted, the exercise of judicial power is spent.*
>
> *The sentencing order does not create any right or entitlement in the prisoner to their release on parole; or that their entitlement to parole would be determined based on the parole system as in force at the time of sentence.*
>
> *The Bill does not purport to set aside, vary, alter or otherwise stultify the effect of the judgement, decree or sentence of the court; albeit it may alter the 'statutory consequences of the sentence'.*

Committee comment

The committee notes the advice immediately above based on the High Court decision in *Crump*.

It appears that there is no inherent 'right' to parole, especially not an entitlement to parole that is tied to the parole system in force at the time of sentencing. Consequently, the relevant FLP is a more general consideration of whether the amendments proposed by the Bill would be fair and reasonable to parole applicants.

In practical terms, there are a number of conceivable circumstances where a prisoner would be unable to reveal the location of a body or remains, including where:

- they are genuinely innocent and have no knowledge of the location
- although party to the murder, another offender was solely responsible for disposal of the body

- changes in the topography of a landscape has removed identifying markers (eg. broad scale land clearance removing trees as markers in a forest setting or extensive flooding has washed large tracts of land away)
- extensive development during their time in prison has completely changed the setting where the body was disposed of (eg. It was buried in a once vacant allotment that is now covered over by a shopping centre and carpark), and
- it involved a disposal at sea.

The submission from the Queensland Law Society similarly raised the point that there are circumstances where compliance with this policy will not be possible:

> *The Bill requires the parole board to refuse to grant an application for parole, unless the board is satisfied the prisoner has cooperated satisfactorily in identifying the victim's location. However, there are numerous circumstances within which it would not be possible for an offender to provide accurate information about the victim's location.*
>
> *There is a real possibility that a person who has maintained their innocence, and is in fact innocent despite having been convicted, would be detained in prison indefinitely as a result of this legislative reform. The well-known Lindy Chamberlain case, whereby Mrs Chamberlain was wrongly found guilty of murdering her daughter, illustrates the possibility of this devastating mistake.*
>
> *Similarly, in circumstances where an offender is not aware of the location of a body, it would not be possible to cooperate. Natural events, including floods, rain, changes in topography, as well as where a body has been disposed of at sea, would prevent a convicted person from providing accurate information. The practical reality of Queensland's environment means that these events would not be unusual.*[91]

Related concerns were also raised by the QCCL in its submission:

> *Those who are wrongly convicted of homicide offences due to miscarriages of justice will be unable to ever be released.*
>
> *The result of this means that there will inevitably be innocent people that will never be released under these laws. An innocent person, who has had no involvement in the death of the deceased cannot provide to authorities the location of that body. The only cooperation the prisoner can possibly offer is to be a model prisoner, which is not sufficient to overcome the hurdle posed by the proposed laws.*
>
> *…….*
>
> *If a person is wrongly convicted of a crime they did not commit, that is a significant miscarriage of justice. If this is exacerbated by the fact that they are further detained because they are unable to meet the requirements suggested by the Bill, we submit that this is an unacceptable risk and is not overcome by any potential benefits.*[92]

The departmental response to submissions notes in respect of this issue that:

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91 Submission 1, pp 1-2.

92 Submission 3, p 2.

The Bill does not provide an absolute rule that the Parole Board cannot grant parole unless the body is in fact recovered. A failure to locate the body does not equate to 'never to be released'.

Rather, decision-making about release must be informed by a range of factors including: the report of the Commissioner of Police and any Court records relevant to the offence (including remarks at sentence) in order for the Parole Board to determine whether the prisoner has cooperated satisfactorily. The Bill is sufficiently broad to allow for the release of a prisoner to parole in circumstances where the body cannot be recovered for a variety of reasons, including, for example, those who cooperate but it is an impossibility that the body or remains will ever be found (eg. due to a loss of capacity on behalf of the prisoner or decomposition of the remains to the point where they are no longer recoverable).[93]

At the committee's public briefing, the department advised:

It should be noted that the bill contemplates those cases where it is an impossibility for the body to be recovered. This may be the case in circumstances where the body may have been completely disposed of or has since been interfered with by another person or animals. The framework in the bill does not impose an absolute rule that the body must in fact be recovered but, rather, seeks to evaluate the prisoner's cooperation in determining the last known location and place of the victim's remains.[94]

Committee comment

The committee notes that the response from the department contemplates instances where a prisoner has cooperated on the issue of providing information about the location of a body or remains but for external reasons recovery of the body is an impossibility. The response does not provide for the worst case scenario raised by the QLS, QCCL and the Qld Bar Association, being if a person is genuinely innocent then they cannot be expected to have any knowledge of the location of the body and what is a genuine absence of knowledge may be presumed to be a lack of cooperation that will likely hamper their bid for parole.

The committee considers that on balance, the amendments to the CSA proposed above are fair and reasonable in their potential treatment of parole applicants.

4.1.2 Natural justice

Section 4(3)(b) of the LSA provides that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

Summary of provisions

Proposed new section 193A(4) provides that the Parole Board must, after receiving the parole application, request a written report about the prisoner's cooperation in the investigation of the offence to identify the victim's location.

The Police Commissioner (or delegate) must provide their written report to the parole board at least 28 days prior to the proposed parole hearing day.

93 Correspondence dated 23 June 2017, p 2.

94 Public briefing transcript, Brisbane, 14 June 2017, p 2.

Proposed new section 193A(6) provides that the Commissioner's report must state whether the prisoner has cooperated (of a type required by section 193A) and if so, an evaluation of:

- the nature, extent and timeliness of the prisoner's cooperation;
- the truthfulness, completeness and reliability of any information or evidence provided by the prisoner in relation to the victim's location; and
- the significance and usefulness of the prisoner's cooperation.

Potential FLP issues

Legislation should be consistent with the principles of natural justice which are developed by the common law and incorporate the following three principles: (1) something should not be done to a person that will deprive them of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present their case to the decision-maker; (2) the decision maker must be unbiased; (3) procedural fairness should be afforded to the person, meaning fair procedures that are appropriate and adapted to the circumstances of the particular case.[95]

There is no mechanism provided in the Bill by which the information and opinions contained in the report from the Police Commissioner can be directly challenged by the parole applicant.

The submission from the QCCL stated:

> *The Bill does not provide for adequate accountability measurements as it does not allow the prisoner to challenge any adverse findings in the Report issued by the Police Commissioner to the Parole Board.*
>
> *As the Bill currently stands, it places too much reliance on a single report by the Police Commissioner.*
>
> *There is no direct avenue outlined in the Bill that allows the prisoner to challenge potentially adverse findings in the Report.*
>
> *We submit that any amendments to the Bill ought to include a provision that allows time for the prisoner to consider the Report and to bring before the Parole Board any evidence or submissions to the contrary.*[96]

The departmental response to submissions noted that:

> *The existing Ministerial Guidelines to the Queensland Parole Board (the Guidelines) provide for the disclosure to the prisoner of material or factors adverse to the prisoner in the decision making process.*
>
> *While new Guidelines must be issued upon proclamation of the Corrective Services (Parole Board) and Other Legislation Amendment Act 2017, it is envisaged that such a requirement would be retained under the new Guidelines given its importance in ensuring natural justice to the applicant. As such, the Commissioner's report would be required to be disclosed to the prisoner*

95 Office of the Queensland Parliamentary Counsel, Fundamental Legislative Principles: *The OQPC Notebook*, p 25.

96 Submission 3, p 3.

(subject to any exceptions listed in the new Guidelines, for example, perhaps where the information may put another person at risk).[97]

Adverse comment about a prisoner's actual or perceived level of cooperation contained in the Police Commissioner's report to the Parole Board could jeopardise the success of a prisoner's bid for parole.

Accordingly, it may be appropriate for prisoners to be given the opportunity to bring contrary evidence before the parole board to contextualise or refute negative assertions made in the report about their level of cooperation. This is especially so given that the sorts of things which the Commissioner's report must cover are arguably matters of a subjective nature.

The report itself requires the Commissioner's evaluation of the nature, extent and timeliness of the prisoner's cooperation, its significance and usefulness, and the truthfulness, completeness and reliability of any information or evidence provided by the prisoner.

Whilst it is to be expected that the evaluation would be based on a fair appraisal of the prisoner's cooperation efforts, there remains the possibility that there may be a valid reason for something that could, on its face, be classified as non-cooperation. Without an opportunity to present the reason to the parole board, the board's decision would be made on the basis of an essentially unbalanced weight of information - that is, the Police Commissioner's Report - with no opportunity for the prisoner's side to be put forward in response.

Committee comment

The committee notes that the department's response in respect of Ministerial Guidelines to the Parole Board notes that the guidelines require that material or factors adverse to the prisoner in the decision making process must be disclosed to the prisoner.

4.1.3 Retrospectivity

Section 4(3)(g) of the LSA provides that whether legislation has sufficient regard to the rights and liberties of individuals, depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

Summary of provisions

Clause 5 of the Bill inserts a new Part 12 (Transitional provisions) into Chapter 7A of the CSA to expressly provide for the retrospective application of the amendments.

Under the Bill, the No Body, No Parole policy would apply to the following parole applications:

- where the prisoner is convicted and sentenced for the homicide offence after commencement of the Bill (prospective application);
- where the prisoner was convicted of the homicide offence before commencement but sentenced for the offence after commencement of the Bill;
- where the prisoner was convicted and sentenced for the homicide offence before commencement of the Bill and the application for parole is made after commencement of the Bill;
- where the prisoner was convicted and sentenced for the homicide offence and the parole application made before commencement, but the application is not yet determined at the time of commencement; and

[97] Correspondence dated 23 June 2017, p 6.

- where the prisoner was convicted, sentenced and released to parole but returned to prison, whether before or after commencement of the Bill, and that parole order is cancelled.

The transitional provisions mean that the Bill will have a retrospective effect on those who have already applied for parole (prior to the commencement of this Bill) and have a decision pending.

Potential FLP issues

Section 4(3)(g) of the LSA provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively. Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

This Bill would operate retrospectively in the sense that certain prisoners convicted of murder/manslaughter who had made an application for parole prior to the commencement of the Bill will find that their eligibility for parole is contingent upon a newly introduced requirement. That is, their cooperation in telling authorities where a body or remains can be located.

As the Bar Association cautions in its submission:

> *It is easy to imagine a prisoner who has been incarcerated for a long time (perhaps even decades) and has made genuine and impressive efforts towards rehabilitation in the hope of parole. Such a prisoner could be suddenly ineligible for parole owing to the effect of the Bill and the passage of time upon their memory or even the state or the location of the missing remains.*[98]

The explanatory notes acknowledge the retrospective nature of the Bill, advising:

> *The Bill retrospectively applies the amendments to certain prisoners. New section 490U (Application of s193A) applies section 193A (Deciding particular applications where victim's body or remains have not been located) to parole applications regardless of when the prisoner was convicted of or sentenced for the homicide offence. New section 490V (Existing applications for parole order or applications under s 490R) applies section 193A to an application for parole made, but not yet decided before commencement of the Bill.*
>
> *A parole eligibility date is not a guarantee that the prisoner will be granted parole on that particular date; or that the prisoner's entitlement to parole will be determined based on the parole system as in force at the time of sentence.*
>
> *Although the Bill provides for new section 193A to apply retrospectively, it is not removing a prisoner's right to receive parole. Rather, the Bill applies an obligation on the parole board to evaluate the prisoner's cooperation in locating a victim's body or remains. Gathering such information is designed to help victims' families and to provide a strong incentive for prescribed prisoners to cooperate. The No Body, No Parole policy will only apply to a very small cohort of prisoners; and is reserved for those who commit very serious criminal offences (murder, manslaughter, accessory after the fact to murder or conspiring to murder etc.). The retrospective application of new section 193A is considered justified for the above reasons and on public interest grounds.*[99]

98 Submission 4, p 3.

99 Explanatory notes, p 4.

Committee comment

The committee notes the retrospective operation of the Bill and considers it justified in the circumstances.

4.2 Explanatory notes

Part 4 of the LSA relates to explanatory notes. It requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Appendix A – List of submissions

Sub #	Submitter
001	Queensland Law Society
002	Ms Fiona Splitt
003	Queensland Council for Civil Liberties
004	Bar Association of Queensland

Appendix B – List of witnesses at public departmental briefing and public hearing

Public briefing – Brisbane, 14 June 2017

Department of Justice and Attorney-General

- Mrs Leanne Robertson, Acting Assistant Director-General, Strategic Policy and Legal Services
- Ms Carolyn McAnally, Acting Director, Strategic Policy and Legal Services

Queensland Corrective Services

- Ms Kate Petrie, Director, Policy and Legislation

Public hearing – Brisbane, 19 June 2017

Queensland Council for Civil Liberties

- Mr Terry O'Gorman, Vice President

Bar Association of Queensland

- Mr Stephen Keim SC, Criminal Law Committee
- Ms Polina Kinchina, Criminal Law Committee

Queensland Law Society

- Ms Christine Smyth, President
- Mr Bill Potts, Immediate Past President

Submitter

- Ms Fiona Splitt