Report 34

STANDING COMMITTEE ON LEGISLATION

Sentence Administration Amendment Bill 2017

Presented by
Hon Dr Sally Talbot MLC (Chair)
November 2017
Standing Committee on Legislation

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### GLOSSARY

<table>
<thead>
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<th>Term</th>
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<tr>
<td>the Act</td>
<td><em>Sentence Administration Act 2003</em></td>
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<td>the Bill</td>
<td><em>Sentence Administration Amendment Bill 2017</em></td>
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<tr>
<td>the Committee</td>
<td>Standing Committee on Legislation of the Legislative Council, Parliament of Western Australia</td>
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<tr>
<td>Early release order</td>
<td>release on parole or on a re-entry release order</td>
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<td>Governor</td>
<td>the Governor of Western Australia</td>
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<tr>
<td>Governor’s Pleasure Detainee</td>
<td>a child convicted of wilful murder under section 282 (now repealed) or under section 279(5)(b) of the Criminal Code, who was ordered to be detained in strict or safe custody at the Governor’s pleasure, or a person subject to an indeterminate sentence on the grounds set out in the now repealed sections 661 or 662 of the Criminal Code (being an habitual criminal or being detained at the Governor’s pleasure, either following a term of imprisonment or not, in certain circumstances given the antecedents, health, mental health and age of the offender and the nature of the offence)</td>
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<tr>
<td>No body, no parole</td>
<td>common parlance for a law which provides that a prisoner shall not be granted parole unless he or she has satisfactorily cooperated with police in locating the remains of the victim of the offence</td>
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<tr>
<td>Police Force</td>
<td>Western Australia Police Force</td>
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<tr>
<td>PRB</td>
<td>Prisoners Review Board</td>
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<tr>
<td>Parole eligibility order</td>
<td>an order that an offender serving a fixed term of imprisonment of more than six months, that is not a prescribed term, be eligible to be considered for parole by the Prisoners Review Board</td>
</tr>
<tr>
<td>Parole term</td>
<td>a term of imprisonment to which a parole eligibility order applies, or a sentence in respect of which a minimum term of imprisonment is deemed to have been fixed under the <em>Prisoners (Interstate Transfer) Act 1983</em></td>
</tr>
</tbody>
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Prescribed term
a term of imprisonment imposed for a
'prison offence’, meaning a ‘minor prison
offence’ (which consists of a list of 11
behavioural infringements set out at section
69 of the Prisons Act 1981) or an
'aggravated prison offence’ (a list of 9 more
serious offences listed at section 70 of the
Prisons Act 1981), or a term imposed for
escaping lawful custody (section 85,
Sentencing Act 1995)

Prisoner
a person sentenced to a fixed term (whether
a parole term or not), a person sentenced to
life imprisonment, a person sentenced to
indefinite imprisonment or a Governor’s
pleasure detainee

Re-entry Release Order
an order made under Part 4 of the Sentence
Administration Act 2003, including a re-
entry release order made for the purposes of
section 72 (where an early release order has
been cancelled, then another made)

Release action
the making of a parole order under section
23(3)(b) of the Act (where the prisoner is
serving a sentence of less than six months)

Release considerations
listed at section 5A of the Act

Release decision
a decision by the Prisoners Review Board to
recommend early release in a report to the
Attorney General, a decision to release a
prisoner on parole under section 20(2) of the
Act, a decision to make a parole order under
section 23(3)(a) or a decision to make a R-
entry Release Order

Royal Prerogative of Mercy
an order by which a prisoner may be
pardoned, entirely within the gift of the
Governor, without quashing or setting-aside
the conviction. In the exercise of this
Prerogative, the Governor may also make a
parole order in respect of the prisoner, for
between six months and five years

Schedule 3 prisoner
a person described in Schedule 3 to the Act,
about whom the Prisoners Review Board
must report to the Attorney General at the
times set out in that schedule
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EXECUTIVE SUMMARY, FINDINGS AND RECOMMENDATIONS

EXECUTIVE SUMMARY

1 On 15 August 2017, the Legislative Council referred the Sentence Administration Amendment Bill 2017 to the Standing Committee on Legislation for report by 28 November 2017. The motion of referral included the power to inquire into and report on the policy of the Bill.

2 The purpose of the Bill is to make amendments to the Sentence Administration Act 2003 by inserting provisions regarding the granting of early release from prison. In common parlance, those provisions have come to be known as ‘no body, no parole’ provisions. However, the Bill’s effect is not to create a prohibition on early release in the absence of a body.

3 The policy objective of the proposed provisions is that relevant prisoners will be encouraged to cooperate with the police in locating and recovering the remains of their victims — the legislative changes proposed by this Bill will mean that their possible early release from prison will be contingent upon satisfactory cooperation.

4 If the Bill becomes law, Western Australia will become the fifth State or Territory of Australia, after South Australia, the Northern Territory, Victoria and Queensland, to have such provisions. Details of the laws of those other jurisdictions may be found in Chapter 5 of this Report, and a comparative table of them may be found at Appendix 1. The governments of New South Wales¹ and the United Kingdom² are also considering similar provisions.

FINDINGS AND RECOMMENDATIONS

5 Findings and recommendations are grouped as they appear in the text at the page number indicated:

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| Finding 1: The Committee finds that the number of prisoners who would currently be affected by the provisions would be around 14. |

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| Finding 2: The Committee finds that the Prisoners Review Board has no role in advising the Attorney General or the Governor of Western Australia in the exercise of the Royal Prerogative of Mercy. |


Finding 3: The Committee finds that the legislative regime whereby the authority to release on parole a prisoner serving a life or indefinite sentence lies with the Governor of Western Australia rather than the Prisoners Review Board or its equivalent is unique amongst Australian jurisdictions.

Finding 4: The Committee finds that the reason advanced for leaving the commencement of the Sentence Administration Amendment Bill 2017 to the Executive is now redundant.

Finding 5: The Committee finds that the Government should monitor the information gathering process of the Western Australia Police Force on interstate prisoners for reports prepared under the proposed section 66C of the Sentence Administration Act 2003, to ensure its efficiency and effectiveness.

Finding 6: The Committee finds that an examination of equivalent legislative provisions in other Australian jurisdictions assists the Committee in its consideration of the Sentence Administration Amendment Bill 2017 in two respects:

- the possible inclusion of the offence of manslaughter in the definition of ‘homicide offence’

and

- the possible inclusion of a requirement for the Prisoners Review Board to consider the mental capacity of a prisoner to cooperate at the time that it makes a release decision or takes release action under proposed section 66B.

Finding 7: The Committee finds that, from the point of view of the friends and family of victims, and also from the point of view of the Western Australia Police Force, the proposed provisions are desirable. Moreover, in the Committee’s view, it is ultimately desirable that prisoners will be aware that their cooperation in locating the remains of the victim will be a statutory pre-requisite to parole.

Finding 8: The Committee finds that the proposed legislation is clear with regard to the primacy of considerations for the Prisoners Review Board — satisfactory cooperation in locating the remains of the victim is a gateway to any consideration of the matters set out at sections 5A and 5B. The inclusion of a proviso to section 5B, as suggested by the Prisoners Review Board, is unnecessary.
Finding 9: The Committee finds that concerns regarding miscarriages of justice, whilst relevant to certain aspects of the judicial process, do not arise in the consideration of the proposed provisions.

Finding 10: The Committee finds that cooperation rather than the recovery of a body is the critical criterion for a prisoner’s eligibility for parole consideration.

Finding 11: The Committee finds that the existing mechanisms in place for the rehabilitation of offenders will not be impacted upon by the provisions of the Sentence Administration Amendment Bill 2017.

Finding 12: The Committee finds that prisoners convicted of manslaughter should be included within the scope of the proposed provisions.

Recommendation 1: The Committee recommends that clause 9 of the Sentence Administration Amendment Bill 2017 be amended to include the offence of manslaughter within the definition of ‘homicide offence’ at proposed section 66A. This can be effected in the following manner:

Page 3, after line 23 — To insert:

(aa) manslaughter; or

Finding 13: The Committee finds that the mental capacity of a prisoner to cooperate in locating a victim’s remains should be specifically taken into account by the Prisoners Review Board in making a release decision or taking release action, and that the Commissioner of Police should be required to report on a prisoner’s mental capacity to cooperate, to the extent that this is known to the Commissioner of Police, where this is relevant.
Recommendation 2: The Committee recommends that the mental capacity of a prisoner to cooperate in locating a victim’s remains should be a consideration to be taken into account by the Prisoners Review Board in making a release decision or taking release action. This may be effected in the following manner:

Page 5, after line 32 — To insert:

(2A) The Board must, when deciding whether it is satisfied under subsection (1)(a), take into account any information the Board has about the prisoner’s mental capacity to provide relevant information or evidence.

Page 6, after line 30 — To insert:

(v) to the extent known to the Commissioner of Police, the prisoner’s mental capacity to provide relevant information or evidence;

Finding 14: The Committee is satisfied that there is no ‘right’ or ‘entitlement’ to parole which would be affected by the terms of the Sentence Administration Amendment Bill 2017.

Finding 15: The Committee finds that the Government should give consideration to creating a mechanism for prisoners to receive advance copies of reports prepared under the proposed section 66C, given that the Police Force has no objections to this and that the report would be obtainable under the freedom of information process in any event.

Finding 16: The Committee finds that the Sentence Administration Amendment Bill 2017 appropriately protects against self-incrimination.

Finding 17: The Committee finds that the provisions of the Sentence Administration Amendment Bill 2017 do not affect rights and liberties, or impose obligations, retrospectively.
CHAPTER 1
INTRODUCTION

REFERENCE AND PROCEDURE

1.1 On 15 August 2017, the Legislative Council referred the Sentence Administration Amendment Bill 2017 (the Bill) to the Standing Committee on Legislation (the Committee). The motion of referral read:

(1) That the Sentence Administration Bill 2017 be discharged and referred to the Standing Committee on Legislation for consideration and report by no later than Tuesday, 28 November 2017; and

(2) The Committee has the power to inquire into and report on the policy of the Bill.3

1.2 Details of the concerns raised by Members in the referral of the Bill, and the Committee’s consideration of those concerns, may be found at Chapter 6 of this Report.

1.3 The Committee called for submissions by:

- writing to the Western Australia Police Force (Police Force) and the Prisoners Review Board (PRB) directly
- inviting the Commissioner for Victims of Crime and the Law Society of Western Australia to comment on the Bill
- advertising the inquiry by way of a media release issued on 24 August 2017
- advertising the inquiry in The West Australian newspaper on 26 August 2017
- publicising the inquiry and the public hearing through Legislative Council social media accounts.

1.4 The Committee received a briefing from officers of the Department of Justice, and held a hearing with members of the Police Force. The submissions and subsequent correspondence received may be found at Appendix 2. The Committee would like to extend its thanks to those who provided written submissions and who appeared to give evidence.

COMMITTEE APPROACH

1.5 The Committee’s approach during this inquiry, in broad terms, was to focus on the following issues in its consideration of the Bill:

- whether the legislative changes which would be effected should the Bill become law were necessary to achieve the Government’s stated policy aims

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3 Hon Aaron Stonehouse MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 15 August 2017, pp 2704-5.
• whether the provisions of the Bill could be amended to better achieve the intended policy aims

• what would be the practical outcomes of the proposed amendments to the *Sentence Administration Act 2003* (the Act), including for those prisoners who, for whatever reason, are unable to cooperate in the locating of the remains of the victim.

1.6 The Committee’s scrutiny of the Bill also included an assessment as to whether its provisions are consistent with fundamental legislative scrutiny principles. Whilst consideration or application of those principles are not mandatory in Western Australia, the Committee has used them as a framework for fair and effective scrutiny of putative legislation since 2004. A list of those fundamental legislative scrutiny principles may be found at Appendix 3.
CHAPTER 2
POLICY AND INTENT OF THE BILL

BACKGROUND

2.1 The Government’s motivation for the introduction of this Bill is evidenced in the words of Hon Sue Ellery MLC, Leader of the House. During her second reading speech, she said:

It is clear that it is a matter of great importance, and a step towards closure, for a family to be able to bury their loved one.4

2.2 The Leader of the House outlined the background to the proposals in the following terms:

As honourable members may be aware, the history of this legislation starts with Margaret Dodd. Her daughter, Hayley, has not been found. Mrs Dodd started a public petition for no body, no parole laws and it gained the support of approximately 40,000 people.5

2.3 Ms Dodd, then aged 17, disappeared in July 1999 whilst hitchhiking approximately 200 kilometres north of Perth. In December 2015, a man was extradited from Queensland and formally charged with her murder, and at the time of this Report, that case is ongoing. Her body has never been found.6

2.4 Hon Sue Ellery MLC continued:

The murder of Craig Puddy also comes to mind—the offender was convicted and received a life sentence with a minimum non-parole period of 18 years. Mr Puddy’s father, Laurie, said that the verdict was a first step but that it would not bring the family closure as he still does not know the whereabouts of his son’s body.7

2.5 The desire of family and friends of homicide victims for closure was amplified by the Office of the Commissioner for the Victims of Crime:

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4 Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 28 June 2017, p 1889.
5 ibid.
7 Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 28 June 2017, p 1889.
There is considerable research which supports the view that there appears to be an almost universal human need to bury ones dead. Any psychological resolution after a homicide is hindered when the loved one has vanished without a trace and there is no body to bury and no opportunity to honour the person and participate in the cultural rituals of burial and mourning.

The family and friends of homicide victims in Western Australia and in other jurisdictions have given voice to their need to bury their loved ones. This office has had contact with families who have no knowledge of the whereabouts of the body of their family victim. This lack of knowledge has impacted on them over many years and they support the introduction of this bill. There is a strong view amongst victim groups that "Killers cannot claim remorse or rehabilitation unless they have revealed where their victims are". It is this focus on remorse and rehabilitation which relates directly to decisions regarding parole and release from custody.8

Sentence Administration Amendment Bill 2016

2.6 A community-based campaign and a petition, which was tabled in the Legislative Assembly on 18 February 20169, led to the introduction in the Assembly of the Sentence Administration Amendment Bill 2016 by Mr John Quigley MLA on the same day. This was a short Private Member’s Bill, the second reading debate for which occurred on 24 February 201610, 16 March 201611 and 11 May 2016.12

2.7 The intention of that bill was to amend the Act to provide for a ‘no body, no parole’ type provision. The bill as presented would have introduced, in clause 6, a restriction whereby:

A report given under section 12 or 12A [that is a report on a prisoner from the PRB to the Attorney General] must not make a release recommendation in relation to a prisoner unless the Board is satisfied that the prisoner has satisfactorily cooperated in the investigation of the murder (whether the cooperation occurred before or after the prisoner was sentenced to imprisonment).

2.8 The provision would have applied to a prisoner who was:

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9 Petition 341, tabled by David Templeman MLA, Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 18 February 2016, p 468.
10 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 24 February 2016, pp 771 - 777.
11 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 16 March 2016, pp 1226 - 1231.
12 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 11 May 2016, pp 2762 - 2773.
(a) a person serving a sentence of life imprisonment for murder where a minimum period has been set under the Sentencing Act 1995 section 90(1)(a); or

(b) a person serving a sentence of indefinite imprisonment where the nominal sentence (as defined in the Sentencing Act 1995 section 98(1)) was imposed for murder.  

2.9 Following an amendment to the bill made during the Consideration in Detail stage in the Legislative Assembly, the substantive provision read:

Section 5A amended
After section 5A(c) insert:

(ca) if the prisoner is in custody for an offence relating to the death of a person, the extent (if any) to which the prisoner has assisted in the location of the person’s remains;

2.10 Thus, following that amendment, the prisoner’s assistance in locating the victim’s remains would have become a ‘release consideration’ for the PRB to take into account, alongside 11 other matters to be weighed in the balance under section 5A of the Act, rather than a prohibition on recommendations for release in the absence of cooperation.

2.11 Moreover, the class of prisoner affected would have included all of those in custody ‘for an offence relating to the death of a person’, clearly a much wider class than just those convicted of murder.

2.12 In any event, the Private Members’ Bill did not complete its passage through the Legislative Assembly.

POLICY AND INTENT OF THE BILL

2.13 Continuing her second reading speech for the Bill now under consideration, Hon Sue Ellery MLC, Leader of the House, summed-up the intent of the provisions in one sentence:

The aim of the proposed provisions is to enhance the likelihood of locating the body of the victim of a murder.

2.14 The objective of the Bill is that the new provisions will provide an incentive to prisoners convicted of murder or murder-related offences to cooperate with police to identify the location, or last known location, of the remains of the victim. The granting of early release would be contingent upon that cooperation. In legal terms, this will be done by

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13 Sentence Administration Amendment Bill 2016, clause 6.
14 Western Australia, Legislative Assembly, Parliamentary Debates (Hansard), 11 May 2016, pp 2773 - 2783.
15 Hon Sue Ellery MLC, Leader of the House, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 28 June 2017, p 1889.
legislating a prohibition on the granting or recommending of parole to such prisoners unless the PRB is satisfied that the prisoner has provided that cooperation.

2.15 The clear policy intent of the Bill is that consideration of this issue would be mandatory, not merely one of a collection of other considerations. As the Attorney General said during debate in the Legislative Assembly:

*The government considers that the issue is of such importance to require the board to give special mandatory consideration. This will ensure that the matter is expressly and specifically considered by the board and the relevant prisoners are aware of this specific consideration, which will provide an incentive to cooperate.*

2.16 When enquiries were made about the number of prisoners who would be affected by the proposed provisions, there was a small variation in the figures given. However, it would seem that as at the date of this Report, there are some 12 or 13 prisoners incarcerated in Western Australia for murder or wilful murder, and one for being an accessory after the fact (having disposed of a body at sea), who would be impacted.

2.17 Despite the shorthand descriptor that has been applied to provisions such as those that are proposed, they do not equate to ‘*no body, no parole*’. The Bill would not impose an absolute rule that the body or the remains of it must be recovered before early release may be granted. The proposed provisions might more accurately be described, as Hon S F McGurk MLA, Minister for Child Protection, Women’s Interests, Prevention of Family and Domestic Violence and Community Services put it, ‘*no cooperation, no parole*’. The Minister pointed out:

*Even in the event that the body may not physically be found, if the police report to the parole board that they believe that the prisoner has cooperated to a sufficient level, that can be taken into account.*

Finding 1: The Committee finds that the number of prisoners who would currently be affected by the provisions would be around 14.

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16 Hon John Quigley MLA, Attorney General, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 June 2017, p 1693.

17 Hon Simone McGurk MLA, Minister for Child Protection, Women’s Interests, Prevention of Family and Domestic Violence and Community Services, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 27 June 2017, p 1691.
CHAPTER 3
CURRENT LEGISLATIVE FRAMEWORK

CURRENT LEGISLATIVE FRAMEWORK FOR SENTENCING AND PAROLE

3.1 The sentencing of offenders, eligibility for parole and the grounds on which parole may be ordered, including for those prisoners serving sentences in Western Australia for offences committed interstate, may be found in four statutes:

- the Criminal Code Act Compilation Act 1913 (the Criminal Code)
- the Sentencing Act 1995
- the Sentence Administration Act 2003 (referred to throughout this Report as the Act)
- the Prisoners (Interstate Transfer) Act 1983.

3.2 The relevant parts of these statutes insofar as they relate to sentences that may be given for offences affected by the terms of the Bill, being those for a ‘homicide offence’ or for a ‘homicide related offence’, are set out below.

The Criminal Code

Homicide offence

3.3 For the purposes of the Bill, a ‘homicide offence’ is defined as murder (which includes the now repealed offence of ‘wilful murder’\(^{18}\)) or ‘infanticide’\(^{19}\). Those repealed offences are included in the definition in order to include all relevant prisoners, regardless of when the offence was committed. Murder is defined in section 279 of the Criminal Code as follows:

\[
(1) \text{ If a person unlawfully kills another person and —}
\]

\[
(a) \text{ the person intends to cause the death of the person killed or another person; or}
\]

---

\(^{18}\) An offence that was repealed by section 10 of the Criminal Law Amendment (Homicide) Act 2008, it was previously defined as follows (section 278 of the Criminal Code): Except as hereinafter set forth, a person who unlawfully kills another, intending to cause his death or that of some other person, is guilty of wilful murder. The offence is now taken to be included in statutory references to murder by virtue of section 4(2) of the Criminal Code.

\(^{19}\) An offence that was also repealed in 2008, by section 13 of the Criminal Law Amendment (Homicide) Act 2008, it was previously defined as follows (section 281A of the Criminal Code): When a woman or girl who unlawfully kills her child (under the age of 12 months) under circumstances which, but for this section, would constitute wilful murder or murder, does the act which causes death when the balance of her mind is disturbed because she is not fully recovered from the effect of giving birth to the child or because of the effect of lactation consequent upon the birth of the child, she is guilty of infanticide only.
(b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or

(c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life.

the person is guilty of murder.

(2) For the purposes of subsection 1(a) and (b), it is immaterial that the person did not intend to hurt the person killed.

(3) For the purposes of subsection (1)(c), it is immaterial that the person did not intend to hurt any person.

3.4 It should be stressed that a conviction for murder does not automatically result in a life sentence. Section 279 goes on to provide that an adult so convicted must be sentenced to life imprisonment unless such a sentence would be manifestly unjust in the circumstances of the case and the person is unlikely to be a threat to the community when released — in that case, the person is liable to imprisonment for 20 years. If the murder occurs during an aggravated home burglary, and a sentence of life imprisonment is not imposed, then a sentence of at least 15 years must be given. A child found guilty of murder may be sentenced to a maximum of life imprisonment or be detained at the Governor’s pleasure.

Homicide related offence

3.5 A ‘homicide related offence’ under the Bill is defined as any of the following if the offence relates to the death of a person:

(a) counselling or procuring the commission of a homicide offence; or

(b) inciting another person to commit a homicide offence; or

(c) becoming an accessory after the fact to a homicide offence; or

(d) conspiring with another person to commit a homicide offence.

3.6 A person who counsels or procures the commission of an offence may be charged with actually committing the offence in the alternative, and a conviction for counselling or procuring ‘entails the same consequences in all respects as a conviction of committing the offence’ (section 7 of the Criminal Code).

3.7 Charges of incitement to commit an offence or becoming an accessory after the fact to an offence are dealt with by section 10D of the Criminal Code, and conspiracy is dealt with in section 10F. Sentencing for each of those offences is included at Part VII, Chapter LVII of the Criminal Code, but were summarised in the submission made on behalf of the PRB:

If the offender is convicted as a co-conspirator to a murder or if so charged is convicted as inciting a murder, or is convicted as being an
accessory after the fact to murder, he or she is not liable to life imprisonment, but to a maximum sentence of 14 years imprisonment.

In all such cases, imprisonment of the offender is not mandatory, although it must be acknowledged that imprisonment for a finite term is likely.20

Sentencing Act 1995

3.8 This Act sets out the basic sentencing principles, such as the application of mitigating or aggravating factors and the effect of guilty pleas, together with the sentencing process and the types of sentences available to magistrates and judges upon a conviction.

3.9 Section 89 in broad terms declares that a court may (or indeed may not in certain circumstances) make a ‘parole eligibility order’ — that is, an order that an offender serving a fixed term of imprisonment of more than six months, that is not a ‘prescribed term’, be eligible to be considered for parole by the PRB.

3.10 Section 90 then deals with the imposition of life sentences for murder. Under subsection 90(1), where a court imposes such a sentence, it must either:

(a) set a minimum period of —

(i) at least 15 years, if the offence is committed by an adult offender (within the meaning given in The Criminal Code section 1(1) in the course of conduct that constitutes an aggravated home burglary (within the meaning given in that section); or

(ii) at least 10 years in any other case,

that the offender must serve before being eligible for release on parole; or

(b) order that the offender must never be released.

An order under 90(1)(b) must be made if it is necessary to do so in order to meet the community’s interest in punishment and deterrence.

3.11 Section 93 goes on to deal with release from a ‘parole term’ (that is, in short, a term to which a parole eligibility order applies, or a sentence in respect of which a minimum term of imprisonment is deemed to have been fixed under the Prisoners (Interstate Transfer) Act 1983 — see paragraphs 3.34 to 3.37 below). Subsection 93(1) states that such a prisoner becomes eligible to be released on parole:

(a) if the term served is 4 years or less — when he or she has served one-half of the term; or

3.12 Any order for the release on parole of a prisoner to whom subsection (1) applies ‘must be made in accordance with Part 3 of the Sentence Administration Act 2003’ (section 93(2)).

3.13 Section 96 deals with release from life imprisonment. A prisoner serving such a sentence for an offence other than murder (so this may be relevant to a prisoner convicted of a ‘homicide related offence’) must serve at least seven years. If a convicted murderer had a minimum period imposed under section 90(1)(a), then that minimum period must be served. If an order has been made under section 90(1)(b), that prisoner ‘is not to be released.’

3.14 However, Part 19 of this Act deals with the Royal Prerogative of Mercy, under which a prisoner may be pardoned, entirely within the gift of the Governor, without quashing or setting-aside the conviction. In the exercise of this Prerogative, the Governor may also make a parole order in respect of the prisoner, for between six months and five years (section 141). Part 3 of the Sentence Administration Act 2003 again applies in respect of that prisoner.

3.15 If an order is made under the Royal Prerogative of Mercy in respect of a prisoner sentenced under section 90(1)(b) (i.e. ‘not to be released’), the Attorney General must table that order, together with a written explanation of the circumstances giving rise to the making of it, in both Houses of Parliament within 15 days (section 142).

3.16 It should be noted that the PRB has no role in advising the Attorney General or the Governor in the exercise of the Royal Prerogative of Mercy.21

Finding 2: The Committee finds that the Prisoners Review Board has no role in advising the Attorney General or the Governor of Western Australia in the exercise of the Royal Prerogative of Mercy.

Sentence Administration Act 2003

3.17 Whilst the Criminal Code and the Sentencing Act 1995 establish the sentences that may be imposed, and when parole eligibility may arise, the Sentence Administration Act 2003 deals with the service of terms of imprisonment, matters affecting those terms, prisoner reports and ‘early release orders’ (defined as including release on parole and release on a re-entry release order — section 4).

Parole

3.18 Depending on the nature of the sentence, early release decisions may be made either by the PRB or by the Governor on the advice of the Attorney General. Sometimes the PRB’s discretion is limited by mandatory release provisions.

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There are three categories of parole, being:

- parole for life and indefinite prisoners (including Governor’s pleasure detainees).
- parole for finite term sentences greater than six months
- parole terms for sentences shorter than six months.

Life and indefinite sentences

Uniquely to Australia, the PRB has no authority to release such prisoners — the authority to make a parole order vests in the Governor. Sections 25 to 27B allow the Governor to parole a prisoner serving a life sentence, again for between six months and five years, following receipt of a report from the PRB to the Attorney General under section 12 or 12A (see paragraphs 3.27 to 3.33 on reporting).

A prisoner serving an indefinite term may also be paroled following receipt of such a report. A Governor’s pleasure detainee may be released on parole, again for between six months and five years, following receipt of a section 12 or 12A report, but in these cases the Attorney General must table in Parliament the parole order made, and an explanation of the circumstances giving rise to the making of it, within 15 days of its making (section 27B).

Finding 3: The Committee finds that the legislative regime whereby the authority to release on parole a prisoner serving a life or indefinite sentence lies with the Governor of Western Australia rather than the Prisoners Review Board or its equivalent is unique amongst Australian jurisdictions.

Finite term sentences greater than six months

Section 93 of the Sentencing Act 1995 (discussed at paragraph 3.11) sets out the parole eligibility criteria for prisoners serving a sentence in respect of which a minimum term of imprisonment was fixed by the court. Section 20 of this Act then sets out the power for the PRB to parole such prisoners. It must make a parole order if it decides that it is appropriate to do so having regard to:

- the ‘release considerations’
- any report made by the Chief Executive Officer (CEO) of the Department of Justice under section 17 (the CEO must make a report to the PRB in respect of a prisoner serving a parole term, which must cover the ‘release considerations’)

In other jurisdictions, release decisions regarding relevant prisoners are for the respective parole boards. See paragraph 6.6 of this Report and Submission 1 from the Prisoners Review Board, 21 September 2017, p 13 (at paragraph 6.13 of this Report).
any other information about the prisoner that comes to light.

The release considerations mentioned are set out in sections 5A of the Act. They are:

(a) the degree of risk to the community or to an individual
(b) the circumstances of, and seriousness of, the commission of the offence
(c) any remarks made by the sentencing court regarding (a) and (b)
(d) any issues for the victim
(e) the behaviour of the prisoner in custody
(f) whether the prisoner has participated in any programmes in custody
(g) the prisoner’s performance during any such programmes
(h) the prisoner’s behaviour when subject to any previous early release order
(i) the likelihood of commission of an offence whilst on early release
(j) the likelihood of compliance with any obligations of an early release order
(k) any other considerations.

However, by virtue of section 5B:

The Board or any person performing functions under this Act must regard the safety of the community as the paramount consideration.

Sentences shorter than six months

The Court will not make a parole eligibility order in respect of such prisoners, because that eligibility is automatic after serving any minimum mandatory sentence for the offence, or half the term (section 23).\(^{23}\) This type of decision of the PRB is referred to as a ‘release action’ in the Act, and is mandatory except in the case of a ‘prescribed prisoner’.\(^{24}\)

Even through the grant of parole may be mandatory, the PRB still has regard to the release considerations above and to any report from the CEO, as it retains the discretion to impose conditions on the release.

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\(^{23}\) Section 23(3)(b) allows a court to fix a sentence of such length that the prisoner is mandatorily released on parole. In these cases, the role of the PRB is merely to fix the conditions of parole.

\(^{24}\) A ‘prescribed prisoner’ is one serving a term for a ‘serious offence’ as listed in Schedule 2 to the Act, or one released (on parole or to freedom) from a term for a serious offence in the five years prior to the commencement of this current term, or one previously granted an early release order (being parole or a re-entry release order) that was cancelled in the two years prior to the commencement of the current term.
Re-entry release orders

3.20 Part 4 of the Act deals with ‘Re-entry Release Orders’ (RROs). These are another form of release order, in addition to parole orders. Prior to 2003, they were known as ‘Work Release Orders’.

3.21 The Department of Corrective Services ‘Policy Directive 47, Re-entry Release Orders’, points out that an RRO may be made as a precursor to release on parole, or release to freedom. It goes on:

_The Re-entry release programme aims to facilitate the successful re-entry of prisoners into the community and promote a constructive self-supporting, law-abiding lifestyle in the community by:_

- Re-establishment of family and community ties
- The development of Re-entry skills
- The development of social skills
- Participation in education or other personal development
- Exposure to a period of normal employment
- Service to the community
- Participation in treatment programmes or counselling where relevant.²⁵

3.22 Certain categories of prisoner may apply for release on an RRO (excluded, for example, are prisoners on a parole term or those serving life or indefinite imprisonment). In respect of every applicant, the PRB must consider:

- a report from the CEO of the Department of Justice
- the release considerations
- whether the personal safety of people in the community or of any individual in the community would be better assured if the prisoner were released under an RRO instead of at the time when he or she would otherwise have to be released.

3.23 A prisoner released on an RRO must give a number of undertakings in writing, including that he or she must complete a prescribed number of community correction activities, must not leave the State and must not change address or place of employment without prior permission. Moreover, every RRO contains a requirement that the released person actively seek or engage in gainful employment or engage in approved voluntary work.

3.24 The PRB, in granting an RRO, may also impose additional requirements, such as the wearing of a monitoring device. The released person is also subject to supervision, unless otherwise ordered by the PRB.

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²⁵ Department of Corrective Services, Policy Directive 47, Re-entry Release Orders, p 2.
3.25 The Prisoners Review Board Annual Report 2016/17 was tabled in Parliament on 10 October 2017, and contains interesting statistics concerning the use of such RROs. Under the heading ‘Breakdown of total prisoners released under an early release order’, the following figures are given:

<table>
<thead>
<tr>
<th>TYPE OF EARLY RELEASE ORDER</th>
<th>2016/17</th>
<th>2015/16</th>
<th>CHANGE (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>PAROLE</td>
<td>966</td>
<td>847</td>
<td>14% ↑</td>
</tr>
<tr>
<td>RE-ENTRY RELEASE ORDER</td>
<td>0</td>
<td>0</td>
<td>0% ⇒</td>
</tr>
<tr>
<td>SHORT-TERM PAROLE (SUPERVISED)</td>
<td>441</td>
<td>365</td>
<td>20.8% ↑</td>
</tr>
<tr>
<td>SHORT-TERM PAROLE (UNSUPERVISED)</td>
<td>2</td>
<td>0</td>
<td>100% ↑</td>
</tr>
<tr>
<td>TOTAL</td>
<td>1409</td>
<td>1212</td>
<td></td>
</tr>
</tbody>
</table>

3.26 Clearly there is an issue with the granting of RROs, but that is not a matter for this inquiry.

**Reporting**

3.27 Section 12 of the Act deals with reports about prisoners. The PRB must give a report to the Attorney General:

- when so requested, or
- when it considers it necessary to do so.

3.28 Either report must deal with the release considerations listed at paragraph 3.19.

3.29 Section 12(4) currently states that a report by the PRB to the Attorney General must (if the report was requested) or may (if otherwise given) recommend whether or not the Governor should be advised to release the prisoner under powers vested in him or her and, if release is recommended, the requirements or conditions (if any) that should apply to the release.

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Additionally, the PRB is required under section 12A to carry out a review of, and report on, prisoners serving life or indefinite sentences on either a yearly or three yearly cycle depending on the statutory requirements set out in Schedule 3 to the Act. That schedule covers 15 categories of prisoners (known as ‘Schedule 3 prisoners’). A copy of the schedule may be found at Appendix 4 for ease of reference, but by way of example:

- a prisoner serving a life sentence for murder where a minimum period of imprisonment has been set must be reviewed at the end of that minimum period, and then every three years after that
- a prisoner serving a life sentence for an offence other than murder must be reported on after seven years, and then every three years after that
- a prisoner serving a Governor’s pleasure detention for murder committed as a child must be reported on after every anniversary of the beginning of the detention.

Again, such a report must deal with the release considerations listed at (a) to (k) in paragraph 3.19.

Any report given as described may recommend to the Attorney General whether or not the Governor should be advised to exercise his or her release powers and, if release is to be recommended, the conditions (if any) that should be attached to the release.

According to the PRB’s latest Annual Report, some 53 statutory reports were prepared for the Attorney General in the year to 30 June 2017.²⁷

Prisoners (Interstate Transfer) Act 1983

Finally, mention should be made of the relevant provisions of the Prisoners (Interstate Transfer) Act 1983.

Section 85 of the Sentencing Act 1995 defines ‘parole term’ (see paragraph 3.11) for the purposes of parole eligibility as meaning:

(a) a term to which a parole eligibility order applies; or

(b) a translated sentence in respect of which a minimum term of imprisonment is deemed to have been fixed under the Prisoners (Interstate Transfer) Act 1983 section 26(1).

From time to time, the Attorney General may accept a transfer of a prisoner from interstate under section 8 of this Act. Section 25(1) then states that any sentence imposed by an interstate court is deemed to have been imposed in Western Australia, including any direction or order imposed on that sentence. The aforementioned section 26(1) specifically provides that where a minimum term was imposed by that interstate court, during which a prisoner shall not be eligible for parole, then that minimum term is

deemed to have been fixed by the Western Australian court, and shall be applied accordingly.

3.37 All of the above parole provisions, including those that would be amended by the Bill, will thus apply to such interstate prisoners just as they apply to those convicted in the courts of Western Australia.
CHAPTER 4
THE BILL AND ITS CONTENTS

OVERVIEW

4.1 The purpose of the Bill may be found in the Explanatory Memorandum which accompanied it, and which was presented to the Legislative Council by Hon Sue Ellery MLC, Leader of the House, on 28 June 2017. In brief, its preamble states:

The proposed new provisions require the Prisoners Review Board (PRB):

- when considering whether a relevant prisoner should be granted an early release order; and
- where the location of the remains of the victim of the murder is unknown to a member of the WA Police Force,

to not make a release order or release recommendation (as the case may be) unless satisfied that the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the murder.

4.2 The material difference for prisoners serving a finite prison term will be an extra two years in prison unless they cooperate in the location of the victim’s remains. For those serving a life sentence, they will stay in prison for the rest of their natural lives unless they also so cooperate, or they are released under the Royal Prerogative of Mercy (see the parts of the submission of the PRB quoted at paragraphs 4.36 and 4.37 below).

CLAUSES OF THE BILL

4.3 The Bill contains 10 clauses, the effect of which on existing legislation is set out below.

Clauses 1 - 3

4.4 These contain the usual introductory and administrative provisions. The short title of the new statute would be the Sentence Administration Amendment Act 2017, commencement of the substantive provisions would be fixed by proclamation, and the Act would amend the Sentence Administration Act 2003.

4.5 The Department of Justice advised that the provisions were to be proclaimed, rather than coming into force the day after Royal Assent, so as to allow the police time to prepare reports under the proposed section 66C for any prisoners that may be due for parole consideration shortly after commencement.

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28 Hon Sue Ellery MLC, Leader of the House Western Australia, Legislative Council, Parliamentary Debates (Hansard), 28 June 2017, p 1889.
4.6 The Committee raised this issue with the Police Force. Officers confirmed that the process of preparing these reports, should the Bill be enacted, had already begun. The Committee was told:

_The Homicide Squad has ready access to all of the relevant material required to prepare the report and their Review Officer (Detective Senior Sergeant) will be tasked to complete it. Officers from the Offender Review Unit represent the Commissioner at the parole hearing and will submit, and or table, the report as required (requests from the Board have already been received and responded to)._29

4.7 Commencement of legislation by proclamation is increasingly common, and should be avoided unless absolutely necessary. It is an issue that often confronts the Standing Committee on Uniform Legislation and Statutes Review of the Legislative Council, which pointed out as recently as October 2017 that where commencement by proclamation is provided for in legislation, this leaves the Executive to determine commencement dates, potentially eroding the sovereignty of Parliament. It is conceivable that a proclamation may never be made and the will of the Parliament, in passing the Bill, would be frustrated.30

| Finding 4: The Committee finds that the reason advanced for leaving the commencement of the Sentence Administration Amendment Bill 2017 to the Executive is now redundant. |

**Clause 4**

4.8 This clause would amend section 12(4) of the Act, dealing with reports. In brief, any report to the Attorney General from the PRB under this provision would be unable to recommend release of a relevant prisoner unless the PRB is satisfied with the prisoner’s level of cooperation in identifying the location of the victim’s remains, where that location is unknown to a member of the Police Force — in other words, the so called ‘no body no parole’ provision.

**Clause 5**

4.9 This clause would have the same effect as clause 4 above, but in respect of reports on Schedule 3 prisoners (see paragraph 3.30). The PRB must again address the issue at new section 66B (which would be inserted by clause 9 of the Bill), being the provision which would prevent a recommendation to release on parole without satisfactory cooperation in locating the victim’s remains.

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29 Chris Ann Fichardo, Project Officer, Western Australia Police Force, Email, 6 November 2017.
### Clause 6

4.10 This clause would amend section 20(2) of the Act.

4.11 In making a decision whether to release a prisoner on parole, the PRB must currently take into account:

- the release considerations at section 5A
- the report that needs to be delivered by the CEO of the Department of Justice under section 17
- any other information that has been brought to its attention.

4.12 The amendment to section 20(2) to be made by clause 6 of the Bill would mean that the PRB would first have to take into account the section 66B issue — the ‘no body no parole’ consideration — in making that decision.

### Clause 7

4.13 This clause would amend subsections 23(2) and (3) of the Act.

4.14 As has been mentioned, these provisions apply to short-term prisoners, being:

- prisoners serving a sentence of one term that is less than six months, which is not a prescribed term or a term in respect of which a parole eligibility order has been made or
- prisoners for whom the aggregate of sentences imposed is less than six months, none of which are for prescribed terms or for terms in respect of which a parole eligibility order has been made.

4.15 Section 23(2a) concerns any decision by the PRB to release such a prisoner on parole. These are the mandatory parole provisions — the PRB may in the case of a ‘prescribed prisoner’ or must in any other case, make a parole order (see paragraph 3.19). Again, the release considerations at section 5A must be taken into account, as well again as the report that needs to be delivered by the CEO of the Department of Justice and any other information brought to its attention. These considerations are applied, in this instance, to determine whether automatic parole should be supervised or unsupervised and, in the case of supervised parole, whether that should be subject to conditions.

4.16 By virtue of the amendment to be made by clause 7 of the Bill, the PRB would again need to address the issue that would be inserted into the Act as the new section 66B.

### Clause 8

4.17 This clause would amend section 52(2) of the Act, with regard to the making of RROs.

4.18 Under the proposed amendment, when making a decision whether to grant, defer or refuse an application for an RRO, the PRB would also have to take into account section
66B — the ‘no body no parole’ condition — as well as the usual release conditions and the CEO’s report that must be provided under section 51.

Clause 9

4.19 This clause introduces the most substantive provisions of the Bill.

4.20 It would, if enacted, insert new sections 66A, 66B and 66C into the Act.

Section 66A

4.21 This would define the following terms:

*Homicide offence* — murder (which includes wilful murder) or infanticide.

*Homicide related offence* — counselling or procuring or inciting the commission of a homicide offence, or being an accessory after the fact, or conspiracy to commit a homicide offence, where the offence relates to the death of someone.

*Release action* — a decision to release a prisoner under section 23(3)(b) (i.e. where the PRB must release a short-term prisoner who is not a prescribed prisoner).

*Release decision* — a decision by the PRB to recommend release to the Attorney General, a decision by the PRB to release on parole a parole-term prisoner, a decision by the PRB to release on parole a prescribed prisoner or a decision to make an RRO.

*Relevant prisoner* — someone serving a sentence for homicide or a homicide related offence, a person convicted of murder as a child and held at the Governor’s pleasure, a person guilty of wilful murder and being kept in strict or safe custody or a habitual criminal where at least one of the offences committed was a homicide offence or a homicide related offence.

*Remains of the victim* — the remains of the person against whom the homicide offence was committed.

Section 66B

4.22 This would provide that the PRB must not make a release decision, or take release action, for a homicide or homicide related offence, unless it is satisfied that:

- the prisoner has cooperated with the Police Force in identifying the location, or the last known location, of the remains of the victim

or

- a member of the Police Force already knows the location of the remains.

4.23 The cooperation of the prisoner need not be prior to sentencing or to the outcome of any appeal — this preserves a prisoner’s right to silence.

4.24 The provisions would have retrospective effect due to new section 66B(3), so that all relevant prisoners in the State may be included within the new provisions. It would provide that:
This section applies to a decision or action in relation to a relevant prisoner in custody for a homicide offence or homicide related offence whether the offence was committed before, on or after the day on which the Sentence Administration Amendment Act 2017 section 9 comes into operation.

Section 66C

4.25 This would provide that, whenever the PRB is required to make a release decision (to recommend parole to the Attorney General, or to release on parole or on an RRO) or to take release action (release of a prisoner serving a sentence of less than six months), it must make a written request to the Commissioner of Police for a report about the prisoner’s cooperation, which must be given within a reasonable time. This provision does not apply if the PRB is satisfied that the location of the remains of the victim is known by the Police Force.

4.26 With regard to the extent of the prisoner’s cooperation for the purposes of section 66B, that report would need to cover:

- the nature and extent of the cooperation
- the timeliness of the cooperation
- the truthfulness, completeness and reliability of the information given
- the significance and usefulness of that information.

The report must also indicate whether the Police Force knows the location of the remains of the victim.

4.27 Proposed section 66C(5):

ensures that the Board does not take into account matters that may appear on the Police Report that fall outside of the categories of information listed at subsection 66C(3).31

4.28 This duty on the Police Force to provide a report to the PRB, where it does not know of the whereabouts of the victim, is a new one. The Committee asked about this when officers from the Police Force appeared before it on 11 October 2017.32 The Committee was concerned about the increased workload that this would entail, but the officers opined that this would not be an issue for them. The presentation of the report to the PRB will be dealt with by a particular unit, the Offender Review Unit (ORU), currently managed by one officer, assisted by two 0.8 full-time equivalent Police Auxiliary Officers and seven casual Police Auxiliary Officers. The ORU represents the

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31 Sentence Administration Amendment Bill 2017, Explanatory Memorandum, Legislative Council.
Commissioner of Police on the PRB (and its juvenile equivalent, the Supervised Release Review Board).  

4.29 However, as Deputy Commissioner Brown informed the Committee:

_The WAPF Homicide Squad (HS) will be responsible for preparing the Commissioner's report under the proposed section 66 of the Bill, as they are the subject matter experts in relation to homicides and are responsible for their investigation State-wide. The HS have ready access to all of the relevant material required to prepare the report and their Review Officer (Detective Senior Sergeant) will be tasked to complete it. Officers from the ORU represent the Commissioner at the parole hearing and would submit and or table the report as required._

4.30 The Police Force currently makes submissions from time to time to the PRB, either upon request or because it has determined that an issue should be brought to the PRB’s attention.

4.31 Subsequent to the hearing with the Police Force, the Committee received a letter from Deputy Commissioner Brown, attaching a letter from the Commissioner of Police to the PRB dated 17 October 2017. This letter took the form of a proposed section 66C report, and provided a useful example of how the Police Force will formulate such reports if that section comes into force. It also provided an example of how the Police Force is able in a live case to opine that cooperation may be satisfactorily provided even in the continuing absence of a body.

**Clause 10**

4.32 Finally, this clause would amend section 112 of the Act.

4.33 Section 112 deals with annual reports to the Attorney General by the PRB, to be delivered before 1 October of each year.

4.34 The provision lists the matters about which the PRB must report, such as the number of prisoners eligible for parole or who applied for an RRO and the number granted early release by the PRB or Governor or denied such early release.

4.35 Two new matters to be reported on would be added to that list:

- the number of prisoners whose cooperation was considered by the PRB during the previous financial year
- the number of those prisoners who were released by the PRB or the Governor during that financial year.

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33 Stephen Brown, Deputy Commissioner (Specialist Services), Western Australia Police Force, Letter, 20 October 2017, p 1.
34 ibid. p 2.
35 ibid. Attachment 1.
EFFECT OF THE BILL

4.36 The effect of the proposed provisions on various relevant prisoners was summed up by the PRB in its submission to the Committee. Of prisoners serving a finite sentence, it said:

Given the maximum period of parole that may be served by a prisoner sentenced to a finite term of imprisonment is two years, if a co-conspirator to murder, a person charged as a co-conspirator but convicted as inciting a murder, or an accessory after the fact to murder does not (a) cooperate with a member of Police Force with the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force does not know the location of the remains of the victim of the homicide offence, then they will be required to serve their full sentence. In practical terms, that means they will lose the opportunity for release to parole up to two years earlier. So for them, the law will mean they will possibly serve two years longer than had they been released to parole at their earliest eligibility date, had the original sentencing judge determined to make a parole eligibility order.36

4.37 Of those prisoners sentenced to life imprisonment for murder, the PRB went on:

Under the proposed Bill, those offenders who are sentenced to life imprisonment for murder will remain in prison for their natural life unless:

(1) (a) they cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force knows the location of the remains of the victim of the homicide offence, in which case their eligibility for release depends upon the risk they pose upon release, or

(2) they are released by the Governor in Executive Council under the royal prerogative of mercy.37

36 Submission 1 from the Prisoners Review Board, 21 September 2017, p 6.
37 ibid.
CHAPTER 5
OTHER JURISDICTIONS

INTRODUCTION

5.1 Western Australia would be the fifth State or Territory in the country to introduce provisions such as these, should this Bill become law.

5.2 With regard to the legislation already made, there are differences that are worthy of discussion, but there are also a number of common features:

- all legislate for a prohibition on the granting of parole without ‘cooperation’ on the part of the prisoner
- all early release decisions will be made taking into account reports from the Chief of Police of the respective jurisdiction
- all provisions take effect retrospectively
- all allow for the prisoner’s cooperation to take place after the trial, or after the outcome of any appeal, so as not to interfere with that prisoner’s right to silence.

5.3 There are, however, some significant differences in, for example, the prisoners that may be affected by the provisions and the type of behaviour that may be deemed to be sufficient cooperation. The differences are worthy of consideration, should they point to any potential improvements that may be made to the Western Australian Bill.

5.4 For ease of reference, a comparative table, setting out the provisions and their differences, may be found at Appendix 1.

OTHER JURISDICTIONS

South Australia

5.5 South Australia was the first State to legislate on this matter. The provisions became law on 11 February 2016 by way of amendments made to the Correctional Services Act 1982 (SA) by section 6 of the Correctional Services (Parole) Amendment Act 2015 (SA).

5.6 Unlike some other jurisdictions, the relevant measures do not appear to have been prompted by any individual case. Instead, it was part of a government commitment at the 2014 State election to introduce a range of measures affecting the State’s parole system.38

5.7 Section 67 of that Correctional Services Act 1982 (‘Release on parole by the Board’) outlines the matters to be taken into account by the Parole Board of South Australia on

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an application for parole. The paramount consideration must always be the safety of the community (section 67(3a)), but thereafter the Board must take the following matters into consideration (section 67(4)):

- Any relevant remarks made by the sentencing court.
- The likelihood of the prisoner complying with the conditions of parole.
- Where the prisoner was imprisoned for an offence or offences involving violence, the circumstances and gravity of the offence or offences (though the Parole Board cannot substitute its own view of those matters for the view expressed by the court in passing sentence).
- The impact that the release of the prisoner on parole is likely to have on any registered victim and the registered victim's family.
- The behaviour of the prisoner while in prison or on home detention or during any previous release on parole.
- Any reports tendered to the Board on the prisoner’s social background, or on the medical, psychological or psychiatric condition of the prisoner, or from the Chief Executive of the relevant Department.
- The probable circumstances of the prisoner after release from prison or home detention.
- Any other matters that the Board thinks are relevant.

The new cooperation considerations come in subsections 67(6) and (7), inserted by section 6(1) of the amending Act. They read as follows:

(6) Without derogating from subsections (3a) and (4), the Board must not order that a prisoner serving a sentence of life imprisonment for an offence of murder be released on parole unless the Board is satisfied that the prisoner has satisfactorily cooperated in the investigation of the offence (whether the cooperation occurred before or after the prisoner was sentenced to imprisonment).

(7) For the purposes of subsection (6), the Board must take into account any report tendered to the Board from the Commissioner of Police evaluating the prisoner's cooperation in the investigation of the offence, including—

(a) the nature and extent of the prisoner's cooperation; and

(b) the timeliness of the cooperation; and

(c) the truthfulness, completeness and reliability of any information or evidence provided by the prisoner; and

(d) the significance and usefulness of the prisoner's cooperation.
The phrase ‘offence of murder’ in subsection (6) is defined as including an offence of conspiracy to murder and an offence of aiding, abetting, counselling or procuring the commission of a murder (section 67(11)).

There are some differences between the Bill now being considered and the South Australian legislation. Those legislative provisions, for example, make no specific mention of the recovery or location of the body or remains of the victim, merely that the prisoner must have cooperated ‘in the investigation of the offence’.

Furthermore, there is no exclusion of the need for the Parole Board to consider the prisoner’s cooperation when the police already know the location of the victim, which is how the equivalent provision appears in the Bill under scrutiny at clause 9.

**Northern Territory**

The Parole Amendment Act 2016 (NT) received Royal Assent on 13 July 2016, and took effect on 5 August 2016.

It would appear that the provisions were aimed in particular at one offender, Bradley John Murdoch, who was jailed in 2005 for life, with a non-parole period of 28 years, for the murder of Peter Falconio in 2001. Mr Falconio’s remains have never been located.

In introducing the amending bill into the Legislative Assembly, and during his second reading speech, the Attorney General, Hon John Elferink MLA, said:

*One of the final dignities a family can afford to a loved one who is a victim of a violent crime that ends their life is the celebration of that life, which includes the ability to lay their loved one’s remains to rest. Conversely, the location of a body is a matter that an offender can hold over a victim’s family’s head for the sole purpose of extending their suffering. It is a clear sign of a lack of contrition and remorse. The Parole Board must be required to take this cooperation, or lack of it, into account when assessing suitability for parole of an offender serving a sentence for murder.*

The Parole Act (NT) was thus amended to insert a new section 4B, ‘Release on parole of prisoner serving life imprisonment for murder’. The provision confirms that in making parole decisions for such prisoners, the public interest is of primary importance, and in considering that public interest, the Board must consider:

- the protection of the community as being the paramount consideration
- the likely effect of the prisoner’s release on the victim’s family

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• where the prisoner is an Aboriginal or Torres Strait Islander who identifies with a particular community of Aboriginals or Torres Strait Islanders, the likely effect of the prisoner’s release on that community.

The Board may invite submissions from the victim’s family or, in the latter case, from representatives of the community, under section 4B(2).

5.16 Section 4B(4) then says:

_The Board must not make a parole order in relation to the prisoner unless the Board considers that the prisoner has cooperated satisfactorily in the investigation of the offence to identify the location, or the last known location, of the remains of the victim of the offence._

5.17 Again, the cooperation may be before or after sentencing, and again the Board must take into account any report from the Commissioner of Police, which report must evaluate the same four considerations as are listed in the South Australian legislation, being:

• 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
• the significance and usefulness of the prisoner’s cooperation.

5.18 Interestingly, and unlike the law of other jurisdictions, the new considerations will only apply to a prisoner who is serving a life sentence for murder (section 4B(1)). This would appear to have been a deliberate consideration of the Northern Territory Government. The Attorney General continued (reflecting upon the Private Members’ Bill of John Quigley MLA as tabled, discussed at paragraphs 2.6 to 2.12):

_Importantly, the amendments contained in this bill only relate to prisoners undergoing a sentence for murder. Therefore, its application is quite narrow. This is the position in the Western Australian bill, whereas the South Australian act and the Victorian bill extend the matter to be considered by the Parole Board to a broader range of homicide offences._

5.19 As with the South Australian legislation, there is no specific exclusion of the requirement for the Parole Board to consider the prisoner’s cooperation where the location of the body or remains is already known to police.

5.20 It is also noted (though irrelevant for the purposes of this inquiry, as this is not a matter for the current Bill) that the legislation particularly mandates the Board to take into account the possible effect of a prisoner’s release on the members of the Aboriginal or Torres Strait community where relevant.

40 ibid.
Victoria

5.21 The Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016 (Vic) was assented to on 13 December 2016, and the relevant provisions for the purposes of this inquiry came into force the following day. Part 3 of the Act (‘Amendments relating to no body cases’) amended the Corrections Act 1996 (Vic).

5.22 The existing section 73A makes the point that the Adult Parole Board must always give paramount consideration to the safety and protection of the community in making any parole decision. The newly inserted section 74AABA then states as follows:

Conditions for making a parole order for person imprisoned for certain fatal offences

(1) The Board must not make a parole order under section 74 or 78 in respect of a prisoner serving a sentence of imprisonment for an offence of murder, conspiracy to murder, accessory to murder or manslaughter unless the Board is satisfied that the prisoner has cooperated satisfactorily in the investigation of the offence to identify—

(a) the location, or the last known location, of the body or remains of the victim of the offence; and

(b) the place where the body or remains of the victim of the offence may be found.

(2) Subsection (1) also applies in the case of a corresponding offence committed outside Victoria for which the prisoner is serving a sentence of imprisonment in Victoria, having been transferred to Victoria under the Prisoners (Interstate Transfer) Act 1983.

5.23 Section 74AABA(3) goes on to list the matters to which the Adult Parole Board must have regard, being:

• A report by the Chief Commissioner of Police evaluating the prisoner’s cooperation in the investigation of the offence. That evaluation must take place as against the same four factors listed in the South Australia and Northern Territory legislation (at paragraphs 5.8 and 5.17 respectively).

In this instance, however, in the context of the significance and usefulness of the prisoner’s cooperation, the Board is directed to specifically consider information ‘including, but not limited to, information ascertained from the Crown’s case put at trial, if that case includes reference to whether the prisoner was acknowledged to have information relevant to—

(i) the location, or the last known location, of the body or remains of the victim of the offence; and
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(ii) the place where the body or remains of the victim of the offence may be found.’

- A report from the Secretary to the relevant department as to whether the prisoner is suitable for release on parole
- The capacity of the prisoner to cooperate in the investigation of the offence — the statute specifically lists as examples ‘a mental or physical infirmity, such as age, cognitive impairment, mental impairment, dementia or a decline in memory’
- Court records including the judgment and the reasons given during sentencing
- Any other information regarding whether the body or remains of a deceased victim was or were recovered as a result of the prisoner’s cooperation in the investigation of the offence
- Any victim’s statement given to the Board.

5.24 Perhaps the most noteworthy difference between the Victorian provisions and the Bill under consideration is the inclusion of prisoners convicted of manslaughter in the legislative scheme. The Committee will consider that issue later in this Report.

5.25 There are, however, three other provisions, again not included in the putative Western Australian legislation, that are worthy of mention.

Interstate prisoners

5.26 Section 74AABA(2) specifically includes within the effect of the new provisions those imprisoned in Victoria for the commission of a relevant offence outside the State but who have been transferred at their own request to a Victorian prison under the terms of the Prisoners (Interstate Transfer) Act 1983 (Vic).

5.27 The Committee considered whether a similar provision is necessary in the Bill under consideration. It is content that it is not.

5.28 As has been outlined at paragraphs 3.34 to 3.37, where the Attorney General has accepted a transfer of a prisoner from another State or Territory into a Western Australian prison under section 8 of the Prisoners (Interstate Transfer) Act 1983, that person would fall within the definition of ‘relevant prisoner’ for the purposes of the proposed Division 1A of the Act. Following such a transfer, the sentence imposed by the interstate court is deemed to have been imposed by a Western Australian court, including any non-parole term (section 25), and the domestic parole provisions apply.

5.29 The Committee was concerned as to how officers of the Police Force in Western Australia would be able to compile reports on prisoners that had transferred from interstate, when they may not have had any previous dealings with the case. The Committee was informed:

Sentenced prisoners transferred to a WA Prison for a relevant offence from Interstate are managed by the Department of Justice (Corrective
Services). The WA Police Force will not have information holdings to prepare the report and would have to communicate with the Department of Justice (Corrective Services) and the Interstate Police Jurisdiction where the investigation, charging and conviction took place in order to obtain the information required to compile the Commissioner’s report.  

5.30 The Committee brings this matter to the Government’s attention and suggests that information gathering relating to reports on interstate prisoner cooperation should be monitored to ensure its efficiency.

Finding 5: The Committee finds that the Government should monitor the information gathering process of the Western Australia Police Force on interstate prisoners for reports prepared under the proposed section 66C of the Sentence Administration Act 2003, to ensure its efficiency and effectiveness.

Capacity to cooperate

5.31 This matter will also be considered by the Committee later in this Report.

Two elements necessary to cooperation

5.32 It is notable that, under this Victorian legislation (later replicated by the Parliament of Queensland), the Board needs to be satisfied that the prisoner has cooperated satisfactorily in the investigation of the offence to identify both:

(a) the location, or the last known location, of the body or remains of the victim of the offence; and

(b) the place where the body or remains of the victim of the offence may be found [Emphasis added].

5.33 By contrast, proposed section 66B simply speaks of identification of the location, or last known location, of the remains of the victim. They are expressed in the alternative. As Hon Sue Ellery MLC, Leader of the House put it during her second reading speech:

For the assistance of honourable members, in summary, the bill provides that in every case in which the Prisoners Review Board considers whether a relevant prisoner should be granted an early release order, the Board must not make a release order or release recommendation unless satisfied that the prisoner has cooperated with a member of the Western Australian police force about either of the following two matters—first, identification of the location of the

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41 Chris Ann Fichardo, Project Officer, Western Australia Police Force, Email, 6 November 2017.
remains of the victim; and, second, identification of the last known location of the victim’s remains.42

5.34 The Committee could find no practical benefit in obliging a prisoner to meet both of these elements of cooperation. It will be interesting in the future to see how these are interpreted by Victorian courts. In the meantime, the Committee sought the view of the Police Force on whether the Bill should be amended to reflect the Victorian approach. Deputy Commissioner Brown wrote:

_The WAPF have formed the opinion the proposed amendment would serve no purpose, as the Board is required to assess the extent of the prisoner’s cooperation, which must be detailed in the Commissioner’s Report and the inclusion of this amendment would be of little benefit to the WAPF._43

Queensland

5.35 Until now, Queensland was the only jurisdiction in which the ‘no body no parole’ legislative provisions had been scrutinised by a committee, in this case the Legal Affairs and Community Safety Committee.44

5.36 According to the Australian Broadcasting Corporation (ABC), the Queensland bill was sparked by the murder of 81-year-old Elizabeth Kippin in Townsville in 2016, allegedly by a man released on parole just hours earlier. Further, mention was made of the disappearance of Bruce Schuler, who disappeared from his home north of Cairns in 2012 (whilst 2 people were convicted for his killing, his body was never found) and Timothy Pullen, also in 2012, murdered over a drug debt in Mackay.45

5.37 The Committee inquiry was preceded by the report of a review of the Queensland parole system undertaken by Mr Walter Sofronoff QC (as he then was). He included a consideration of the ‘no body no parole’ issue after receiving submissions from the widow of Bruce Schuler concerning the same (she also presented two petitions to Parliament). His report concluded, at Recommendation No. 87:

_The Queensland Government should introduce legislation, similar to that in South Australia, which requires the Parole Board to consider the cooperation of an offender 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_
The Government Response to that report supported Mr Sofronoff’s recommendation, stating:

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.47

The main substantive provision of the Corrective Services (No Body, No Parole) Amendment Act 2017 (Qld) inserted section 193A into the Corrective Services Act 2006 (Qld). This reads as follows:

Deciding particular applications where victim’s body or remains have not been located

(1) This section applies to a prisoner’s application for a parole order if the prisoner is serving a period of imprisonment for a homicide offence and—

(a) the body or remains of the victim of the offence have not been located; or

(b) 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.

The provision goes on to state the usual considerations, i.e. that the Queensland Parole Board must refuse to grant the application under section 193 unless the Board is satisfied the prisoner has cooperated satisfactorily.

As in Victoria, the Board, in deciding whether the prisoner has satisfactorily cooperated, must have regard to any information it has regarding the prisoner’s capacity to cooperate.48

Homicide offence

The provisions apply to prisoners serving sentences for a ‘homicide offence’. By virtue of section 193A(8), this includes the primary offences of murder, manslaughter, improper or indecent interference with a corpse and unlawful striking to the head and neck causing death, as well as counselling or procuring, conspiracy and becoming an accessory after the fact.

The offences regarding misconduct with a corpse and unlawful striking were added by amendments in the course of the bill’s passage through the Legislative Assembly (as

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48 Corrective Services Act 2006 (Qld), section 193A(7)(a)(ii).
was being an accessory after the fact to manslaughter). The amendments were clearly aimed at known cases and individuals, and expanding the pool of prisoners to whom the new provisions might apply.\(^{49}\)

5.44 The Western Australian equivalent of the offence of unlawful striking to the head and neck causing death may be found at section 281 of the Criminal Code — *Unlawful assault causing death* — the so-called ‘one-punch law’. A person guilty of this crime is liable to 20 years imprisonment. The offences relating to ‘Misconduct with regard to a corpse’ (liable to imprisonment for 2 years) and ‘Interfering with corpse to hinder inquiry’ (a sentence of up to 10 years for the guilty) are dealt with at sections 214 and 215.

**Victim’s location**

5.45 As mentioned, the new Queensland provisions take effect where:

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\begin{align*}
(a) & \text{ the body or remains of the victim of the offence have not been located;} \\
(b) & \text{ 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.}
\end{align*}
\]

5.46 The reasoning behind the wording of (b) may be found in the Explanatory Notes which accompanied the bill on its tabling:

\[\text{The latter would capture, for example, instances where the prisoner may have dismembered the body of the victim and deposited the parts of the body at various locations; or the prisoner may have taken a part of the victim as a trophy or souvenir of their killing.}^{50}\]

**Finding 6:** The Committee finds that an examination of equivalent legislative provisions in other Australian jurisdictions assists the Committee in its consideration of the Sentence Administration Amendment Bill 2017 in two respects:

- **the possible inclusion of the offence of manslaughter in the definition of ‘homicide offence’**

and

- **the possible inclusion of a requirement for the Prisoners Review Board to consider the mental capacity of a prisoner to cooperate at the time that it makes a release decision or takes release action under proposed section 66B.**

5.47 Both of these possible inclusions will be discussed in Chapter 6 of this Report.


\(^{50}\) Corrective Services (No Body, No Parole) Amendment Bill 2017 (Qld), Queensland, Legislative Assembly, Explanatory Notes, p 5.
CHAPTER 6

COMMITTEE CONSIDERATIONS

6.1 A number of key issues arose during the Committee’s consideration of the Bill, each of which will be addressed in detail in this Chapter. They are:

- the necessity for and/or desirability of the Bill
- the primacy of considerations for the PRB should the provisions come into effect
- how those prisoners who were the subject of a miscarriage of justice might be affected
- how ‘cooperation’ will be measured
- whether the provisions may lead to reduced rehabilitation of offenders
- whether the offence of manslaughter should be added to the definition of ‘homicide offence’
- whether the mental capacity of a prisoner to cooperate should be specifically taken into account.

NECESSITY FOR AND/OR DESIRABILITY OF THE BILL

6.2 The motion to refer this Bill to Committee was moved by Hon Aaron Stonehouse MLC on 15 August 2017 because, he thought, the provisions may not have any practical effect. The cooperation of a prisoner in locating the remains of a victim was, the Member averred, already a consideration taken into account by the PRB, so the Bill would merely ‘mandate something that is already happening’.\(^5\)

6.3 During the second reading debate for this Bill in the Legislative Assembly, Mr Peter Katsambanis MLA pointed out that, uniquely to Western Australia, the PRB is not the final arbiter on whether a murderer gets parole; the PRB makes a recommendation to the Attorney General. He was of the opinion that no Attorney General had released, or would release, a prisoner to parole in the absence of cooperation in locating a victim’s remains.\(^2\)

6.4 Similar sentiments were expressed by Isobel Roper, Associate to Justice Barr of the Supreme Court of the Northern Territory, writing in the Alternative Law Journal about the equivalent ‘no body, no parole’ provisions that were enacted in the Northern Territory. She wrote:

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\(^5\) Hon Aaron Stonehouse MLC, Western Australia, Legislative Council, *Parliamentary Debates (Hansard)*, 15 August 2017, p 2704.

\(^2\) Peter Katsambanis MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 22 June 2017, p 1576.
Commentators in the Territory have criticised the law by highlighting the fact that Lindy Chamberlain would not have had the opportunity to apply for parole under the proposed scheme. In fact, Chamberlain served three years after being convicted of the murder of her baby daughter Azaria before her convictions were quashed after fresh evidence arose to support her claim that a dingo had taken her baby.

The stronger argument against the new law is not based on this anecdotal and only partly relevant local case, but the fact that it is not necessary. While a lack of public understanding of the operations of the Parole Board may make the new law appear desirable, an offender convicted of murder who does not show remorse is unlikely to be granted parole in any event.

Alternate measures, such as revoking an offender’s privileges in custody, for example the right to work, may offer greater incentives to reveal the location of a victim’s body.  

6.5 In an article for The Sunday Times, Mr Tom Percy QC wrote:

In my experience, no one in WA has ever been released on parole in a murder case where the body was not recovered.  

6.6 Indeed, this point was reiterated by Hon Michael Mischin MLC, former Attorney General of Western Australia. He reminded the Legislative Council that, unlike other jurisdictions where the decision on early release of prisoners subject to a life sentence is entirely a matter for the local parole board, in Western Australia it is a matter for the Attorney General. This has the effect of providing a further level of safeguard — the involvement of the PRB together with the involvement of the Attorney General. He said:

Whereas other jurisdictions may have a requirement to direct and restrain the discretion of a parole board to release an offender who might otherwise have complied with the board’s requirements and be eligible for parole but to not release that offender because they have failed to cooperate in a particular way, such as revealing the whereabouts of their victim’s remains, it is a decision for that board and that board alone. In Western Australia, that has always been a recommendation to the Attorney General of the day—one to be accepted or refused on its merits and accepted or refused by weighing up the Prisoners Review Board report and making a decision. Some might argue that it is a political decision, but so be it. The ultimate responsibility rested and currently rests with the Attorney General of the day. I, for one, am not aware of any Attorney General of this

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54 Mr Tom Percy QC, “No body, no parole” just doesn’t work, The Sunday Times, 28 February 2016, p 39.
jurisdiction ever releasing an offender to parole in a case in which an offender has refused, in such a fundamental way, to assist the secondary victims of his or her crime.\textsuperscript{55}

6.7 In its submission to the Committee, the PRB gave a detailed explanation of the risk assessment tools utilised by it in the context of the overriding release consideration contained in section 5B of the Act (set out at paragraph 3.19), being whether the prisoner would pose a threat to the safety of the community and whether any cooperation by a prisoner was taken into account in that context.

\textit{Cooperation with police, or lack thereof, is not a component of risk assessment and is not taken into account when level of risk is being assessed and treatment options are being considered.}

\textit{The absence of cooperation with police or assistance to locate the body of a deceased are, in each of the risk prediction instruments currently used, only a relatively minor component of the assessment of the risk of an offender reoffending in a violent manner.}\textsuperscript{56}

6.8 The prisoner’s cooperation with the police, or lack thereof, may however be taken into account in the context of the release considerations listed at section 5A, particularly section 5A(k) (any other consideration that is or may be relevant to whether the prisoner should be released). At page 10 of that submission, the PRB states:

\textit{This provision provides the board with the flexibility to consider a range of other matters, in some cases, cooperation with Police or lack-there-of may be one such consideration, although not mandated. Under this provision, the board may also consider materials such as media articles and previous comments made by the Attorney General in the past which may be relevant to the reasons why release was denied at that time.}

6.9 However, having said that cooperation may be one such consideration under section 5A(k), the Chairperson clarified the matter in a subsequent letter to the Committee:

\textit{True, section 5A(k) provides that the Board may take into account any other relevant consideration and cooperation may fall into this category, but it is not required that the Board consider this routinely for every case. To my knowledge, such issues have never been considered under section 5A(k).}\textsuperscript{57}

6.10 As can be seen, there is no evidence that the PRB already takes the prisoner’s cooperation with police into account in considering whether to grant or recommend parole. On the other hand there is also no evidence that an Attorney General has released

\textsuperscript{55} Hon Michael Mischin MLC, Western Australia, Legislative Council, Parliamentary Debates (Hansard), 15 August 2017, p 2705.

\textsuperscript{56} Submission 1 from the Prisoners Review Board, 21 September 2017, p 11.

a prisoner to parole where cooperation in the location of the victim’s body has not been forthcoming.

6.11 In any event, the Committee notes that the Bill under consideration elevates a prisoner’s cooperation above being merely taken into account by the PRB as part of the release considerations. Cooperation or lack of it will become a ‘gateway’ issue in a prisoner’s possible early release, not a matter to be listed for consideration later in the process if the gateway is satisfactorily negotiated.

6.12 The key issues for the Committee are that consideration of cooperation or lack of it would now be mandatory, that it should be the first and perhaps only consideration and not merely be one of a collection of other considerations, and furthermore that the prisoner will be aware that this is mandatory.

6.13 The submission from the PRB concluded, in light of the fact that Western Australia has the unique two-tier involvement of the PRB and the Governor in making these parole decisions:

I acknowledge that similar "no body no parole" legislation exists in the Australian jurisdictions of Victoria, South Australia, the Northern Territory and recently in Queensland and is being considered in New South Wales. Western Australia has a unique regime for the release of prisoners serving life sentences, and the necessity for this law is less obvious.  

6.14 The reason why the necessity for this legislation is less obvious is that Western Australia’s unique two tier system is assumed to provide a safeguard mitigating against the necessity for this mandatory consideration. However, currently, prisoner cooperation in locating the body or remains of a victim of murder or associated offences is not a precondition of parole consideration by the PRB.

6.15 Insofar as it is the Government’s policy that a prisoner’s cooperation be a mandatory precondition of parole consideration by the PRB, this Bill will give effect to that policy.

6.16 Irrespective of whether the proposed provisions are considered necessary, in the view of the Committee, consideration should turn to their desirability.

6.17 In addition to the benefit that might accrue to the friends and families of victims if the remains of the loved ones are located as a result of these proposed measures, the Police Force did draw the Committee’s attention to other potential benefits.

6.18 Commissioner Dawson, in the Police Force’s submission to the Committee of 22 September 2017, expressed the view that this legislation would be in the interest of the achievement of justice. He added:

The WA Police Force recognises this Bill has the greatest significance for a victim’s family. It will go some way to enable

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58 Submission 1 from the Prisoners Review Board, 21 September 2017, p 13.
these families to achieve a greater degree of closure, by knowing the final location of their loved one, and even potentially being able to have their remains recovered and to be able to lay them to rest.\textsuperscript{59}

6.19 He went on however to point to a potential benefit from the police’s point of view:

As the Bill has retrospective application, this will apply to all homicide and homicide related convictions where the body has not been recovered or the last known location identified. This legislation therefore has the potential to assist in the finalisation of aspects of historic offences and may even provide further information relevant to other historic offence investigations.\textsuperscript{60}

6.20 In evidence before the Committee, Deputy Commissioner Brown expanded upon this further assistance that might ensue:

What charges to lay and the true circumstances given the demise of the victim. The specifics of that case or those things, material in particular, around the cause of death; the clothes or items that were found in or nearby where the deceased or victim was ultimately located, the clothing, all of those things which are material to the case.\textsuperscript{61}

6.21 Mr Scanlan, Commander, State Crime, went on:

One of the circumstances that has not been covered off is where we do have a suspect that is assisting us with our inquiries and we have not found the body. The need or necessity to find that body also clarifies for us other party involvement. We have a number of cases that we have worked on over the years where we suspect others of being involved, but we certainly do not have the evidence to convict those other parties. If we have anyone on our list where they come forward and we do find the body, it may put us in a position where our investigation will start over again because we would need to then consider whether charges are then laid against those other parties involved.\textsuperscript{62}

Finding 7: The Committee finds that, from the point of view of the friends and family of victims, and also from the point of view of the Western Australia Police Force, the proposed provisions are desirable. Moreover, in the Committee’s view, it is ultimately desirable that prisoners will be aware that their cooperation in locating the remains of the victim will be a statutory pre-requisite to parole.

\textsuperscript{59} Submission 2 from the Western Australia Police Force, 22 September 2017, p 1.

\textsuperscript{60} ibid. p 2.

\textsuperscript{61} Stephen Brown, Deputy Commissioner, Western Australia Police, Transcript of Evidence, 11 October 2017, p 9.

\textsuperscript{62} Pryce Scanlan, Commander, State Crime, Western Australia Police, Transcript of Evidence, 11 October 2017, pp 10-11.
**Primacy of Considerations**

6.22 As has been mentioned, the Private Members’ Bill introduced into the Legislative Assembly on 18 February 2016 failed to complete its necessary parliamentary stages.

6.23 In debate, whilst expressing general agreement with the sentiment of the proposals, the Government of the day had expressed some reservations with the precise wording of the proposed provisions. One of them was that the provisions as then drafted elevated the issue of a prisoner’s cooperation in the investigation of the murder above the ‘paramount’ consideration for the PRB as set out in section 5B of the Act — that is:

*The Board or any other person performing functions under this Act must regard the safety of the community as the paramount consideration.*

6.24 It was apparently for this reason that an amendment to that Bill was proffered, and eventually accepted by the Assembly, that would have had the effect of making consideration of the prisoner’s cooperation in locating the victim’s remains a mere release consideration alongside the 11 others listed at section 5A of the Act.

6.25 With regard to the Bill now before the Committee, the PRB expressed a similar misgiving in its submission:

*In the context of the release considerations of section 5A and 5B of the Sentence Administration Act 2003 (WA), the Bill raises the issue of whether it is the intention to keep a murderer in prison and deny his or her release solely due to his or her failure to advise of the whereabouts of the remains of the deceased victim is actually anything to do with protection of the community. If it is not, then there is some merit in considering whether there should be a proviso added to section 5B, because, as I [the Chairperson of the PRB] read the Bill, telling the authorities of the whereabouts of the remains of the deceased victim will ultimately become the paramount consideration in the case of those murderers who receive a life sentence under section 90(1)(a) of the Sentencing Act 1995 (WA).*

6.26 The submission continued:

*it could be viewed that the current Bill gives a static factor, not a dynamic or changeable one, more weight over any other consideration. When applying the release considerations to a particular prisoner’s case, the release considerations may not be considered on their merit as section 66B would be the overriding and ultimate consideration. As outlined, the Bill would ultimately be in conflict with section 5C (sic) of the Sentence Administration Act 2003 (WA) and would create an ’absolute rule’ that the Board cannot*
6.27 The Committee finds no lack of clarity with regard to the effect of the proposed provisions. Section 66B would indeed override the consideration at section 5B. This new provision in itself is not about the protection of the community, which only falls to be considered if and when the PRB has satisfied itself that the prisoner has cooperated in locating the remains of the victim. The key point is that no prisoner will be recommended for release or released by the PRB without it having given the safety of the community paramount consideration.

6.28 Elsewhere in its submission, the PRB cautioned against regarding cooperation with the police as a measure of empathy with the victim’s friends and family, and against regarding that as an indicator of future risk. The submission said:

Should the Board be required to reject the possibility of release if the whereabouts of the remains of a deceased victim have not been disclosed by the prisoner, then it can be said that the safety of the community is no longer the over-riding or paramount consideration. In such cases, it may be argued that a prisoner has ‘demonstrated’ a level of empathy for the victim or the family members of a deceased victim by disclosing the location of remains of the victim. However, the Board has trouble with this notion and the over-reliance, by some, on the presence of empathy when evaluating a prisoner’s risk. The Board cautions against an over-reliance on a prisoner's empathy as a release consideration and recognises that it does not hold a central motivational role in the adoption of future pro-social behaviour nor is it considered to assure any basis for social change.

6.29 With respect to the PRB, the Committee believes that there has been a conflation of issues. The cooperation or otherwise of a prisoner is not intended to be assessed as part of a prisoner’s risk to the community, nor is it to be regarded as an element of his or her empathy or otherwise towards the victim’s friends and family. It is a stand-alone provision.

6.30 The policy of the Government, and the intent behind the provisions, was clearly set out by Hon Sue Ellery MLC, Leader of the House, (quoted at paragraph 5.33 above), when she said during the second reading debate in the Legislative Council that in every relevant case the PRB considers, it must not make a release order or release recommendation unless satisfied that the prisoner has cooperated with a member of the Police Force.

6.31 She continued:

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64 ibid. pp 11 - 12.
65 ibid. pp 7 - 9.
However, in this context, it is important to note that the usual considerations that the Board takes into account when deciding, for example, whether to recommend to the executive government that a prisoner be granted parole, will continue to apply to such prisoners.\textsuperscript{66}

Later in the second reading debate, the Leader of the House reinforced this aspect of the proposed provisions:

\begin{quote}
I make the point that the policy of the bill is about elevating one consideration of the relevant conditions to be tested by the Prisoners Review Board above others. That is essentially the policy of the bill. The point made about what the bill already does is quite right, but this is about an elevation of one particular element of it.\textsuperscript{67}
\end{quote}

That was reflected in the briefing given to the Committee by the Department of Justice. It was stressed that the policy presented to officers of the department by the Government, for the purposes of preparing the Bill, was that a prisoner’s cooperation had to be elevated to a separate mandatory consideration, as opposed to one of a number that the PRB can look at.

In an attempt to set out the proposed provisions in simple terms, when allied with existing ones, the Committee sees them operating as follows:

(a) The new provision is a gateway to any further considerations being taken into account. If the PRB is not satisfied that the prisoner has cooperated in locating the remains of the victim, that is an end to the matter. Early release shall not be granted or recommended.

(b) Should such cooperation be forthcoming, then the safety of the community shall be considered under section 5B as paramount, alongside but overriding the 11 release considerations at section 5A.

If the issue at (a) is not satisfactorily dealt with, the issues at (b) become irrelevant — the prisoner will remain in custody.

His Honour Judge Cock QC was fearful that such an interpretation would cause the PRB significant difficulties in complying with its statutory reporting obligations. He said in a subsequent letter:

\begin{quote}
If the Committee is suggesting that the Board simply do not have regard for the release considerations in a case where the victim's remains had not been located, the Board would not be complying with its reporting obligations to the Minister. Would the Board simply state that as no
\end{quote}

\textsuperscript{66} Hon Sue Ellery MLC, Minister for Education and Training, Western Australia, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 28 June 2017, p 1889.

\textsuperscript{67} Hon Sue Ellery MLC, Minister for Education and Training, Western Australia, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 15 August 2017, p 2708.
body was found, the release considerations were not taken into account?\(^{68}\)

6.36 It should be reiterated here that the key determinant is not whether the body has been located or not, but whether the prisoner has satisfactorily cooperated or not. Given that the clear policy intent of the Government, which the Committee believes is reflected in the Bill, is that if a prisoner fails to pass through the gateway that is satisfactory cooperation in the view of the PRB, then whether he or she may be a threat to the safety of the community, or whether or not empathy has been displayed or not, is immaterial — the prisoner will remain in custody.

**Finding 8:** The Committee finds that the proposed legislation is clear with regard to the primacy of considerations for the Prisoners Review Board — satisfactory cooperation in locating the remains of the victim is a gateway to any consideration of the matters set out at sections 5A and 5B. The inclusion of a proviso to section 5B, as suggested by the Prisoners Review Board, is unnecessary.

**MISARRIAGES OF JUSTICE**

6.37 During its inquiry into the Corrective Services (No Body, No Parole) Amendment Bill 2017, the Legal Affairs and Community Safety Committee of the Parliament of Queensland received submissions from the Queensland Council for Civil Liberties\(^ {69}\) and the Bar Association of Queensland\(^ {70}\) raising concerns that those prisoners who have been wrongfully convicted due to miscarriages of justice would never be released — that those original miscarriages would be exacerbated by the fact that the prisoners would never be able to meet the requirements of the proposed legislation.

6.38 Similar concerns had been expressed during the passage of the Northern Territory’s equivalent legislation. On 11 March 2016, the ABC News website reported the lawyer who had defended Lindy Chamberlain as attacking the new laws because they did not take into account the possibility that some people convicted of a crime may in fact be innocent. He is reported as saying:

> It's draconian, and it's always been shown that being draconian like this doesn't work. People under this new act are not going to be given parole unless they show contrition, and so if you haven't done it and you're innocent, how can you properly show contrition? The only thing you can be sorry about is being wrongly convicted. The other thing of

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Ms Chamberlain — now known as Lindy Chamberlain-Creighton after remarrying — was wrongly found guilty in 1982 of murdering her daughter Azaria, who disappeared while on a family holiday to Uluru, and an inquest later found the young girl was killed by a dingo.

In an article for its website dated 28 May 2017, the law firm Sydney Criminal Lawyers wrote of some of the provisions around Australia (in anticipation of the Parliament of New South Wales considering the same):

Such laws obviously have the potential to compound the injustice experienced by those who are wrongly accused and imprisoned for murder and other homicide-related offences.

The article went on to cite the Lindy Chamberlain case, as well as numerous wrongful convictions identified in the United States of America. It also pointed to at least one case of a wrongful conviction arising in Western Australia involving ‘botched DNA testing by the state government-run testing laboratory PathWest’.

However, it is the Committee’s view that PRB or Ministerial consideration of parole matters is not the forum for a reconsideration of an alleged wrongful conviction. The provisions of this Bill do not serve to extend a prisoner’s sentence, whatever the merits of the original conviction.

The guilt or otherwise of a prisoner is not an issue when early release of that prisoner is being considered. The entire parole system is built, and must be built, on the assumption that the prisoner is guilty. Wrongful conviction or otherwise is a matter for appeal to the higher courts or a pardoning. The point was made by Mr John Quigley MLA during the debate on his Private Member’s Bill in 2016 when he said:

People should not look at parole as a safety net for someone who has been wrongfully convicted, because parole might never be recommended. No, if people are wrongly convicted, they have recourse firstly under the Criminal Code for an appeal to the Court of Appeal, and if that is refused and new evidence comes to light, they can petition
Mr Simon Millman MLA also touched upon this during debate on the Bill under consideration. He said:

*if someone has had all the advantages of the criminal justice system and all the benefits of a trial before a judge and jury and they have been convicted, they have been convicted—they are no longer an accused but a prisoner. Parole should never operate as a hedge against conviction. If someone has been wrongly convicted, they should enlist the support of a fearless, tireless advocate and have that conviction overturned.*

**Finding 9:** The Committee finds that concerns regarding miscarriages of justice, whilst relevant to certain aspects of the judicial process, do not arise in the consideration of the proposed provisions.

**HOW WILL ‘COOPERATION’ BE MEASURED?**

6.45 A failure to locate a body does not equate to ‘never to be released’. As has been mentioned, it is not a failure to locate a body that will lead to a prisoner becoming ineligible to be considered for early release, rather a failure to cooperate in the search for that body. However, questions remain about how that cooperation will be measured by the Commissioner of Police in his or her report to the PRB, and how thereafter will it be evaluated by the PRB.

6.46 A failure to cooperate may be due to the prisoner’s actual or maintained innocence, but alternatively it may, for example, be because of environmental factors, the passage of time or natural events having eroded those remains or their location, or because the body was disposed of at sea, or because of the involvement of a third party, such as an accomplice or accessory hired to dispose of a body, with the perpetrator of the killing having no knowledge of where the disposal occurred. Indeed, it may result from a lack of mental capacity to cooperate at the time parole is being considered (paragraphs 6.71 to 6.79 below).

6.47 Under the new provisions, the extent of a prisoner’s cooperation will first be reported upon by the Police Force under proposed section 66C, then adjudged by the PRB under proposed section 66B and in reports to be given to the Attorney General under the proposed amendments to sections 12 and 12A. Officers from the Police Force confirmed

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74 John Quigley MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 11 May 2016, p 2772.

75 Simon Millman MLA, Western Australia, Legislative Assembly, *Parliamentary Debates (Hansard)*, 22 June 2017, p 1579.
that they would be able to report satisfactory cooperation even in the absence of a body.

Mr Scanlan, Commander, State Crime gave examples in evidence to the Committee:

> We do have a body that is missing down in the forest area south of the metropolitan area. The person has taken us out there twice to try and locate the body. However, due to the passage of time, we have been unable to locate that body. So in those circumstances, where we have those people coming forward and making great effort to provide us with the information we require, that would be provided in the report.\(^{76}\)

6.48 He went further:

*Mr SCANLAN*: There are a couple of examples I could use. I was talking about one this morning. We have not found the body of Richard Cotic, who was murdered in Geraldton some time ago. The offenders for that were Steve Southam, Paul Zaghet and John Hobby. The reality is that the murder was probably undertaken by Steve Southam and Zaghet, but John Hobby disposed of the body. Now, we have never been advised as to where the location of that body is, so those two people who have been convicted of murder highly likely do not know the location of where the body was placed. Their information that they have provided to us would be that, yes, we murdered the person. The person who disposed of the body was, say, John Hobby. So he is the person. They have pointed us in the direction and provided us with as much information as they possibly could.

*The CHAIR*: So an assessment could be done that gave them, metaphorically speaking, 10 out of 10 for cooperation, despite the fact that there was no recovery of a body?

*Mr SCANLAN*: Yes.\(^ {77}\)

6.49 Subsequent to that hearing, the Committee received a letter from Deputy Commissioner Brown, attaching a copy of a letter from the Commissioner of Police to the PRB, dated 17 October 2017. This letter was prepared in the form of a section 66C report, in anticipation of the Bill’s provisions coming into effect. What that letter illustrates is that the element of cooperation may be satisfied, at least in the opinion of the Police Force, even in the absence of a body.\(^ {78}\)

6.50 Thus, it is clear that the police may be able to give an opinion to the PRB that a given prisoner has satisfactorily cooperated. Thereafter, the judgement as to whether that

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\(^{76}\) Pryce Scanlan, Commander, State Crime, Western Australia Police, Transcript of Evidence, 11 October 2017, p 2.

\(^{77}\) ibid. p 3.

\(^{78}\) Stephen Brown, Deputy Commissioner (Specialist Services), Western Australia Police Force, Letter, 20 October 2017, Attachment 1.
cooperation is sufficient to warrant consideration for early release will fall upon the PRB to be made.

6.51 In a letter dated 25 October 2017, the Chairperson of the PRB gave the Committee his view on how cooperation would thereafter be adjudged:

_The Board accepts that the Commissioner of Police is best placed to provide a thorough assessment to enable the Board during its decision making process in determining the level of the cooperation provided by the prisoner. Whilst there may be degrees of cooperation, generally, in assessing “cooperation ... in the identification of the location, or last known location, of the remains of the victim” the Board will be looking for evidence of a willingness to work jointly with police to reveal all the prisoner knows about the location. Eventually there must be evidence that nothing of relevance has been withheld and that cooperation has been full, or in the terms of the Bill, "complete"._

**Finding 10: The Committee finds that cooperation rather than the recovery of a body is the critical criterion for a prisoner’s eligibility for parole consideration.**

**WILL THE BILL RESULT IN REDUCED REHABILITATION OF OFFENDERS?**

6.52 In her contribution to the second reading debate on the Bill, Hon Alison Xamon MLC said:

_A significant concern that the Greens have about this legislation is how it has the potential to undermine our parole system. We have significant concerns about the impact of the bill on the purpose and function of the parole system. The parole system provides a mechanism to supervise and support the transition of prisoners back into the community. Importantly, it seeks to minimise their chances of reoffending ... Prisoners often have to actively participate in treatment programs, attend counselling, actively seek employment—that is really important—participate in training or engage in other activities to facilitate re-entry into the community._

6.53 She continued:

_Frankly, if a prisoner knows that they are not going to get parole, they have no incentive at all to undertake rehabilitative programs while they are in custody. If they are ultimately released, and they may well be, that will happen not only without parole supervision, but also without_
the benefit of having had any sort of rehabilitative treatment in custody. That is not good for the community or community safety. These sorts of things have the potential to have unforeseen consequences.\footnote{ibid.}

6.54 This concern was also raised by the Bar Association of Queensland in its submission to the Legal Affairs and Community Safety Committee of the Queensland Parliament’s inquiry into the Corrective Services (No Body, No Parole) Amendment Bill 2017.\footnote{Submission 4 to the Parliament of Queensland, Legal Affairs and Community Safety Committee, Inquiry into the Corrective Services (No Body, No Parole) Amendment Bill 2017, July 2017, p 2.}

6.55 The PRB does of course take into account these matters already — the release considerations include, at sections 5A(f) and (g) of the Act ‘whether the prisoner has participated in programmes available to the prisoner when in custody, and if not the reasons for not doing so’ and ‘the prisoner’s performance when participating in a programme mentioned in paragraph (f).’

6.56 As for supervision post-release, this is a separate consideration. For prisoners granted an early release, the PRB and the Governor have unfettered powers to impose all manner of conditions (or requirements) on a parole order under sections 28 to 30 of the Act. Moreover, the CEO of the Department of Justice is expressly mandated to ensure that a parolee (unless the parole order was an unsupervised order) is supervised by a Community Corrections Officer.

6.57 Further, by virtue of amendments to the Act made by Part 3 of the Sentencing Legislation Amendment Act 2016, which came into force on 1 July 2017, the PRB must now consider whether to make a ‘post-sentence supervision order’ (PSSO) in respect of certain prisoners, being those found guilty of a number of serious violent offences, including murder (and manslaughter).

6.58 Regardless of whether an early release was granted to a prisoner or not, or whether the prisoner served the full term of his or her sentence, a PSSO may be made under Part 3. Those 2017 amendments provide an authority for the PRB to order that an offender remains on supervision (including GPS tracking) for a period of two years beyond the expiry of the sentence handed down by the court.

6.59 The PRB, in making such a decision, will be primarily guided by the need for community safety and protection for the victim. Similar to the parole provisions outlined earlier in this Report, however, there is a list of ‘PSSO considerations’ set out at section 74B of the Act. These again include:

\begin{itemize}
\item[(c)] whether the prisoner has participated in programmes available to the prisoner in custody, and if not the reasons for not doing so;
\item[(d)] the prisoner’s performance when participating in a programme mentioned in (c).
\end{itemize}
Finding 11: The Committee finds that the existing mechanisms in place for the rehabilitation of offenders will not be impacted upon by the provisions of the Sentence Administration Amendment Bill 2017.

MANSLAUGHTER

6.60 As mentioned in Chapter 5, the equivalent legislation in both Victoria and Queensland includes prisoners guilty of the offence of manslaughter within the definition of those to whom the no parole without cooperation provisions will apply.

6.61 Section 277 of the Criminal Code states:

*Unlawful homicide is murder or manslaughter*

*Any person who unlawfully kills another is guilty of a crime which, according to the circumstances of the case, may be murder or manslaughter.*

6.62 Where a person unlawfully kills another person under such circumstances as not to constitute murder, that person is guilty of manslaughter and is liable to a maximum sentence of imprisonment for life under section 280. But whilst manslaughter is regarded as a homicide offence for the purposes of the Criminal Code, it is not so regarded for the purposes of this Bill.

6.63 As discussed at paragraphs 2.6 to 2.12 of this Report, the Private Member’s Bill on this subject that was tabled and debated in 2016 applied only to the offence of murder. Amendments made to that bill during its passage through the Legislative Assembly would have applied its provisions to prisoners in custody for ‘an offence relating to the death of a person’, which would of course have included manslaughter.

6.64 The rationale for including manslaughter within the operation of the legislation in Victoria was explained by Ms Gabrielle Williams MLA:

*As I outlined, it not only applies to murder but it also applies to conspiracy to murder, manslaughter and accessory to murder. These offences have been included because we know there are cases that involve an offender disposing of a body or having knowledge of the location of a deceased and having involvement in different aspects of the crime that may not strictly fall within the definition of murder but are in many ways as serious and in many ways render that person’s silence as to the location of a victim just as abhorrent. By broadening the scope of crimes we recognise the seriousness of these offences and*
will provide the opportunity for closure to the greatest number of victims’ families.83

6.65 According to case histories supplied to the Committee by the Police Force, there are two prisoners serving sentences for manslaughter, at the time of this Report, where the victim’s remains were never recovered.84

6.66 The Attorney General was asked by the Committee about this possible gap in the Bill now under consideration. He said:

*The Sentence Administration Amendment Bill 2016 (the member’s Bill) only covered the offence of murder and this remains the Government’s policy on the matter (modified to include certain homicide-related offences).*85

6.67 This Committee was specifically empowered to consider the policy of the Bill in the terms of reference. If the objective of the Bill is to increase the possibility of finding the remains of the victims of crime, so as to bring a measure of solace and closure to friends and relatives of that victim, it is the view of the Committee that the provisions should have the widest possible application and that manslaughter should be included within the definition of ‘homicide offence’ in clause 9 of the Bill (proposed section 66A of the Act) for the very reasons given by Ms Gabrielle Williams MLA in Victoria — to provide the opportunity for closure to the greatest number of victims’ friends and families.

6.68 Asked the question whether the Police Force would support broadening the definition of ‘homicide offence’ to include manslaughter, Deputy Commissioner Brown wrote:

*The WAPF HS [the Western Australia Police Force Homicide Squad] have identified two prisoners who have been convicted of manslaughter where the victim’s body has not been located. The WAPF supports the inclusion of manslaughter on the definition of ‘homicide’ offences, alongside murder, wilful murder and infanticide.*86

6.69 At least one of those in custody for manslaughter was charged with murder, but pleaded guilty to manslaughter. It is not uncommon in the criminal justice system for someone charged with the more serious offence to either plead guilty to the lesser one, or indeed to be found guilty of the lesser one following the hearing of the evidence regarding the circumstances of the offence. It seems to the Committee to be counter-intuitive that the prohibition on early release may apply to one offender and not another based on those circumstances — in either instance, a person is dead and the body remains missing, but

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83 Gabrielle Williams MLA, Victoria, Legislative Assembly, *Parliamentary Debates (Hansard)*, 7 December 2016, p 4852.
84 Stephen Brown, Deputy Commissioner (Specialist Services), Western Australia Police Force, Letter, 20 October 2017, p 3.
85 Hon John Quigley MLA, Attorney General, Letter, 5 October 2017, p 1.
86 Stephen Brown, Deputy Commissioner (Specialist Services), Western Australia Police Force, Letter, 20 October 2017, p 2.
the prisoner is expected to cooperate in order to be considered for parole in only one of those instances.

Finding 12: The Committee finds that prisoners convicted of manslaughter should be included within the scope of the proposed provisions.

6.70 Given that finding, the Committee recommends as follows:

Recommendation 1: The Committee recommends that clause 9 of the Sentence Administration Amendment Bill 2017 be amended to include the offence of manslaughter within the definition of ‘homicide offence’ at proposed section 66A. This can be effected in the following manner:

Page 3, after line 23 — To insert:

(aa) manslaughter; or

MENTAL CAPACITY

6.71 Under the equivalent legislation in Queensland, in deciding whether the prisoner has satisfactorily cooperated in the investigation of the offence to locate the victim’s location, the Queensland Parole Board must have regard to, amongst other things, ‘any information the Board has about the prisoner’s capacity to give the cooperation.’ This was adapted from the equivalent Victorian legislation, which mandates the Adult Parole Board to have regard to, amongst other considerations, ‘the capacity of the prisoner to cooperate in the investigation of the offence, which may include information provided in a report under paragraph (a) or (b)’ [these are reports to the Board from the Chief Commissioner of Police and from the Secretary to the relevant department]. Parliamentary Counsel then provides useful examples, being:

A mental or physical infirmity, such as age, cognitive impairment, dementia or a decline in memory.

6.72 In its submission to the Committee, the PRB pointed out that, due to the definition of ‘relevant prisoner’ in the Bill, mentally-impaired accused would not be caught within its provisions. In that context, it was describing accused persons who are charged with murder but acquitted on the ground of unsoundness of mind, or those who are found to be not mentally fit to stand trial and are the subject of a custody order.

6.73 That is a different consideration, however. Those persons are dealt with under the Criminal Law (Mentally Impaired Accused) Act 1996, where the release considerations are wholly different, and not under parole legislation.

87 Corrective Services Act 2006 (Qld), section 193A(7)(a)(ii).
88 Corrections Act 1986 (Vic), section 74AABA(3)(c).
The Committee’s consideration regards those prisoners who are mentally incapacitated at the time a parole decision comes to be made, not at the time of trial. Clearly, where a person is sentenced to life imprisonment, perhaps for a term of 15 or 20 years, intervening events may well impair that prisoner’s mental capacity, as described in the Victorian legislation or indeed as caused by acts of violence whilst incarcerated, for example. The provisions of the Bill contain no express requirement for the PRB to take this into account in judging a prisoner’s cooperation.

Officers of the Department of Justice were asked whether the PRB should have the ability to take into account the prisoner’s mental capacity to cooperate with the police in locating the remains of the victim, as it is in Victoria in Queensland. Whilst there is no specific direction to include that capacity in its considerations, the department opined that mental capacity would be taken into account, and be materially relevant, under a number of the other release considerations.89

However, that evaluation of mental capacity as a release consideration, if it occurs, would take place later on in the PRB’s evaluation processes, under the provisions of section 5A of the Act, and not as part of the initial ‘gateway’ considerations (if the Committee’s hierarchy of considerations paragraph 6.34 is accepted). In other words, if the PRB takes the view that a prisoner has not satisfactorily cooperated with the police in locating the victim’s remains, that will be the end of the PRB’s dealings with that prisoner. The gateway has been firmly closed, and the section 5A release considerations (including, if the Department’s evidence in this regard is accepted, the prisoner’s mental capacity) will not be taken into account.

The Department does go on to deal with reports that would be given by the Commissioner of Police under the new section 66C. In his letter to the Committee of 19 September 2017, the Director General wrote:

Of relevance to the Bill is that the Police report must deal with the nature and extent of the prisoner’s cooperation (amongst other factors). It is arguable that this portion of the report would by necessity deal with capacity to cooperate. In addition to this information the Board also has other information at its disposal when determining the question of cooperation and the extent to which this may have been affected by lack of capacity. This includes reports from Corrective Services and the Judge’s sentencing remarks.90

The Committee accepts these points, but notes that it is only ‘arguable’ that a police report would deal with mental capacity. Any report from Corrective Services may or may not deal with the issue, and the Judge’s sentencing remarks are unlikely to be of any relevance towards the end of a life sentence if loss of capacity has taken hold during that time.

89 Dr Adam Tomison, Director General, Department of Justice, Letter, 19 September 2017, pp 1-2.
90 ibid.
6.79 His Honour Judge Robert Cock QC, Chairperson of the PRB, whilst warning that the inclusion of the consideration of a prisoner’s mental capacity might have the potential to be exploited by prisoners and their lawyers, offered some practical advice on how the issue may be dealt with:

Perhaps it may be worthy of consideration whether to include a new subparagraph (v) under section 66C(3)(a) in the Bill which requires that Police must, in their report to the Board, comment on the mental capacity of the prisoner at the time or more broadly, whether there were any other factors that may have affected the prisoners level of cooperation, including mental health issues, apparent cognitive capacity, illness or duress.91

Finding 13: The Committee finds that the mental capacity of a prisoner to cooperate in locating a victim’s remains should be specifically taken into account by the Prisoners Review Board in making a release decision or taking release action, and that the Commissioner of Police should be required to report on a prisoner’s mental capacity to cooperate, to the extent that this is known to the Commissioner of Police, where this is relevant.

6.80 Given that finding, the Committee recommends as follows:

Recommendation 2: The Committee recommends that the mental capacity of a prisoner to cooperate in locating a victim’s remains should be a consideration to be taken into account by the Prisoners Review Board in making a release decision or taking release action. This may be effected in the following manner:

Page 5, after line 32 — To insert:

(2A) The Board must, when deciding whether it is satisfied under subsection (1)(a), take into account any information the Board has about the prisoner’s mental capacity to provide relevant information or evidence.

Page 6, after line 30 — To insert:

(v) to the extent known to the Commissioner of Police, the prisoner’s mental capacity to provide relevant information or evidence;

CHAPTER 7

FUNDAMENTAL LEGISLATIVE SCRUTINY PRINCIPLES

7.1 As mentioned at paragraph 1.6 above, the Committee’s scrutiny of bills includes an assessment as to whether its provisions are consistent with fundamental legislative scrutiny principles (FLPs).92 The FLPs are taken from section 4 of Queensland’s Legislative Standards Act 1992, and are described by section 4(1) of that Act as being ‘the principles relating to legislation that underlie a parliamentary democracy based on the rule of law.’ A list of those principles may be found at Appendix 3.

SUFFICIENT REGARD FOR THE INSTITUTION OF PARLIAMENT?

7.2 The second collection of FLPs, listed at numbers 12 to 16, encourages the Committee to turn its mind to some basic considerations relating to the rule of law and the primacy of Parliament – for example, whether delegated powers are appropriate and subject to sufficient oversight and whether there are any consequences arising from the bill for parliamentary privilege.

7.3 The Committee is satisfied that the Bill contains no provisions that are of concern in these regards, save for the issue that was the subject of Finding 4 above (and detailed at paragraphs 4.4 to 4.7 of this Report). That is, commencement of the substantive provisions by proclamation leaves the Executive to determine commencement dates, which potentially erodes the sovereignty of Parliament. Such commencement provisions should be avoided unless absolutely necessary. The Committee does not believe that delayed commencement is warranted in this instance.

SUFFICIENT REGARD FOR THE RIGHTS AND LIBERTIES OF INDIVIDUALS?

7.4 The first part of the list of FLPs to be taken into consideration concern the rights and liberties of the individual. In the absence of overriding human rights legislation in Western Australia, or of a mandated statutory reference point such as the Queensland Act mentioned earlier, the Committee undertakes the role of scrutinising draft legislation with a view to the protection of individual rights and whether, for example, the provisions are consistent with principles of natural justice.

7.5 Only potential breaches of FLPs are considered. First, is there a ‘right’ to parole?

The ‘right’ to parole

7.6 To repeat the words of the PRB (paragraph 4.36 above):

for them [prisoners serving a finite sentence], the law will mean that they will possibly serve two years longer than had they been released

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92 Western Australian legislation committees have used FLPs as a framework for scrutinising bills since 2004 when the Uniform Legislation and General Purposes Committee (which scrutinised uniform and other bills) considered these principles. During the 37th and 38th Parliaments, the Standing Committee on Legislation and Standing Committee on Uniform Legislation and Statutes Review (established in 2005) continued the practice of considering whether a bill abrogated or curtailed FLPs.
to parole at their earliest eligibility date, had the original sentencing judge determined to make a parole eligibility order.\textsuperscript{93}

7.7 The key word here is ‘eligibility’. It is only an eligibility. It is well established that parole is not a right, merely a privilege. As stated by Mr Simon Millman MLA during the second reading debate in the Legislative Assembly:

\textit{The purpose of parole is to recognise that the criminal justice system is incredibly nuanced and finely balanced. Parole plays an important part in that balance, but it has never been a right. Parole has always been a privilege that must be earned by a person who has been convicted of an offence.}\textsuperscript{94}

7.8 In the case of \textit{Crump v State of New South Wales}\textsuperscript{95}, the prisoner had been sentenced in 1974 to life imprisonment, the mandatory sentence for murder, but at the time such prisoners were eligible for release on licence. A subsequent re-sentencing by McInerney J of the Supreme Court substituted a non-parole period of 30 years. A number of statutory amendments to the parole scheme occurred in the interim, one of which was the insertion into the \textit{Crimes (Administration of Sentences) Act 1999 (NSW)} in 2001 of section 154A. This section had the effect of preventing serious offenders who had initially been the subject of a ‘\textit{never to be released}’ recommendation, from being released on parole unless they were in imminent danger of death or were of such limited physical capacity as to be of no danger to anyone.

7.9 The High Court was asked to opine on whether section 154A constituted an impermissible legislative interference with the judicial decision to substitute the non-parole period of 30 years, following which Crump would have had at least some prospect of being released on parole. It was argued on his behalf that the State legislature did not have the power to enact laws which alter or detract from rights or entitlements.

7.10 The joint judgment of Gummow, Hayne, Crennan, Kiefel and Bell JJ affirmed that the prisoner enjoyed no such ‘\textit{rights or entitlements}’. They stated:

\textit{As a matter neither of form nor substance did the sentencing determination by McInerney J create any right or entitlement in the plaintiff to his release on parole.}\textsuperscript{96}

7.11 Moreover, that eligibility for parole need not be determined by reference to the law as it stood at the time of conviction. French CJ stated:

\textit{Section 154A imposed strict limiting conditions upon the exercise of the executive power to release the plaintiff and other serious offenders the subject of a non-release recommendation. It may be said to have}

\textsuperscript{93} Submission 1 from the Prisoners Review Board, 21 September 2017, p 6.

\textsuperscript{94} Simon Millman MLA, Western Australia, Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 22 June 2017, p 1578.

\textsuperscript{95} [2012] HCA 20.

\textsuperscript{96} ibid. para 60.
altered a statutory consequence of the sentence. It did not alter its legal effect.

The distinction between the legal effect of a judicial decision and consequences attached by statute to that decision is apposite in the context of sentencing decisions and statutory regimes providing for conditional release by executive authorities. The power of the executive government of a State to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the State. Statutes providing for executive release may be changed from time to time.  

7.12 Heydon J concurred, adding:

he had no right or entitlement that the regime should continue to apply to him. It was open to the legislature to alter the legislation in place when the order was made in relation to criteria for the grant of parole – either by making it easier for persons in the plaintiff’s position to gain release on parole, or by making it harder.

7.13 Once a sentence has been imposed by a court, and any appeal processes have been exhausted, the involvement of the judiciary is complete. The prisoner is then essentially in the hands of the Executive, guided by a Legislature which is entitled to amend the statutory consequences of the judgment or sentence handed down. A clear distinction must be drawn between the judicial function of the court in sentencing, and the Executive function carried out by the PRB and the Governor in determining whether a person eligible for early release should be so released.

Finding 14: The Committee is satisfied that there is no ‘right’ or ‘entitlement’ to parole which would be affected by the terms of the Sentence Administration Amendment Bill 2017.

Is the Bill consistent with principles of natural justice?

Prisoner review of evidence

7.14 It is a principle of natural justice that a person be given an adequate opportunity to present their case to a decision maker, in this case the PRB. Under the Bill, the PRB will be heavily reliant on the report produced by the Commissioner of Police under proposed section 66C. However, there is no mechanism in the proposals whereby a prisoner will have an opportunity to comment upon or challenge what the Commissioner has said. Clearly, an adverse assessment may jeopardise the prisoner’s chances of success.

97 ibid. paras 35-36.
98 ibid. para 71.
This was an issue addressed by the Legal Affairs and Community Safety Committee of the Queensland Parliament in its inquiry into the Corrective Services (No Body, No Parole) Amendment Bill 2017. Evidence submitted by the Queensland Council for Civil Liberties to that inquiry, and cited in the Committee’s report, said:

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.

The Committee’s response was favourable. It felt that it would be appropriate for prisoners to have an opportunity to bring contrary evidence before the Parole Board, especially given that the sorts of things that the Commissioner’s report must cover (the same as would be the case in Western Australia under proposed section 66C(3)(a)) would arguably be matters of a subjective nature.

The Committee raised this issue with the Department of Justice. In a letter dated 19 September 2017, Dr Adam Tomison, Director General of the Department, said:

There is currently no express requirement in the Bill that a copy of the Police report regarding cooperation be provided to a prisoner. The PRB does not provide prisoners with copies of materials and reports which have been submitted to it by external agencies. The PRB is an exempt agency under the Freedom of Information Act 1992 but the agencies from which reports originate are not, so it remains open to a prisoner to seek access to those materials directly from those agencies through the freedom of information process (subject to any statutory exemptions).

The Committee raised this matter with the representatives of the Police Force when they appeared for a public hearing on 11 October 2017. Officers believed that providing the prisoner with a copy of the police report for the PRB would be beneficial. Deputy Commissioner Brown said:

My view is that it would be in the interest of justice overall to provide them with the material so they can make comment.

100 ibid. p 28.
101 ibid. p 29.
102 Dr Adam Tomison, Director General, Department of Justice, Letter, 19 September 2017, p 3.
103 Stephen Brown, Deputy Commissioner, Western Australia Police, Transcript of Evidence, 11 October 2017, p 9.
7.19 In Queensland, the Committee satisfied itself that Ministerial Guidelines to the Queensland Parole PRB issued under section 227 of the Corrective Services Act 2006 (Qld) already provided for the disclosure to a prisoner of adverse material. Indeed, paragraph 3.2 of those guidelines states:

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.\textsuperscript{104}

7.20 In Western Australia, the Committee found no equivalent provision or guidance whereby a prisoner is permitted to see or comment upon the information before the PRB at the time a decision is made. Moreover, the Bill contains no such provision.

7.21 Section 115 of the Act states:

\textit{Rules of natural justice excluded}

The rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to the doing or omission of any act, matter or thing under Parts 2 to 6 by —

(a) the Governor; or
(b) the Minister; or
(c) the Board; or
(d) an authorised person as defined in section 108(1); or
(e) the CEO.

7.22 The proposed sections 66A, 66B and 66C would be inserted into Part 5 of the Act, and thus be included within this provision.

7.23 Nevertheless, the lack of a mechanism whereby a prisoner may provide comments on the report provided to the PRB by the Police Force under proposed section 66C seems to the Committee to be counter-productive at best and potentially unjust. The view of the Police Force expressed above is that providing that report would be in the interests of justice overall in that the prisoner should be given an adequate opportunity to present contrary arguments to the information provided in a report. In any event, the prisoner would have access to the report under freedom of information provisions.

Finding 15: The Committee finds that the Government should give consideration to creating a mechanism for prisoners to receive advance copies of reports prepared under the proposed section 66C, given that the Police Force has no objections to this and that the report would be obtainable under the freedom of information process in any event.

\textsuperscript{104} Ministerial Guidelines to the Queensland Parole Board 2015, Minister for Police, Fire and Emergency Services and Minister for Corrective Services, 8 September 2015, p 3.
Does the Bill provide appropriate protection against self-incrimination?

7.24 It might be said that if an accused person who is before the criminal justice system is required to identify the location of the body, they are in fact being required to incriminate themselves, and indeed abrogate the right to silence.

7.25 During the second reading debate on this Bill in the Legislative Council, Hon Alison Xamon MLC articulated that concern:

_Yet another concern is that this legislation, in effect, undermines the rule of law that it is a person’s right to remain silent. That concept is enshrined; we understand in the western context in particular that people are afforded the key protection of the right to not incriminate themselves. At the moment, if it is the view of the courts, the Prisoners Review Board and indeed the relevant politician that that is not good enough, there is a remedy to address that, but otherwise that is a concerning potential outcome. I look forward to the opportunity to discuss this in more detail during the second reading debate to see whether those unintended concerns will occur._

7.26 Necessitating a breach of this fundamental right is properly avoided in the Bill by the inclusion of proposed section 66B(2) which, for ease of reference, reads:

_The Board may be satisfied under subsection (1)(a) in relation to a relevant prisoner in custody for a homicide offence or homicide related offence even if the prisoner did not cooperate —_

(a) before being sentenced for the offence; or

(b) before the determination of an appeal against the conviction or sentence for the offence.

7.27 Thus, a prisoner to whom the new regime would apply is not a person who is facing criminal charges and is being compelled to confess guilt by way of identifying the location of a body.

**Finding 16:** The Committee finds that the Sentence Administration Amendment Bill 2017 appropriately protects against self-incrimination.

Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

7.28 The application of the proposed provisions will undoubtedly have retrospective effect, in the sense that they will apply to prisoners regardless of when convicted. The

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105 Hon Alison Xamon MLC, Western Australia, Legislative Council, _Parliamentary Debates (Hansard)_ , 15 August 2017, p 2706.

106 Simon Millman MLA, Western Australia, Legislative Assembly, _Parliamentary Debates (Hansard)_ , 22 June 2017, pp 1578 - 9.
definition of ‘relevant prisoner’ at proposed section 66A would include all prisoners serving sentences for homicide or homicide related offences that were handed down prior to the commencement date of the provisions, including offences such as wilful murder that are no longer on the statute book.

7.29 Of the equivalent provisions in the Queensland legislation, the Bar Association of Queensland wrote:

    Clause 5 of the Bill would insert transitional provisions into the Act to make the effect of the "no body, no parole" scheme retrospective. The Association is opposed to the creation of retrospective legislation that has the potential to significantly affect the right to liberty of individuals.107

7.30 However, as stressed at paragraphs 7.6 to 7.13 of this Report, there is no intrinsic ‘right to parole’. As the Explanatory Notes that accompanied the Queensland bill stated:

    A parole eligibility date is not a guarantee that the prisoner will be granted parole on that particular date, or that the prisoner’s parole will be determined based on the parole system as in force at the time of sentence.108

7.31 Nor is there a ‘right to liberty’ for convicted prisoners that would be retrospectively affected by the Bill. The deprivation of liberty has already occurred by way of the sentence imposed for the criminal liability. The provisions do not vary the terms of the sentence imposed by the court.

7.32 Considerations about retrospectivity do not arise in connection with this Bill.

7.33 The Bill does not impose an obligation on prisoners. At all times, they remain at liberty to cooperate or not. The only obligations imposed by the Bill are on the PRB and the Police Force, but relevantly not retrospectively.

Finding 17: The Committee finds that the provisions of the Sentence Administration Amendment Bill 2017 do not affect rights and liberties, or impose obligations, retrospectively.

Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

7.34 The eleventh of the FLPs requires the Committee to consider whether the Bill is unambiguous and drafted in a sufficiently clear and precise way.

7.35 The Committee is so satisfied.

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CHAPTER 8
CONCLUSIONS

8.1 Insofar as the policy of the Bill is to provide an incentive to prisoners to reveal the whereabouts, or last known whereabouts, of the body or remains of a victim of a homicide or homicide-related offence, the Bill will achieve that. It will not guarantee a prisoner’s cooperation — there is nothing that the Parliament could do to ensure that. Nor will it necessarily lead to the discovery of the remains of any victim.

8.2 However, the effect of ineligibility for parole on a prisoner serving a life sentence in the absence of cooperation will be substantial. Moreover, to quote Mr Walter Sofronoff QC (as he was then) in the report of his review into the Queensland parole system:

\textit{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.}^{109}

8.3 The Committee identified no unintended consequences, except for the lack of a provision to take into account a prisoner’s mental capacity as part of the gateway to consideration for parole, rather than as an element of the wider release considerations. As a result, any lack of capacity may not be taken into account because consideration of the release conditions may never be reached in the absence of cooperation.

8.4 The Police Force representatives expressed themselves as supportive of the provisions, and confirmed that they envisaged no potential workload problems arising out of them. Moreover, the Commissioner for Victims of Crime said:

\textit{The Bill is supported by this office as it provides victims with assurance that the offender’s willingness to cooperate with police regarding the location of the body will be considered during any parole hearings.}^{110}

8.5 The Committee is satisfied that the Bill is consistent with fundamental legislative scrutiny principles.

8.6 The Bill, subject to amendments, can be passed.

\footnotesize

\textsuperscript{110} Submission 3 from the Office of the Commissioner for Victims of Crime, 31 October 2017, p 1.
Hon Dr Sally Talbot MLC
Chair

28 November 2017
## APPENDIX 1
### COMPARATIVE TABLE

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<tr>
<td><strong>Prisoners affected</strong></td>
<td>(i) Murder (ii) Wilful murder* (iii) Infanticide* (iv) Counselling or procuring (j) to (m) (v) Inclination to commit (i) to (ii) (vi) Accessory after the fact to an offence under (i) to (iii) (vii) Conspiracy to commit (i) to (ii) *Repealed offences</td>
<td>(i) Murder (ii) Conspiracy to murder (ii) Aiding or abetting the commission of a murder (iv) Counselling or procuring the commission of a murder</td>
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<td>(i) Murder (ii) Conspiracy to murder (iii) Accessory to murder (iv) Manslaughter</td>
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<td><strong>Retrospective?</strong></td>
<td>Yes</td>
<td>Yes</td>
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<td><strong>Type of cooperation required</strong></td>
<td>Board must be satisfied that the prisoner has cooperated with a member of the Police Force in the identification of the remains</td>
<td>Board must be satisfied that the prisoner has cooperatively cooperated in the investigation of the offence</td>
<td>Board must consider that the prisoner has cooperated satisfactorily in the investigation of the offence to identify the prisoner serving sentence for corresponding offences committed interstate</td>
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<td><strong>Location, or last known location of the remains of the victim</strong></td>
<td>location, or the last known location, of the remains of the victim of the offence</td>
<td>location, or the last known location, of the remains of the victim of the offence</td>
<td>(a) the location, or the last known location, of the body or remains of the victim of the offence; and (b) the place where the body or remains of the victim of the offence may be found</td>
<td>victim’s location (meaning the location or last known location of every part of the body or remains and the place where every part may be found)</td>
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<td><strong>When is cooperation required?</strong></td>
<td>Anytime (either before or after sentence or outcome of appeal)</td>
<td>Anytime (either before or after sentence)</td>
<td>Anytime (before or after the prisoner was sentenced to imprisonment)</td>
<td>Anytime (before or after the prisoner was sentenced to imprisonment)</td>
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<td><strong>What must the Board have regard to in determining cooperation?</strong></td>
<td>Report from the Commissioner of Police</td>
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<td>Board must have regard to: (a) Report from the Commissioner of Police (b) Any information the Board has about the prisoner’s capacity to give the cooperation (c) The transcript of any proceedings against the prisoner for the offence, including any relevant information contained in (a) or (b) (d) The record of the sentencing court (e) Any other information regarding whether the body or remains of the victim are or may be connected with the prisoner</td>
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<td>What must report to the Board evaluate?</td>
<td>(i) Nature and extent of the prisoner's cooperation (ii) Timeliness of the prisoner's cooperation (iii) Truthfulness, completeness and reliability of any information or evidence provided by the prisoner (iv) Significance and usefulness of the prisoner's cooperation</td>
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<td>Specific mention of lack of capacity to cooperate</td>
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<td>Cooperation includes location of every part of the body or remains</td>
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APPENDIX 2

SUBMISSIONS AND CORRESPONDENCE

Submission 1

PRISONERS REVIEW BOARD
 WESTERN AUSTRALIA

The Honourable Dr Sally Elizabeth Talbot MLC
 Chairperson
 Legislative Council Committee Office
 Parliament House
 4 Harvest Terrace
 WEST PERTH WA 6005

Dear Chairperson

RE: Inquiry into the Sentence Administration Amendment Bill 2017 (Ref: A629071)

I refer to your letter, dated 23 August 2017, in which you seek from me a written submission and thereafter, that I appear before the Committee at an evidential hearing regarding the Sentence Administration Amendment Bill 2017.

The amendments which most relate to the Prisoners Review Board (the Board) are as follows:

66B. Board not to release or recommend release unless prisoner cooperates or victim's remains located

1) The Board must not make a release decision, or take release action, in relation to a relevant prisoner in custody for a homicide offence or homicide related offence unless the Board is satisfied that—
   a) the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or
   b) a member of the Police Force knows the location of the remains of the victim of the homicide offence.

Given that most murderers are sentenced to life imprisonment and therefore the ultimate responsibility to release a Schedule 3 prisoner does not lie with me as the Chairperson or the Board I chair, I am not minded to provide critical comment on the Bill nor do I feel it appropriate to publically endorse the Bill. Such discussions and critical debate, I feel, are matters for the Members of Parliament.

However, I am happy to provide you with the following information which sets out the manner in which the Board considers murderers who have been sentenced to life imprisonment and the typical elements of a report to the Attorney General and what such a report may say about the deceased’s body. I am also happy to provide you with information as to how the Board envisages it will do its work if the provisions of the Bill become law, rather than provide a critique of the Bill.

Any legislative amendments which affect the release considerations of the Board are of an obvious interest to me and the members of my Board who would be required to apply these provisions to any relevant prisoner. In the case of a Schedule 3 prisoner, any amendments may impact on the level of discussion during a Board meeting and the content of particular
areas of a statutory report to the Attorney General and any recommendations contained therein.

**Penalty for murder**
At present, in accordance with current Western Australian legislation, a prisoner’s eligibility to be considered for release on parole is decided by the Courts.

It is important to note that in the case of murder, life imprisonment is not always the result.

Section 279 of the *Criminal Code* creates the offence of murder as follows:

(1) If a person unlawfully kills another person and —
   (a) the person intends to cause the death of the person killed or another person; or
   (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or
   (c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

   the person is guilty of murder.
   Alternative offence: s. 280, 281, 283, 284, 290 or 291 or Road Traffic Act 1974 s. 59.

(2) For the purposes of subsection (1)(a) and (b), it is immaterial that the person did not intend to hurt the person killed.

(3) For the purposes of subsection (1)(c), it is immaterial that the person did not intend to hurt any person.

(4) A person, other than a child, who is guilty of murder must be sentenced to life imprisonment unless —
   (a) that sentence would be clearly unjust given the circumstances of the offence and the person; and
   (b) the person is unlikely to be a threat to the safety of the community when released from imprisonment,

   in which case, subject to subsection (5A), the person is liable to imprisonment for 20 years.

(5A) If the offence is committed by an adult offender in the course of conduct that constitutes an aggravated home burglary, the court sentencing the offender, if it does not impose a term of life imprisonment must, notwithstanding any other written law, impose a term of imprisonment of at least 15 years.

(5) A child who is guilty of murder is liable to either —
   (a) life imprisonment; or
   (b) detention in a place determined from time to time by the Governor or under another written law until released by order of the Governor.

(6A) If the offence is committed by a juvenile offender in the course of conduct that constitutes an aggravated home burglary and the court sentences the offender under subsection (5)(a) but does not impose a term of life imprisonment, it —
(a) must, notwithstanding the Young Offenders Act 1994 section 46(5a), impose either
   (i) a term of imprisonment of at least 3 years; or
   (ii) a term of detention under the Young Offenders Act 1994 of at least 3 years, as the court thinks fit; and
(b) must not suspend any term of imprisonment imposed; and
(c) must record a conviction against the offender.

(6B) Subsection (6A) does not prevent a court from —

(a) making a direction under the Young Offenders Act 1994 section 118(4); or
(b) making a special order under Part 7 Division 9 of that Act.

(6) A court that does not sentence a person guilty of murder to life imprisonment must give
written reasons why life imprisonment was not imposed.

[Section 279 inserted by No. 29 of 2008 s. 10; amended by No. 25 of 2015 s. 5.]

Section 90 of the Sentencing Act 1995 provides that:

(1) A court that sentences an offender to life imprisonment for murder must either —
   (a) set a minimum period of —
      (i) at least 15 years, if the offence is committed by an adult offender (within
the meaning given in The Criminal Code section 1(1)) in the course of
conduct that constitutes an aggravated home burglary (within the
meaning given in that section); or
      (ii) at least 10 years, in any other case, that the offender must serve before
being eligible for release on parole; or
   (b) order that the offender must never be released.

(2) Any minimum period so set begins to run when the sentence of life imprisonment begins.

(3) A court must make an order under subsection (1)(b) if it is necessary to do so in order to
meet the community’s interest in punishment and deterrence.

(4) In determining whether an offence is one for which an order under subsection (1)(b) is
necessary, the only matters relating to the offence that are to be taken into account are
   (a) the circumstances of the commission of the offence; and
   (b) any aggravating factors.

[Section 90 inserted by No. 29 of 2008 s. 19; amended by No. 25 of 2015 s. 24.]

Penalty for “homicide related offences”
The provisions of clause 9 of the Bill insert section 66A into the Sentence Administration Act
2003 (WA) which will also extend the operation of proposed section 66B to a "homicide
related offence" which is defined to mean any of the following offences, if the offence relates
to the death of a person —
   (a) counselling or procuring the commission of a homicide offence; or
   (b) inciting another person to commit a homicide offence; or
   (c) becoming an accessory after the fact to a homicide offence; or
   (d) conspiring with another person to commit a homicide offence;

Under Western Australia’s current Criminal Code, by section 7 thereof:
7. **Principal Offenders**

When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say —

(a) Every person who actually does the act or makes the omission which constitutes the offence;

(b) Every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

(c) Every person who aids another person in committing the offence;

(d) Any person who counsels or procures any other person to commit the offence.

In the fourth case he may be charged either with himself committing the offence or with counselling or procuring its commission.

A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.

Any person who procures another to do or omit to do any act of such a nature that, if he had himself done the act or made the omission, the act or omission would have constituted an offence on his part, is guilty of an offence of the same kind, and is liable to the same punishment as if he had himself done the act or made the omission; and he may be charged with himself doing the act or making the omission.

Accordingly, a person convicted of "counselling or procuring the commission of a homicide offence" is liable to the same punishment as the actual murderer, hence the penalties in section 279 of the Criminal Code apply.

The law relating to a person who incites another to commit an offence is set out in section 10D and 10F of the Criminal Code:

**10D. Charge of offence, alternative convictions of attempt etc.**

If a person is charged with committing an offence (the principal offence), the person, instead of being convicted as charged, may be convicted of —

(a) attempting to commit; or

(b) inciting another person to commit; or

(c) becoming an accessory after the fact to, the principal offence or any alternative offence of which a person might be convicted instead of the principal offence.

[Section 10D inserted by No. 70 of 2004 s. 36(2).]

**10F. Charge of conspiracy, alternative convictions on**

If a person is charged with conspiring to commit an offence (the principal offence), the person, instead of being convicted as charged, may be convicted of —

(e) committing the principal offence; or

(f) attempting to commit the principal offence; or

(g) inciting another person to commit the principal offence, but the person shall not be liable to a punishment greater than the greatest punishment to which the person would have been liable if convicted of conspiring to commit the principal offence.

[Section 10F inserted by No. 70 of 2004 s. 36(2).]

The penalty for conspiring to commit murder is set out in section 558 of the Criminal Code.
558. Conspiracy to commit indictable offence
(1) Any person who conspires with another person —
   (a) to commit an indictable offence (the principal offence); or
   (b) to do any act or make any omission in any part of the world which, if done or
       made in Western Australia, would be an indictable offence (the principal offence)
       and which is an offence under the laws in force in the place where it is proposed
       to be done or made, is guilty of a crime.
(2) A person guilty of a crime under subsection (1) is liable —
   (a) if the principal offence is punishable on indictment with imprisonment for life —
       to imprisonment for 14 years;
   (b) in any other case — to half of the penalty with which the principal offence is
       punishable on indictment.

Summary conviction penalty: for an offence where the principal offence may be dealt
with summarily — the penalty with which the principal offence is punishable on
summary conviction.

(3) Without limiting subsection (1), the application of subsection (1) extends to a conspiracy
under which an offence is to be committed, or an act or omission done or made, by a person
other than the persons conspiring with each other.
[Section 558 inserted by No. 4 of 2004 s. 42; amended by No. 70 of 2004 s. 34(6) and (7).]

The punishment for being an accessory after the fact to a homicide offence is dealt with by
section 562 of the Criminal Code.

562. Accessory after the fact to indictable offence
(1) Any person who becomes an accessory after the fact to an indictable offence (the principal
offence) is guilty of a crime.
(2) A person guilty of a crime under subsection (1) is liable —
   (a) if the principal offence is punishable on indictment with imprisonment for life — to
       imprisonment for 14 years;
   (i) in any other case — to half of the penalty with which the principal offence is
       punishable on indictment.

Summary conviction penalty: for an offence where the principal offence may be dealt
with summarily, the lesser of —
   (a) the penalty with which the principal offence is punishable on summary conviction;
       or
   (b) the penalty that is half of the penalty with which the principal offence is punishable
       on indictment.
[Section 562 inserted by No. 4 of 2004 s. 44; amended by No. 70 of 2004 s. 34(8) and
   (9).]

Finally, Parliament has identified that it is still possible for a prisoner serving a life sentence
with an order that he or she never be released, may actually be released, in which case
section 142 applies:

142. Strict security life imprisonment, exercise of Prerogative in case of
If in the exercise of the Royal Prerogative of Mercy an order is made in relation to a
person serving a sentence of life imprisonment in respect of which an order has been
made under section 90(1)(b), the Minister must cause a copy of the order and a written explanation of the circumstances giving rise to it to be tabled in each House of Parliament within 15 sitting days of that House after it is made. [Section 142 amended by No. 29 of 2008 s. 22(3).]

Scope of prisoners affected

It can be seen, therefore, that the operation of the proposed section 66B extends beyond prisoners serving a life sentence.

The possibility for a disposition other than a life sentence following a victim being murdered arises for the actual murderer, under section 279 of the Criminal Code, if a life sentence would be clearly unjust given the circumstances of the offence and the person is unlikely to be a threat to the safety of the community when released from imprisonment, in which case, subject to subsection (5A), the person is liable to imprisonment for 20 years.

Under section 279 of the Criminal Code, if a child is the actual murderer, he or she may be sentenced to a maximum of life imprisonment, but life imprisonment is not mandatory, or detained under the Governor's pleasure.

If the offender is convicted as a co-conspirator to a murder or if so charged is convicted as inciting a murder, or is convicted of being an accessory after the fact to murder, he or she is not liable to life imprisonment, but to a maximum sentence of 14 years imprisonment.

In all such cases, imprisonment of the offender is not mandatory, although it must be acknowledged that imprisonment for a finite term is likely.

Given the maximum period of parole that may be served by a prisoner sentenced to a finite term of imprisonment is two years, if a co-conspirator to murder, a person charged as a co-conspirator but convicted as inciting a murder, or an accessory after the fact to murder does not (a) cooperate with a member of Police Force with the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force does not know the location of the remains of the victim of the homicide offence, then they will be required to serve their full sentence. In practical terms, that means they will lose the opportunity for release to parole up to two years earlier. So for them, the law will mean they will possibly serve two years longer than had they been released to parole at their earliest eligibility date, had the original sentencing judge determined to make a parole eligibility order.

Under the proposed Bill, those offenders who are sentenced to life imprisonment for murder will remain in prison for their natural life unless:

1. (a) they cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force knows the location of the remains of the victim of the homicide offence, in which case their eligibility for release depends upon the risk they pose upon release, or
2. they are released by the Governor in Executive Council under the royal prerogative of mercy.

It is of relevance to point out that the release of a prisoner serving a life sentence for murder under, section 90(1)(b) of the Sentencing Act 1995, involves no action by the Board and accordingly would not be controlled by the provisions of the Bill. Moreover, the release under the exercise of the Royal Prerogative of Mercy of a prisoner serving any other sentence for murder, which presumably can arise, will also not be controlled by the provisions of the Bill.
Whilst it will undoubtedly be said that it is the Executive Council which determines a release in the exercise of the Royal Prerogative of Mercy and that the Executive Council will have regard to whether (a) the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force knows the location of the remains of the victim of the homicide offence, the same can apply now to any proposed Executive Council decision to release such an offender to parole, as uniquely in Australia, only in Western Australia, it is also the Executive Council which determines the release of all prisoners serving a life sentence.

Recommendation for release by the Board
When considering a prisoner for early release to parole, section 5B of the Sentence Administration Act 2003 (WA), provides that the Board, or any other person performing functions under the Act, must regard the safety of the community as the paramount consideration.

The decision to release a Schedule 3 prisoner on parole is made by the Governor in Executive Council upon recommendation of the Attorney General. Section 12, 12A and 13 of the Sentence Administration Act 2003 (WA) provide that the Board must, at certain times, and may, at other times, provide the Attorney General with a report which may or may not contain a recommendation for release on parole for a Schedule 3 prisoner.

As mentioned, the decision to release a Schedule 3 prisoner is wholly different from that in other Australian jurisdictions, whereby that decision is one for that parole board alone. In Western Australia, as outlined above, the ultimate responsibility to release a Schedule 3 prisoner lies with the Attorney General of the day which is then endorsed by the appointed Governor at that time acting upon the advice of the Executive Council. As the Honourable Michael Mischin made the point during the second reading speech to Parliament on 15 August 2017, "I, for one, am not aware of any Attorney General of this jurisdiction ever releasing an offender to parole in a case in which an offender has refused, in such a fundamental way, to assist the secondary victims of his or her crime. As Hon Aaron Stonehouse pointed out, there is the question of whether this legislation achieves any material change to what is happening". In that regard, the appointed Attorney General of the day is able to implement a ‘no body no parole’ discretion if he or she so chooses. But of course any executively imposed policy will not apply to offenders compliant in the murder who were sentenced to a finite term of imprisonment.

In the context of the release considerations of section 5A and 5B of the Sentence Administration Act 2003 (WA), the Bill raises the issue of whether it is the intention to keep a murderer in prison and deny his or her release solely due to his or her failure to advise of the whereabouts of the remains of the deceased victim is actually anything to do with protection of the community. If it is not, then there is some merit in considering whether there should be a proviso added to section 5B, because, as I read the Bill, telling the authorities of the whereabouts of the remains of the deceased victim will ultimately become the paramount consideration in the case of those murderers who receive a life sentence under section 90(1)(a) of the Sentencing Act 1995 (WA).

Empathy
In addition to my comments above, it is important to understand empathy and how it, or lack thereof, is not considered to be a good predictor of risk. Should the Board be required to reject the possibility of release if the whereabouts of the remains of a deceased victim have not been disclosed by the prisoner, then it can be said that the safety of the community is no longer the over-riding or paramount consideration. In such cases, it may be argued that a prisoner has ‘demonstrated’ a level of empathy for the victim or the family members of a
deceased victim by disclosing the location of remains of the victim. However, the Board has trouble with this notion and the over-reliance, by some, on the presence of empathy when evaluating a prisoner's risk. The Board cautions against an overreliance on a prisoner's empathy as a release consideration and recognises that it does not hold a central motivational role in the adoption of future pro-social behaviour nor is it considered to assure any basis for social change.

Current practice by the Board – statutory reports
When providing the Attorney General with a statutory report, or assessing the suitability for parole of a prisoner with a finite sentence, the Board must currently deal with the release considerations relating to the prisoner, pursuant to section 5A of the Sentence Administration Act 2003 (WA). The following is an overview of those release considerations and the types of information the Board considers and summarises for the Attorney General in its statutory reports:

(a) the degree of risk (having regard to any likelihood of the prisoner committing an offence when subject to an early release order and the likely nature and seriousness of any such offence) that the release of the prisoner would appear to present to the personal safety of people in the community or of any individual in the community;

The primary source of information pertaining to the risk a prisoner poses to the safety of the community is provided via the Corrective Services division of the Department of Justice (Corrective Services) in the form of a psychological assessment. Psychological assessments are completed every few years and utilise structured risk assessments which may, depending on the prisoner and year of completion, include some of the following tools:

- **Violence Risk Scale (VRS):** The VRS is a fourth generation violence risk assessment tool designed to integrate risk, need, responsivity and treatment change factors relevant to violent offenders. It contains both static and dynamic factors, and is used to assess offenders' level of violence risk, identify treatment targets linked to violence and to evaluate an offender's readiness for change. It can also be recoded after treatment to give a quantitative measure of change on identified treatment targets.

- **VRS-SO:** The VRS-SO is also a fourth generation violence risk assessment tool designed to integrate risk, need, responsivity and treatment change factors relevant to sexual offenders. It contains both static and dynamic factors, and is used to assess offenders' levels of risk, identify treatment targets linked to sexual offending and to evaluate an offender's readiness for change.

- **Spousal Assault Risk Assessment Guide (SARA):** The SARA is a clinical checklist of 20 risk factors for spousal assault identified in the empirical literature. The SARA has been found to relate significantly to the risk of spousal assault recidivism.

- **VRAG:** The VRAG is a 12-item actuarial scale widely used to predict risk of violence within a specific time frame following release in violent offenders.

- **Historical Clinical Risk tool (HCR-20):** The HCR-20 assesses the risk of general violence by examining both static and dynamic factors.

- **PCL-R:** The PCL-R (Hare 1991 and 2002) is an observer rating scale of symptoms related to psychopathic personality disorder. The evaluator makes ratings on twenty individual items based on interview and case history information. In short, the PCL-R assesses the extent to which an individual's personality structure conforms to the clinical construct of psychopathy. The score obtained is an important component of other risk assessment tools including "structured professional judgement". The PCL-R score has gradually come to be recognised as a very useful indicator of likely future recidivism for general, violent and, to a lesser degree, sexual offending.
(b) the circumstances of the commission of, and the seriousness of, an offence for which the prisoner is in custody;

c) any remarks by a court that has sentenced the prisoner to imprisonment that are relevant to any of the matters mentioned in paragraph (a) or (b);

When considering these provisions, the Board typically reviews the specific details of the offence. This includes a review of the judges sentencing remarks from the time of sentencing (including whether the conviction was recorded by a jury or judge alone), court transcript, trial transcript, original record of interview with police, police statement of material facts and any comments made by the prison in relation to their recollection of the offence made during their time in custody. This provides the Board with an accurate depiction, in sequential order, of what precisely led to the offence occurring and what actually occurred during the offence. The Board also considers whether there were any co-offenders involved and reviews and analyses any information which may or may not be incongruent.

The Board also considers the prisoner’s attitude towards the offences in particular, whether or not they have minimised the offence throughout prison term, attitudes of denial, no acceptance, and any harbouring of hostility towards the victim, displays or lack-there-of victim empathy and the prisoner’s level of cooperation with the Police investigations.

d) issues for any victim of the prisoner if the prisoner is released, including any matter raised in a victim’s submission;

The Board is provided with detailed reports from the Victim-Offender Mediation Unit which includes the outcome of discussions with the prisoner and, where possible, discussions with the deceased victim’s family or extended family. Victims are also able to make a submission directly to the Board or through the Victim Notification Register. The Board also, on occasion, receives submissions on behalf of the Victims of Crime Commissioner.

The Board also reviews any media articles where comments or interviews have been held with victims or members of the victim’s family.

e) the behaviour of the prisoner when in custody insofar as it may be relevant to determining how the prisoner is likely to behave if released;

The Board is provided with prison reports from Corrective Services and is able to access the Corrective Services prisoner database for up-to-date information regarding the prisoner’s movements and behaviour in custody. Prison reports contain much valuable information including the results of substance use test, charge and incident histories and notes from prison officers and work supervisors regarding any positive or concerning observations about the prisoners behaviour in custody.

(f) whether the prisoner has participated in programmes available to the prisoner when in custody, and if not the reasons for not doing so;

g) the prisoner’s performance when participating in a programme mentioned in paragraph (f);

Following a prisoner’s successful or non-successful completion of a treatment programme, Corrective Services provides the Board with treatment completion reports/non-completion reports which include an analysis of the prisoners’ behaviour and attitude during the course of the programme.

Corrective Services also provides the Board with a psychological assessment post-programme which includes a critical analysis of any treatment gains the prisoner may or may not have made during the programme and following the completion of the programme. This provides the Board with an outline of whether the prisoner has been able to demonstrate any gains made from the programme and how these gains may be relevant to lowering the
prisoner’s risk and how these gains may be translated into the community setting and incorporated into any release planning.

(h) the behaviour of the prisoner when subject to any release order made previously;
The Board considers and reviews the prisoner’s criminal record and Community Corrections Officer reports. The Community Corrections Officer will provide the Board with not only the dates and associated requirements of previous community orders, but also details of the prisoner's performance whilst subject to previous orders including any relevant comments from discussions during supervision sessions with the Community Corrections Officer and the prisoner.

(i) the likelihood of the prisoner committing an offence when subject to an early release order;
Again, psychological assessments provided by the Corrective Services are the primary source of information for the Board when considering this provision.

(j) the likelihood of the prisoner complying with the standard obligations and any additional requirements of any early release order;
The Board is provided with reports from the Community Corrections Officer and psychological reports which address this provision. The Board also considers the prisoner’s own written or verbal (via video-link) submission and parole plan.

(k) any other consideration that is or may be relevant to whether the prisoner should be released.
This provision provides the Board with the flexibility to consider a range of other matters, in some cases, cooperation with Police or lack-there-of may be one such consideration, although not mandated. Under this provision, the Board may also consider materials such as media articles and previous comments made by the Attorney General in the past which may be relevant to the reasons why release was denied at that time.

Recent history of risk assessments
In the context of concerns regarding section 5B of the Sentence Administration Act 2003 (WA), the following is an overview of the recent history of risk assessment in criminal justice setting and sets out where the fourth generation risk assessment tools have come from.

A number of researchers have commented on and provided evaluations on the development of risk assessment within the field of criminal justice over the last 50 years. For example; Andrews, Bonta, and Wormith, 2006; Brennan, Dieterich, and Ehret, 2009; Campbell, French, and Gendreau, 2009; and Fass, Heilbrun, Dematteo, and Fretz, 2008.

According to researchers in this area, there are four major "generations" of risk assessment.

First generation risk assessments and offender classifications, which arose during the middle of the twentieth century, were based on unstructured clinical judgments of risk that were prone to error and bias and lacked statistical calculations of risk (Campbell et al., 2009; Grove, Zald, Lebow, Snitz, & Nelson, 2000). In other words, decisions pertaining to bail setting and the choice to detain an arrestee or release defendants on recognisance pending trial, were essentially based on "best guess" assessments made by judicial officers of the risk a particular person posed to the community.

In light of the limitations of relying solely on human judgment to assess risk, second generation risk assessment tools made use of additive point scales (Austin, 1983; Gottfredson, 1987; Hoffman, 1994) and comprised of items relating to such things as
criminal history and mental illness diagnoses (Campbell et al., 2009). As a result, these second generation tools provided the early foundations for more standardised risk assessment tools that were to follow which incorporated into the risk assessment process quantifiable measures of risk. Despite this important advancement, second generation tools were criticised on the grounds that they were largely devoid of theory, and the relative importance of factors (the weights assigned to different factors) included in such risk validation of the COMPAS Risk Assessment Classification assessment tools was still established by professional consensus, rather than through statistical methods (Brennan et al., 2009).

The advent of third generation risk assessment tools improved upon second generation tools by not only making use of standardised, quantitative risk calculations, but also by incorporating theoretically driven factors, particularly those pertaining to social learning theory (Andrews et al., 2006; Brennan et al., 2009). In addition, whereas second generation risk assessment tools only emphasised the need to predict risk, third generation tools also sought to identify criminogenic needs that could be targeted for change as a means of reducing risk (Andrews et al., 2006; Bonta, 2002). Nonetheless, third generation tools were criticised for being too theoretically narrow and failing to address such things as gender sensitivity (Andrews et al., 2006; Brennan et al., 2009).

The current generation of risk assessment instruments, termed fourth generation, address a number of the issues with older generation risk assessment tools, and moreover, are specifically designed to be integrated into not only the process of risk management, but also the selection of intervention modes and targets for treatment, as well as the assessment of rehabilitation progress (Andrews and Bonta, 2007; Andrews et al., 2006). Vast improvements in the accuracy of violence risk prediction have been made in the past 25 years. Current research shows that structured risk assessment approaches provide a level of accuracy that now far exceeds chance. Though not perfect, research findings commonly show that when an individual is identified to be a high risk for violent offending, the probability is 80 per cent that the person will be violent in the future (Ogloff & Davis, 2005). Examples of these fourth generation instruments, according to Campbell and colleagues (2009; see also Fass et al., 2008), include the Level of Service/Case Management Inventory (LS/CMI; Andrews, Bonta, and Wormith, 2004), the Violence Risk Scale (VRS; Wong and Gordon, 2006).

As outlined above, fourth generation risk assessment are currently routinely utilised by psychologists with the Corrective Services and form a major component of psychological assessments provided to the Board. When considering a prisoner’s risk, this is closely if not exclusively, aligned with section 5B of the Sentence Administration Act 2003 (WA). Risk assessments provide the Board with an evidence-based assessment of the likelihood of a prisoner’s ability to effectively assimilate in the community and the types of treatment recommended in managing and reducing a prisoner’s risk to the safety of the community.

Cooperation with police, or lack thereof, is not a component of risk assessment and is not taken into account when level of risk is being assessed and treatment options are being considered.

The absence of cooperation with police or assistance to locate the body of a deceased are, in each of the risk prediction instruments currently used, only a relatively minor component of the assessment of the risk of an offender reoffending in a violent manner.

Furthermore, each of the risk prediction instruments, in terms of their explanation and their practical application, highlights that it is the dynamic factors which are of most relevance when conducting a comprehensive assessment of an offender's level of risk. Yet, it could be
viewed that the current Bill gives a static factor, not a dynamic or changeable one, more weight over any other consideration. When applying the release considerations to a particular prisoner’s case, the release considerations may not be considered on their merit as section 66B would be the overriding and ultimate consideration. As outlined, the Bill would ultimately be in conflict with section 5C of the Sentence Administration Act 2003 (WA) and would create an ‘absolute rule’ that the Board cannot recommend release on parole unless the remains of the deceased victim are located.

Similar concerns were also raised during the debate of similar legislation in Victoria by Minister Daldakis, who commented during the second reading speech to Parliament on 17 August 2016: “ultimately the reform should strengthen the consideration of the prisoner’s cooperation in locating the body or the remains of a victim without diluting the paramount consideration of community safety”.

**Prisoner’s incapacity to assist**

Another potential issue is that the Bill does not capture accused who are charged with murder but acquitted on the ground of unsoundness of mind or found to be not mentally fit to stand trial.

Similar concerns were again echoed in Victoria by Minister Daldakis, who commented during the second reading speech to Parliament on 17 August 2016 that; “evaluating cooperation can be quite a complex task to undertake. Some prisoners of course may not have the capacity to cooperate due to medical conditions, including mental impairment or dementia”.

In Western Australia, accused who are acquitted on the ground of unsoundness of mind are dealt with in the following way under section 21 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA):

21. Powers of superior courts

If an accused is acquitted by a superior court or on appeal of an offence on account of unsoundness of mind, the court—

(a) if the offence is a Schedule 1 offence — must make a custody order in respect of the accused;

(b) if the offence is not a Schedule 1 offence — may make an order under section 22 in respect of the accused.

If an accused is found not mentally fit to stand trial, then the following provision applies under section 19 of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA):

19. Procedures

(1) If the judge who decides that the accused is not mentally fit to stand trial —

(a) is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit, the judge must make an order under subsection (4); or

(b) is not so satisfied, the judge must adjourn the proceedings in order to see whether the accused will become mentally fit to stand trial.

(2) Proceedings may be adjourned under subsection (1)(b) for any period or periods a judge thinks fit but the proceedings must not be adjourned for longer than a total period of 6 months after the finding that the accused is not mentally fit to stand trial.

(3) If proceedings are adjourned under subsection (1)(b), a judge must make an order under subsection (4) —

(a) if at any time the judge is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit; or
(b) if at the end of 6 months after the finding that the accused is not mentally fit to stand trial the accused has not become mentally fit.

The Bill does not specifically make reference to mentally impaired accused, currently, by virtue of the definition of the "relevant prisoner", in clause 9 of the Bill, such persons would not be affected by this Bill. But the issue arises whether an accused placed on a custody order, is it therefore appropriate that they not be discharged from their custody order in cases where the victim's remains are not recovered. It may be that to do so would be in direct contrast to the underpinning purpose and values of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) and may also warrant some interest from Human Rights Advocacies and agencies.

When providing the Attorney General with a statutory report, the Mentally Impaired Accused Review Board must currently deal with the release considerations relating to the prisoner, pursuant to section 33(5) of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA). The Mentally Impaired Accused Review Board is provided with a range of information from service providers involved in an accused case including, but not limited to, medical advice, psychiatric reports, psychological reports, risk assessments, submissions from an accused legal counsel, accommodation support services and Community Corrections Officer reports.

The penultimate responsibility to discharge a mentally impaired accused from their custody order lies with the Attorney General of the day which is then endorsed by the appointed Governor at that time acting upon the advice of the Executive Council. When making a recommendation to the Attorney General in these cases, section 33(5) of the Criminal Law (Mentally Impaired Accused) Act 1996 (WA) provides the following:

(5) In deciding whether to recommend the release of a mentally impaired accused, the Board is to have regard to these factors—

(a) the degree of risk that the release of the accused appears to present to the personal safety of people in the community or of any individual in the community;

(b) the likelihood that, if released on conditions, the accused would comply with the conditions;

(c) the extent to which the accused’s mental impairment, if any, might benefit from treatment, training or any other measure;

(d) the likelihood that, if released, the accused would be able to take care of his or her day to day needs, obtain any appropriate treatment and resist serious exploitation;

(e) the objective of imposing the least restriction of the freedom of choice and movement of the accused that is consistent with the need to protect the health or safety of the accused or any other person;

(f) any statement received from a victim of the alleged offence in respect of which the accused is in custody.

Conclusion

I acknowledge that similar "no body no parole" legislation exists in the Australian jurisdictions of Victoria, South Australia, the Northern Territory and recently in Queensland and is being considered in New South Wales. Western Australia has a unique regime for the release of prisoners serving life sentences, and the necessity for this law is less obvious.

I trust this information has been of assistance to you. However, should you have any further queries about this matter, you are able to contact my Senior Advisory Officers, Mrs Serina Collins or Mr Ben Stockey, on 9423 8700.
Yours sincerely,

His Honour Judge Robert Cock QC
CHAIRPERSON
PRISONERS REVIEW BOARD

21 September 2017
Hon Dr Sally Talbot MLC  
Chair  
Standing Committee on Legislation  
Legislative Council  
Parliament House  
4 Harvest Terrace  
WEST PERTH WA 6005

Dear Dr Talbot

Inquiry into the Sentence Administration Amendment Bill 2017

Thank you for your invitation to make a submission to the Legislative Council's Standing Committee on Legislation in relation to the Inquiry into the Sentence Administration Amendment Bill 2017 (the Bill).

I understand the Bill seeks to amend the Sentence Administration Act 2003 (WA) by inserting provisions which are commonly referred to as 'no body no parole' provisions and will only apply in circumstances where the Prisoner’s Review Board (the Board) is considering whether to grant an early release to a prisoner, who has been convicted of a homicide or homicide-related offence and where the location of the remains of the victim is unknown to the Western Australia Police Force (WA Police Force).

It is the WA Police Force’s view that this legislation is in the interest of the achievement of justice and supports its enactment. I also note, WA Police Force was consulted in the drafting of the proposed amendments.

The WA Police Force recognises this Bill has the greatest significance for a victim’s family. It will go some way to enable these families to achieve a greater degree of closure, by knowing the final location of their loved one, and even potentially being able to have their remains recovered and to be able to lay them to rest.

It should be noted that this legislation will only apply to a very limited number of cases. In the overwhelming majority of homicide cases, the body of the victim has been located. On average, at any one time, there are less than ten cases where a person has been convicted of homicide or a homicide-related offence and the whereabouts or the body of the victim remains unknown. Nevertheless, it is believed that this legislation will improve the potential for the recovery of a victim’s remains or for the identification of the last known location of the victim.
While the conviction of the offender would have been based on the WA Police Force's ability to conduct a thorough investigation and to collect evidence which satisfies a Court or Jury, beyond reasonable doubt, that the accused committed the offence, the recovery of the body or the revelation of the last known location of the body would be beneficial in the respect that it can serve to finalise aspects of the offence.

As the Bill has retrospective application, this will apply to all homicide and homicide related convictions where the body has not been recovered or the last known location identified. This legislation therefore has the potential to assist in the finalisation of aspects of historic offences and may even provide further information relevant to other historic offence investigations.

In terms of some of the key provisions of the Bill, the WA Police Force makes the following comments:

• the inclusion of all persons convicted of homicide offences and homicide-related offences is noted and supported. It is appropriate for a person who has been convicted of having been a party to the offence to have these provisions apply to them;
• the legislation focuses on the level of cooperation given to Police, therefore in the rare circumstance that a prisoner genuinely does not know the location or last known of the body, the prisoner could still be judged to have cooperated sufficiently;
• the protection of a person's privilege against self-incrimination (sometimes referred to as their right to silence) is also an important protection contained in the Bill;
• the obligation of the Commissioner to provide a report to the Board, on request, addressing mandated factors regarding the prisoner's co-operation, is believed to enable the Board to make an assessment of whether the prisoner has sufficiently cooperated;
• due to the relatively low numbers of persons to be affected by this legislation, the requirement for the Commissioner to provide a report to the Board is not expected to have a major impact upon the WA Police Force; and
• the requirement that the Commissioner's report be provided to the Board within a reasonable period of time is noted, understood and supported.

It should also be noted that this Bill is not unique to Western Australia. Other Australian jurisdictions have either already enacted, or are considering enacting, similar legislation. It is therefore submitted that with the passage of this law, Western Australian law would not be out of step with other Australian jurisdictions.

In conclusion, I wish to reiterate the WA Police Force's support for this Bill and thank the Standing Committee on Legislation for providing me with the opportunity to provide a submission on this legislation.

Yours sincerely

CHRIS DAWSON
COMMISSIONER OF POLICE

22 September 2017
Submission 3

Government of Western Australia
Department of Justice
Office of the Commissioner for Victims of Crime

All enquiries: Kati Kozlowski
Phone: 9264 9707

The Hon. Dr Sally Talbot MLC
Chair
Standing Committee on Legislation
Parliament House
PERTH WA 6000

Attention: Mr Mark Warner

Email to: lclc@parliament.wa.gov.au

Dear Dr Talbot

Sentence Administration Amendment Bill 2017 – “No Body No Parole”

The Commissioner for Victims of Crime has been asked to provide commentary on the Sentence Administration Amendment Bill 2017 (the Bill). I am currently Acting Commissioner for Victims of Crime, having commenced in this capacity on Monday, 2 October 2017.

This Bill seeks to use the parole system as an incentive to a prisoner convicted of murder to cooperate with Police in locating the victim’s body or the identification of the location of remains of the victim. The Bill is supported by this office as it provides victims with assurance that the offender’s willingness to cooperate with police regarding the location of the body will be considered during any parole hearings.

There is considerable research which supports the view that there appears to be an almost universal human need to bury ones dead. Any psychological resolution after a homicide is hindered when the loved one has vanished without a trace and there is no body to bury and no opportunity to honour the person and participate in the cultural rituals of burial and mourning.

The family and friends of homicide victims in Western Australia and in other jurisdictions have given voice to their need to bury their loved ones. This office has had contact with families who have no knowledge of the whereabouts of the body of their family victim. This lack of knowledge has impacted on them over many years and they support the introduction of this Bill. There is a strong view amongst victim groups that “Killers cannot claim remorse or rehabilitation unless they have revealed where their victims are”. It is this focus on remorse and rehabilitation which relates directly to decisions regarding parole and release from custody.
The key component to the Bill is that the offender has cooperated with the police in the process; the offender will have met this requirement regardless of whether this disclosure occurred at the beginning of their sentence or at the end of the sentence. The Prisoners Review Board can and should take into consideration the way and time in which the information was provided as part of its considerations on parole eligibility.

This legislation will provide victims with the knowledge that the police and justice agencies have canvassed all available options in trying to locate the body of their family member or friend. This office is interested in working with other agencies to monitor the impact of the legislation, and in particular its impact on victims of crime.

Thank you for providing the opportunity for this submission, as indicated there is support for the legislation from the families and friends of victims in Western Australia.

Yours sincerely

Katalin Kraszlan
A/COMMISSIONER FOR VICTIMS OF CRIME

October 2017
Hon. Dr Sally Talbot MLC
Standing Committee on Legislation
GPO Box A11
PERTH WA 6837

Dear Dr Talbot

SENTENCE ADMINISTRATION AMENDMENT BILL 2017

I refer to the evidence provided by representatives of the Department of Justice to the Committee at the private hearing on the Sentence Administration Amendment Bill 2017 which was held on 11 September 2017.

There were a number of questions taken on notice during the hearing and the answers are provided below.

1. The exact offences for the 12 identified eligible prisoners: 5 of the 12 prisoners were convicted of the offence of murder (s279 of The Criminal Code) and the other 7 were convicted of the offence of wilful murder (s278 of The Criminal Code – now repealed).

2. Indicate the ability for the Prisoners Review Board (PRB) to take into account the mental capacity of a prisoner in its deliberations – if no ability, should one be introduced into the legislation?

At the hearing the Department indicated to the Committee that there is a general provision in the Sentence Administration Act 2003 (the Act) that provides for the ‘mental capacity’ of the prisoner to be taken into account by the PRB.

Section 5A(k) of the Act provides that the PRB may take into account any matters that it deems relevant to whether a prisoner should be released. In addition to this general power, to the extent that the ‘mental capacity’ of a prisoner is materially relevant, it will also arise in the context of other release considerations including:

- The degree of risk the prisoner poses to the community – which will include the extent to which a person’s mental capacity affects their risk of reoffending;
- The likelihood of the prisoner complying with the standard obligations and any additional requirements of a release order – to assess whether a prisoner has the mental capacity to understand and comply with a parole order;
- Any remarks made by the Judge during sentencing - this will often include comments relating to mental capacity and also the extent of any cooperation prior to trial as these are both factors the court must take into account when sentencing;
- The prisoner’s behaviour in custody, insofar as it may be relevant to determining how they may be likely to behave when released; and
• Whether a prisoner has participated in programs while in custody and if not, the reasons why not – the latter may be that a person has insufficient mental capacity to participate in treatment programs.

Under the provisions of sections 12 and 12A of the Act, the Board reports on a prisoner and deals with release considerations and parole recommendations. In this context there is a consideration of all the release considerations, which will address any concerns around the mental capacity of a prisoner in terms of the above matters. These provisions do not explicitly extend to consideration of a prisoner’s capacity to cooperate with the authorities for the purposes of the ‘no body no parole’ Bill.

Of relevance to the Bill is that the Police report must deal with the nature and extent of the prisoner’s cooperation (amongst other factors). It is arguable that this portion of the report would by necessity deal with capacity to cooperate. In addition to this information the PRB also has other information at its disposal when determining the question of cooperation and the extent to which this may have been affected by lack of capacity. This includes reports from Corrective Services and the Judge’s sentencing remarks.

The second part of the Committee’s question is whether there ought to be a specific provision in the legislation requiring the Board, when satisfying itself about cooperation, to have regard to information the Board has about the prisoner’s capacity to give the cooperation. While there is some precedent for this in similar legislation in other Australian jurisdictions, the Department is not able to express a view as it is a question of policy.

3. Provide a list of stakeholders with whom the Department consulted in the development of the Bill: consultation took place with the Prisoners Review Board, Solicitor General, Corrective Services, Western Australia Police, the State Solicitor’s Office and Parliamentary Counsel’s Office.

4. Were there any changes in the Bill made as a result of consultation? This information is regarded as Cabinet in Confidence and cannot be provided.

5. Consider where there should be a statutory review period: section 122 of the Act has a statutory review period.

6. Would the prisoner get a copy of the police report regarding cooperation?

The Board is obliged to provide information about its decisions to prisoners. Section 107B of the Act deals with the Board’s obligation to provide a prisoner with notice of a decision which affects them. This includes a requirement that this notice include reasons for the decision. The nature and extent of the ‘reasons’ has been judicially considered, for instance in the matter of Seifert v The Prisoners Review Board [2011] WASCA 148.

...The considerations which inform the required content are an evident legislative intent that the person the subject of the decision know, with sufficient particularity, the reasons why the decision was made against his or her interests, in order that they can understand why the decision was made, take any remedial action which might encourage a more favourable decision in the future, and exercise the right of review conferred by S115A of the Act. The specificity intended by the legislature is apparent from the express power to withhold some or all of the reasons in some circumstances...
...the person affected by the decision must be made aware of the information that was before the Board at the time it made its decision, in order that he or she can assess whether that information was incorrect or irrelevant or omitted relevant information.

...The duty will be fulfilled if the Board’s reasons disclose to the person affected why, and in reliance on what specific material (factual and otherwise), the relevant decision was reached in sufficient detail to ensure that the statutory right of review is fully secured.

The obligation in section 107B is moderated by section 114 of the Act which permits reasons to be withheld if it is not deemed to be in the best interests of the prisoner, another person, or the public.

There is currently no express requirement in the Bill that a copy of the Police report regarding cooperation be provided to a prisoner. The PRB does not provide prisoners with copies of materials and reports which have been submitted to it by external agencies. The PRB is an exempt agency under the Freedom of Information Act 1992 but the agencies from which reports originate are not, so it remains open to a prisoner to seek access to those materials directly from those agencies through the freedom of information process (subject to any statutory exemptions).

7. Provide the total number of prisoners currently in prison for manslaughter and from 2011, whether a body is at issue.

As of Tuesday 11 September 2017, there were 51 people in prison having been convicted of the offence of manslaughter (s280 of The Criminal Code). The victim’s body has not been recovered in relation to one (1) of these 51 prisoners.

8. Provide the name of the 12 prisoners and details of the conviction: The Department of Justice is currently liaising with the Chief Justice in relation to obtaining access to the transcripts of sentencing remarks. Transcripts are produced by the individual courts and are the responsibility of those courts.

I also attach the ‘marked up’ and signed transcripts as requested in your letter of 12 September 2017. I confirm that your office indicated that the transcripts could be included in this letter albeit that it would arrive after your deadline of 20 September 2017.

Kindly direct any enquiries to Dominic Fernandes, Legal Policy Officer on 9264 1076.

Yours sincerely

Dr Adam Tomison
DIRECTOR GENERAL

19 September 2017
Dear Dr Talbot

SENTENCE ADMINISTRATION AMENDMENT BILL 2017

Thank you for your letter dated 13 September 2017 in which the Standing Committee on Legislation (the Committee) poses a number of questions that arose out of the briefing to the Committee by officers of the Department of Justice on 11 September 2017.

Statutory review

I am of the view that a statutory review clause specifically for these amendments is not required in the Sentence Administration Amendment Bill 2017 (the Bill) as it would be covered by the general statutory review required under the current section 122 of the Sentence Administration Act 2003 (WA) (the Act).

Manslaughter

The Sentence Administration Amendment Bill 2016 (the member’s Bill) only covered the offence of murder and this remains the Government’s policy on the matter (modified to include certain homicide-related offences).

It was the wording of the previous government’s amendments to the member’s Bill which included manslaughter in that it sought to add a ‘no body’ consideration as part of the usual release considerations (under section 5A of the Act) in regard to “an offence relating to the death of a person”. This amendment was moved and passed by the previous government during consideration in detail.

Taking additional advice on a report from the Prisoners Review Board

Under the Act the CEO of the Department of Justice reports to the Prisoners Review Board (PRB) (section 11A of the Act).

The PRB in turn reports to the Attorney General in accordance with sections 12, 12A and 12B of the Act. The PRB reports deal with the release considerations and may provide recommendations relating to release.

On occasion, where necessary, I request the PRB to provide additional information to me and where it relates to information outside of their knowledge I will request the PRB to obtain that information. It is not my usual practice to liaise directly with parties other than the PRB on matters relating to prisoners serving a life or indefinite sentence.
I trust this information sufficiently addresses the Committee members’ questions but I will be happy to assist further where necessary.

Yours sincerely

Hon John Quigley MLA
ATTORNEY GENERAL

- 5 OCT 2017
Hon Dr Sally Talbot MLC
Chair
Standing Committee on Legislation
Legislative Council
Parliament House
4 Harvest Terrace
WEST PERTH WA 6005

Dear Dr Talbot

RESPONSE TO REQUEST FOR ADDITIONAL INFORMATION TO THE STANDING COMMITTEE ON LEGISLATION, INQUIRY INTO THE SENTENCE ADMINISTRATION AMENDMENT BILL 2017

On Wednesday, 11 October 2017 myself, Acting Assistant Commissioner Scanian and Mr Ric Sims, Principal Legislative Project Manager, appeared before the Standing Committee on Legislation, Inquiry into the Sentence Administration Amendment Bill 2017.

At the hearing, WA Police Force attendees undertook to provide the Committee with the following additional information on-notice. Furthermore, attached for your information is Commissioner Dawson’s response to Justice Robert Cock’s letter requesting information on the prisoners’ cooperation to locate the remains of the deceased victim in Operation Beachlands.

Details about the coordinating unit within WA Police Force who would be responsible for putting together the Commissioner’s report under the new proposed section 66C – the information requested was the name of the unit, the number of FTEs in the unit, an itemisation of the resource implications for the unit arising out of the Bill (if it becomes law) and whether the one person currently in that unit has other duties to perform as well.

The Offender Review Unit (ORU) is managed by one FTE Western Australia Police Force (WAPF) member, two 0.8 FTE Police Auxiliary Officers (PAO), seven casual PAO employed on a needs basis. All PAOs are extremely experienced having attained the rank of Superintendent or Inspector, before their retirement.

The roles and responsibilities of the ORU are:

- The ORU represents the Commissioner of Police on the Prisoners Review Board (Adult) and the Supervised Release Review Board (Juvenile). It is responsible for WAPF services being delivered in a continuing and professional manner.

- Both Boards have two Chairpersons: His Honour Judge Robert Cock QC (Adult) and His Honour Judge Michael Murray QC (Juvenile) and three Deputy Chairpersons.
The designated Commissioner Representative compiles a report and detailed notes to present to the Board. Board members are required to:
- make decisions on initial applications for parole from eligible prisoners throughout the State;
- suspending parole; and
- cancelling parole and re-applications for parole.
- for the life/indefinite sentenced prisoners, the Board considers a parolee's inclusion in Re-Socialisation Programs prior to being released or recommended for release.
- consideration of complex issues before making recommendations to the Attorney General.

The WAPF Homicide Squad (HS) will be responsible for preparing the Commissioner's report under the proposed section 66 of the Bill, as they are the subject matter experts in relation to homicides and are responsible for their investigation State-wide. The HS have ready access to all of the relevant material required to prepare the report and their Review Officer (Detective Senior Sergeant) will be tasked to complete it. Officers from the ORU represent the Commissioner at the parole hearing and would submit and or table the report as required. (A copy of a recent request from Justice COCK is attached for reference).

Should the Bill provide for a prisoner to cooperate in giving both, the location or last known location, of the remains and where the remains may be found (taken from the Victorian and Queensland legislation)? Can the officers explain the difference?

The Western Australia Sentence Administration Amendment Bill 2017 (the Bill) requires the Board be satisfied the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the victim’s remains. The Victorian legislation expands on this, requiring their Board to also be satisfied the prisoner cooperated in the identification of "the place where the body or remains of the victim of the offence may be found".

South Australia, Northern Territory and Queensland also have legislation requiring their Boards take into account certain things when considering the early release of a prisoner convicted of murder. However, this legislation does not include the additional requirement contained in the Victorian legislation, that the Board be satisfied the prisoner cooperated in the identification of "the place where the body or remains of the victim of the offence may be found".

The WAPF have formed the opinion the proposed amendment would serve no purpose, as the Board is required to assess the extent of the prisoner’s cooperation, which must be detailed in the Commissioner's Report and the inclusion of this amendment would be of little benefit to the WAPF.

How many prisoners are being held who were convicted of manslaughter and the body hasn’t been found, so that this legislation would apply to them?

Does WAPOL believe that manslaughter should be included in the definition of "homicide" offences, alongside murder, wilful murder and infanticide? If not, why not?

The WAPF HS have identified two prisoners who have been convicted of manslaughter where the victim's body has not been located. The WAPF support the inclusion of manslaughter in the definition of "homicide" offences, alongside murder, wilful murder and infanticide.

The following list details those prisoners who have been convicted where the victim’s body has not been located and details when their parole is due for consideration, which involves nine cases, and 14 prisoners who were convicted of murder or manslaughter. Also included for reference are other matters where the victim's body was not located where a murder conviction was not upheld or the prisoner is detained in another jurisdiction and not subject to the Bill.
Could the Committee have the details of any prisoners who are coming up for parole soon that would be affected by these provisions. Have any reports been written to the Prisoners Review Board in anticipation of these prisoners coming up for parole?

Could the Committee have a breakdown of the cases mentioned by Acting AC Scanlan at the Committee Hearing. Please detail the actual number and type of these cases, and what the actual convictions were for.

**Operation ALTUS**

Victim: EDGE

Accused 1:
Sentenced: 07-04-2017 - MAX: 06-04-2029 - Manslaughter
Earliest Eligibility Date: 06-04-2027

Accused 2:
Sentenced: 04-10-2017 – Life (For Murder)
First Statutory Review Date: 05-10-2040

Accused 3:
Charged with Murder; convicted of Manslaughter on 5 April 2017. Earliest release date 28 February 2021. Currently subject to appeal.

Accused 4:
Earliest Eligibility Date: 27-10-2022

Summary: On 25 April 2015, the victim, was lured to house in Clarkson by Accused 1 where he was assaulted by Accused 2 and Accused 3. The victim died in a rear bedroom of the premises. Evidence is that the victim was taken to the back shed at the premises and left for approximately 24 hours. Accused 1 and Accused 2 later took the deceased to sand dunes in Eglington and left the body there for approximately 24 hours. The following night Accused 2 and Accused 4 took the victim out to sea using a borrowed dinghy. To date the body of the victim has not been located.

Parole: None of the accused have appeared before the Parole Review Board at this time.

Note: Accused 3 was originally charged with Accessory after the Fact. The Office of the Director of Public Prosecutions (ODPP) recommended a charge of Murder, which was upgraded by the Homicide Squad. The ODPP accepted a Guilty plea by Accused 3 to Manslaughter. Accused 3 is currently appealing her sentence, therefore no early review date can be provided.

**Operation ZUNI**

Victim: DUNN

Accused 1:
Sentenced: 16-01-2017 – Life (For Murder)
First Statutory Review Date: 16-06-2028

Accused 2:
Sentenced: 12-01-2017 - Life (For Murder)
First Statutory Review Date: 16-06-2037

Accused 3: Charged with Conspiracy to Defeat Justice; not incarcerated.
Summary: On 19 May 2015, the victim, was lured to the address of Accused 1. At the address the victim was beaten to the head and body by both Accused 1 and Accused 2; the victim died as a result of the injuries. After the assault, the victim’s body was disposed of by Accused 1 and Accused 2 at an unknown bush location. On 17 June 2015, Accused 1 and Accused 2 were arrested and charged with the Murder of the victim.

Parole: Accused 1 and Accused 2 have not appeared before the Prisoners Review Board at this time. As per the above, the earliest parole review for Accuse 1 is 2028 and Accuse 2 2037.

Note: Accused 2 was removed from prison by Homicide Squad Detectives in an attempt to locate the body of Dunn without success.

Operation ALDEDO
Victim: MACK

Accused:
Sentenced: 25-01-2013 – Life (For Murder)
First Statutory Review Date: 25-08-2030

Summary: On 6 August 2010 the deceased’s family contacted Police and reported her as a missing person. Police attended and spoke to the accused, who was the victim’s son. The accused told Police his mother had moved out just before Christmas 2008 and wanted nothing to do with her family. He refused to supply any details to allow Police to contact the deceased.

Inquiries were made with all government departments with whom the deceased had contact, as well as business contacts. No person had seen or had direct contact with the victim since late 2008. Immigration has no records of the victim departing any Australian port.

On Thursday 26 August 2010, Detectives from Major Crime Squad and Western Suburbs executed a search warrant at the victim’s address. No evidence of the victim being present was located. The accused was interviewed at length, would only say that his mother was alive, and refused to give details of her location.

It was alleged that on an unknown date between the 17 December 2008 and 6 August 2010 the accused murdered the deceased at an unknown location by unknown means.

The evidence gathered proved that the accused systematically provided false information and documentation to give the impression his mother was alive and making all decisions relating to her business dealings and financial matters. This deception was to enable the accused to access her bank accounts and withdraw large amounts of money.

The accused was removed from Prison on three occasions by Homicide Squad Detectives in an attempt to locate the deceased’s remains without success.

Operation LUCERNE
Victim: SCHULTZ (Hoddy)

Accused 1:
Sentenced: 21-04-2017 – Life (For Murder)
Earliest possible release date 15-06-2034. Subject to appeal.

Accused 2:
Charged with Murder, however the brief was dismissed by the Office of the Director of Public Prosecutions (ODPP) prior to being committed to the Supreme Court.
Summary: In June 2006, Accused 1 sold an unlicensed handgun to the deceased through Accused 2 for $2000.00.

Accused 1 and Accused 2 became involved in a dispute with the deceased after he refused to pay for the handgun. Accused 1 and Accused 2 formed a plan to abduct the deceased and assault him in retribution for refusing to pay. During the evening of 4 August 2006, Accused 1 and Accused 2 lured the deceased to an address in Ocean Reef where he was physically assaulted. After the assault, the deceased was restrained and placed into the back of Accused 1's work vehicle.

Accused 1 and Accused 2 drove with the deceased, still in the rear of the vehicle, to another address where they picked up a third person (not charged) to assist them.

Accused 1 and Accused 2 and the third person formulated a plan to drive the deceased to a bush location, assault him and leave him to walk home.

During this time the deceased threatened all three with physical harm by persons he was allegedly affiliated with (Outlaw Motorcycle Gang members). Believing the claims to be true, the deceased was driven to a bush location approximately 40 kilometres south of Armadale where they left the bitumen road and travelled approximately 800m along a bush track.

At that location, the deceased was removed from the vehicle and struck to the head at least two times, with what is believed to be a wooden weapon, causing severe head trauma. The deceased was dragged to a shallow clandestine grave, his body set alight and then buried.

Parole: Accused 1 has not appeared before the Prisoners Review Board at this time.

Operation MONTARA

Victim: PUDDY

Accused:

Sentenced: 08-NOV-2011- Life (For Murder)
Earliest possible release date 25-05-2028. Subject to appeal.

Summary: At approximately 11:30am on Monday 3 May 2010, the victim was heard at his residence, engaged in a telephone conversation with the accused. This conversation involved an argument over payment of rent by the accused to the landlord for the business premises and money missing from the business safe.

At approximately 6:30pm, that evening the victim’s mother departed the victim’s residence, at which time the victim stated he had a meeting later that night. At approximately 10:15pm that night, a text message was sent from the victim’s mobile telephone to a family friend to the effect that the accused had met the victim at his house and had presented a cheque for $750,000.00 for the purchase of the victim’s boat. The accused and complainant had argued previously over the accused's failure to secure the sale of the boat to an unidentified syndicate.

Since that time the victim has not been contactable or seen by any person known to Police and was reported missing by family members at 11:00pm on 4 May 2010.

A forensic examination of the victim’s premises, found the presence of blood staining in the kitchen. The blood has since been confirmed as being the victim's. A bloodstain pattern analysis in the kitchen indicates that the victim was struck several times with an unknown object.

Two plastic 'wheele bin' rubbish bins were missing from the victim’s house. One bin was located outside a house in Attadale that contained items belonging to the victim. The other bin was located in bushland in Yanchep, on 30 May 2010. This bin contained traces of the victim's blood.
On 25 May 2010, the accused was arrested in Queensland and was extradited back to Western Australia on the charge of Murder.

**Parole**: the accused has not appeared before the Prisoners Review Board at this time. An appeal against his conviction was dismissed on 15 May 2013. Media articles link the accused to considering a second appeal.

**Operation CYGNET**

**Victim**: RINALDI

**Accused**: 
*Sentenced: 13-09-2002 – Life (For Murder)*  
*Statutory Review Date: 12-09-2025*

**Summary**: In this instance the accused is 55 years of age and the estranged husband of the decease. They separated in 1996. Divorce proceedings and property settlement were still proceeding through the Family Law Courts, although an order was made for the accused was to hand over an amount of $98,000.00 on or prior to 1 September 2002.

At approximately 4.30pm on 2 September 2002, the victim departed her employers address and was last seen alive at her residence a short time later. Following the sighting and over a two-day period family members and a number of other persons attempted to contact the victim, by telephone to no avail. Having welfare concerns and at approximately 9.15am on 4 September 2002, the victim’s daughters attended her address and searched the premises before calling Police.

Over several days, Police forensic officers carried out an examination of the scene. During the course of the examination Police located a spent .22 Calibre cartridge case, traces of blood in every room, traces of blood on brick paving at the rear of the victim’s premises and also in the driveway area.

Following the examination of the victim’s unit and during the course of investigations Police seized the accused’s motor vehicle and executed a 711 *Criminal Code*, Search Warrant at his home. A forensic examination of the accused’s vehicle located traces of blood in several different positions. A forensic examination of a firearms bag, seized from a garage at the rear of the accused’s premises found further traces of blood.

The located blood staining in all these locations was matched the victim’s DNA profile.

Police alleged the accused wilfully murdered his wife at her residence between 4.30pm on 2 September 2002 and 9.15am on 4 September 2002, at which time he removed her body from the premises.

On 13 September 2002, the accused was charged with Murder without making any admissions or disclosing the whereabouts of the deceased. The victim’s body is yet to be located and recovered.

**Parole**: the accused has not appeared before the Prisoners Review Board at this time. An appeal against his conviction was dismissed on 7 March 2007.

**The WAPF has not provided submissions to the Parole Review Board in relation to any of the above matters at this time.**
Operation N/A (1993)
Victim: HARDING

Accused 1:
Charged with Murder – Acquitted

Accused 2:
Charged with Accessory After the Fact – 3 years’ probation

Summary: The victim was reported missing in April 1993. Despite two trials, no one has been convicted of his murder.

The victim’s former partner, Accused 2 claimed that she paid Accused 1 $10,000 to kill the victim. Accused 1 told Accused 2 that he had shot the victim. Accused 2 believes the body was taken away in Accused 1’s van and then dumped.

The Coroner found that despite Police not finding the body of the victim, he was satisfied beyond reasonable doubt that the victim had been murdered.

Operation N/A (1989)
Victim: STUBBS

Accused:
Sentenced: 06-02-1998 – Life (For Murder)
Earliest Release Date: 05-02-2013
Multiple Reviews – No recommendations for participation in RSP or ROP
Next PRB Date: 19/01/2019

Summary: In the early hours of 26 March 1989, the victim was abducted by several men outside a pizza bar in Kalgoorlie, tied up and violently beaten before being dumped in a mine shaft near Menzies.

His remains were never found. The accused was convicted of wilful murder in 1998, but refused to name his accomplices at a Coronial Inquest in 2000 — two other men are thought to have been involved.

The accused made admissions to tying up the victim, beating him to death and then dumping his body down a mineshaft.

“It was the Crown’s case at trial that at between 1am and 1:30am on the Sunday morning of the Easter weekend of 1989, Thompson, driving his Ford vehicle and in company with an associate abducted Stubbs outside a pizza bar in Kalgoorlie. Thompson and his associate allegedly took Stubbs to an abandoned mineshaft a fair distance from the town. Thompson tied and blindfolded Stubbs and then cut his throat. Stubbs was pushed down the mineshaft, a fire was lit, and the hot coals were thrown down on top of him.”

Operation N/A (1988)
Victim: ELMORE

Accused:
Charged 30-05-1988 with Murder
The accused was released into the custody of the United States Navy. The accused was convicted of premeditated Murder by general court martial and sentenced to life imprisonment.
Summary: The accused was stationed in Exmouth as a member of the United States Navy. Prosecution alleged that the accused murdered his wife and threw her into shark infested waters off the Gulf of Exmouth.

OTHER RELEVANT INFORMATION:

The below are reference terms which may prove beneficial when interpreting parole and review dates.

Life Term
First Statutory Review Date (SRD) – The Board is required by current legislation to review a sentenced prisoner two years prior to the First SRD, (three yearly thereafter). This review is initiated by the Board receiving documents from Corrective Services advising if the prisoner is suitable for participation in an RSP (Re-Socialisation Program). Corrective Services can facilitate an RSP, moving forward, any recommendations by the Board for participation on an RSP have to be approved by the Attorney General (AG), who then forwards the recommendation to the Executive Council, who have the final approval.

EED – Parole Term
Earliest Eligibility Date (EED) – Prisoner is reviewed by the Board anywhere from a month to two weeks prior to the EED. The matter is automatically listed & reports requested. The Board determines whether to release to a parole order. No AG involvement.

Please contact my office or Mrs Andrea Hancock, Director, Executive Services on 9222 1276, should you require any further information on this matter.

Yours sincerely

STEPHEN A BROWN APM; M.St (Cantab)
DEPUTY COMMISSIONER
(SPECIALIST SERVICES)

20 October 2017
His Honour Judge Robert Cock QC
Chairperson
Prisoner Review Board
GPO Box C127
PERTH WA 6839

Dear Justice Cock,

COOPERATION OF CERTAIN PRISONERS REGARDING THE IDENTIFICATION OF THE LOCATION, OR LAST KNOWN LOCATION, OF THE REMAINS OF A DECEASED VICTIM

Thank you for the opportunity to comment on the cooperation of Mr Steven Norman Southam and Mr Paul Zaghet in identifying the location of the deceased victim, Mr Richard John Cotic who was murdered by Mr Southam and Mr Zaghet on 28 August 1996.

A review of the investigation into Mr Cotic’s murder, Operation Beachlands, has been conducted by Major Crime Division and identified that both Mr Southam and Mr Zaghet cooperated with police post their arrest on 6 December 1996.

Pursuant to the proposed amendments to the Sentence Administration Act 2003, with the inclusion of Section 66C(3)(a) and others, the following information is provided to assist with your determination in relation to Mr Southam and Mr Zaghet’s cooperation as described in Section 66B(1)(a) of the Act:

1) the nature and extent of the prisoners cooperation;

On 6 December 1996, Mr Zaghet provided police with a statement extricating himself in the physical murder of Mr Cotic, while at the same time implicating Mr Southam and co-accused Mr John Wayne Hobby in the disposal of the victim. Mr Zaghet admitted assisting Mr Hobby in placing the victim’s body in Mr Hobby’s vehicle and disposing of key exhibits. Mr Zaghet assisted police in the recovery of those key exhibits but was unable to assist in providing the disposal site of the victim.

The assistance and cooperation of Mr Southam, post his arrest on 6 December 1996, was in the form of full admissions to police regarding his involvement in the murder of Mr Cotic and the roles of Mr Zaghet and Mr Hobby in the murder and disposal of the victim’s body, the murder weapon and other key exhibits.

Mission Statement: “To enhance the quality of life and wellbeing of all people in Western Australia by contributing to making our State a safe and secure place.”
2

Mr Southam later gave evidence for the prosecution at Mr Zaghet and Mr Hobby's trials and Mr Zaghet’s retrial, which greatly assisted in their subsequent convictions.

ii) the timeliness of the prisoners cooperation;

Prior to their arrest both Mr Southam and Mr Zaghet provided police with a number of false statements asserting they last saw the victim when he left their premises at the Separation Point Caravan Park, Geraldton on 28 August 1996 and denying any knowledge of the victim’s whereabouts. Post their arrest on 6 December 1996, both Mr Southam and Mr Zaghet cooperated with police however, both were unable to assist police with the location of the victim’s body because it had been disposed of by Mr Hobby.

iii) the truthfulness, completeness and reliability of any information or evidence provided by the prisoners;

Whilst both Mr Southam and Mr Zaghet initially provided false statements to police prior to their arrest, it is believed the assistance they provided to police post their arrest was truthful, complete and reliable.

iv) the significance and usefulness of the prisoner's cooperation;

The cooperation of Mr Southam in particular was significant in the prosecution gaining convictions against both Mr Zaghet and Mr Hobby.

Mr Zaghet’s initial statement led police to Mr Southam and ultimately Mr Hobby. Mr Zaghet also assisted in the recovery of critical exhibits that had been disposed of after the murder of Mr Cotic.

After careful examination of the evidence gathered by police during the investigation, and the evidence provided by Mr Southam and Mr Zaghet, the Western Australia Police Force is of the view that both Mr Southam and Mr Zaghet do not know the location where the victim was disposed.

At this time, no member of the WA Police Force knows the location of the remains of Mr Cotic.

Mr Hobby, who was sentenced to life imprisonment, remains in custody at Casuarina Prison with an earliest eligibility date (for consideration of release) of 5 December 2021.

Yours sincerely

CHRIS DAWSON
COMMISSIONER OF POLICE

\[\text{October 2017}\]
Dear Chairperson,

RE: Inquiry into the Sentence Administration Amendment Bill 2017 (Ref: A635877)

I refer to your letter dated 11 October 2017 and regret that I have not been in a position to respond until now. Regarding the matters you raised, please find below my response to each:

1. How will “cooperation” be measured
   It will be incumbent upon the Board to measure the level of cooperation, however in doing so, the Board will be substantially reliant upon the advice provided by Police who, in their report, are required to deal with a range of matters (s98C(3)(a)(i-iv)). The South Australian, Norther Territory, Queensland and Victorian models all provide that the Commissioner of Police is to provide a similarly detailed report regarding the level of cooperation provided by the prisoner. The Board accepts that the Commissioner of Police is best placed to provide a thorough assessment to enable the Board during its decision making process in determining the level of the cooperation provided by the prisoner. Whilst there may be degrees of cooperation, generally, in assessing “cooperation ... in the identification of the location, or last known location, of the remains of the victim” the Board will be looking for evidence of a willingness to work jointly with police to reveal all the prisoner knows about the location. Eventually there must be evidence that nothing of relevance has been withheld and that cooperation has been full, or in the terms of the Bill, “complete”.

2. The last paragraph of page 6 of my letter
   The Board is not required under the Act to provide a report to the Attorney General in the use of the Royal Prerogative of Mercy (Part 19 of the Sentencing Act 1995 (WA)). Indeed the use of the Royal Prerogative is not even mentioned in the Sentencing Administration Act, 2003 (the Act). There do not appear to be any restrictions on the Governor’s use of this power, suggesting that the power may be utilised at any time during a prisoner’s sentence. As such, the prisoner may not yet have reached their statutory review date and subsequently, the Board may not have ever considered their case nor had any involvement in the case to date. In these cases, the Board would never have prepared a report for the Minister.

   I can add that based on my knowledge from my work in another capacity, I am aware that the exercise of the Royal Prerogative of Mercy has occurred in the past without the involvement of the Board or any report from the Board.
3. **Paramount consideration**

   The “alternative view” expressed by the Committee appears inconsistent with the Act. Section 5B of the Act is found in Part 2, under general matters, and does not exclusively relate to decisions of early release. Section 5B specifically states that “the Board, or any other person performing functions under this Act, must regard the safety of the community as the paramount consideration”. The “functions” to which the Act refers are not exclusively limited to release on parole; they include any function that the Board has to perform under the Act.

   Further, the Board does not have the power under the Act to release a prisoner. That power lies with the Governor. Further, the Board is required to provide a report to the Minister under sections 12, 12A and 13 of the Act which deals with the release considerations relating to a prisoner. If the Committee is suggesting that the Board simply do not have regard for the release considerations in a case where the victim’s remains had not been located, the Board would not be complying with its reporting obligations to the Minister. Would the Board simply state that as no body was found, the release considerations were not taken into account?

   If the fundamental consideration of the Board becomes whether the victim’s remains have been located and, based on that fact, a recommendation is made to the Minister which may not have included a reference to sections 5A or 5B, it could be argued that the Board has not performed its duty in accordance with the Act, specifically, section 5B of the Act as it did not consider the safety of the community at all as part of its function to make a recommendation to the Minister. The Board may only have considered whether a victim’s remains had been located and that’s where the consideration of that matter ended. As such, in those cases, the location of the victim’s remains would become the paramount consideration as nothing else was in fact considered.

4. **Submissions on behalf of the Commissioner for Victims of Crime**

   These reports are never routinely requested by the Board, but rather, are provided to it on an ad hoc basis by the Commissioner on behalf of, or in assistance with, the victims and/or family members of the deceased victims. Generally they arrive in line with upcoming statutory review dates.

   I am unable to advise of the frequency or total number of such reports, however they are uncommon, and generally arise only when the Commissioner has felt that the existing processes to support a victim have been deficient. I am pleased to say that such occasions are getting even less frequent, presumably due the improvements made in the other processes available to assist victims.

5. **Mental capacity of prisoners to cooperate**

   Again, similar to item 1, the Commissioner of Police is considered to be best placed to provide a thorough assessment that assists the Board during its decision making process in determining the level of the cooperation provided by the prisoner.

   These cases should not necessarily have a different set of rules that the Board would make its own assessment of capacity, but in all other cases it’s up to Police. I think that may cause concerns or may have the potential to be exploited or manipulated by lawyers or prisoners if a different regime is applied. In practical terms, the Board would be reliant on external agencies to make that assessment – as in, prison assessment teams, Forensic Psychological Services or a visiting doctor or psychiatrist.

   Perhaps it may be worthy of consideration whether to include a new subparagraph (v) under section 66C(3)(a) in the Bill which requires that Police must, in their report to the Board, comment on the mental capacity of the prisoner at the time or more
broadly, whether there were any other factors that may have affected the prisoners level of cooperation, including mental health issues, apparent cognitive capacity, illness or duress.

6. Release without cooperation in the past
To my personal knowledge in the 5 ½ years that I have chaired the Board there has not been the release of a murderer where the body remains lost through lack of the offender’s cooperation. I am uncertain about the existence of any previous such parole releases, although none come to mind. Regrettably the older files of the Board are not susceptible to digital searching and they were never categorised according to whether the deceased victim’s body had been recovered. Except for retrieving and reading each old file, it is not possible to be categorical as to whether in the past there has been a murder in which the body of the victim was not recovered and the offender did not cooperate, yet was released to parole. However, a secondary victim would most certainly recall such an instance if there ever was one. It is somewhat telling that throughout this quite long and high profile debate, to my knowledge we are yet to hear the voice of even one secondary victim expressing anger or concern of the release in the past of a murderer on parole where that murderer has not cooperated with police regarding the location of the body of the deceased.

With respect to those who are advocating for a change to the law, it would usually fall upon those wanting a change to the current situation to establish the need for a change, rather than asking others to prove that there is no need for an amendment.

7. Lack of cooperation taken into account in any event
Cooperation or lack thereof is not specified as a release consideration under section 5A and 5B of the Act, so essentially, lack of cooperation would not have that much weight in the decision making process of the Board.

True, section 5A(k) provides that the Board may take into account any other relevant consideration and cooperation may fall into this category, but it is not required that the Board consider this routinely for every case. To my knowledge, such issues have never been considered under section 5A(k).

As mentioned in the previous comments, the Attorney General of the day may have their own no body/no parole agenda and may implement such an approach in their decision making process which, in the case of life term prisoners, has more weight given that it is the Attorney General who takes a recommendation to the Governor about release, not the Board.

I trust this information has been of assistance to you. However, should you have any further queries about this matter, you are able to contact my Senior Advisory Officers, Mrs Serina Collins or Mr Ben Stockey, on 9423 8700.

Yours sincerely,

His Honour Judge Robert Cock QC
CHAIRPERSON
PRISONERS REVIEW BOARD

25 October 2017
Government of Western Australia
Department of Justice
Office of the Director General

All enquiries: Dominic Fernandes
Phone: 9264 1076
Our Ref: 2017/007077
Your Ref: A631775

Hon Dr Sally Talbot MLC
Standing Committee on Legislation
GPO Box A11
PERTH WA 6837

Dear Dr Talbot

SENTENCE ADMINISTRATION AMENDMENT BILL 2017

I refer to the evidence provided by representatives of the Department of Justice to the Committee at the private hearing on the Sentence Administration Amendment Bill 2017 which was held on 11 September 2017.

The Committee has requested the names of the 12 prisoners identified by the Department and details of each conviction. The Department of Justice has liaised with the Chief Justice in relation to obtaining access to the transcripts of sentencing remarks and I attach a table setting out the details of the 12 prisoners and details of their convictions.

Please direct any enquiries to Dominic Fernandes, Legal Policy Officer on 9264 1076.

Yours sincerely

[Signature]

Dr Adam Tomison
DIRECTOR GENERAL

[October 2017]
APPENDIX 3
FUNDAMENTAL LEGISLATIVE PRINCIPLES

Does the legislation have sufficient regard to the rights and liberties of individuals?

1. Are rights, freedoms or obligations, dependent on administrative power only if sufficiently defined and subject to appropriate review?

2. Is the Bill consistent with principles of natural justice?

3. Does the Bill allow the delegation of administrative power only in appropriate cases and to appropriate persons?

4. Does the Bill reverse the onus of proof in criminal proceedings without adequate justification?

5. Does the Bill confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer?

6. Does the Bill provide appropriate protection against self-incrimination?

7. Does the Bill adversely affect rights and liberties, or impose obligations, retrospectively?

8. Does the Bill confer immunity from proceeding or prosecution without adequate justification?

9. Does the Bill provide for the compulsory acquisition of property only with fair compensation?

10. Does the Bill have sufficient regard to Aboriginal tradition and Island custom?

11. Is the Bill unambiguous and drafted in a sufficiently clear and precise way?

Does the Bill have sufficient regard to the institution of Parliament?

12. Does the Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons?

13. Does the Bill sufficiently subject the exercise of a proposed delegated legislative power (instrument) to the scrutiny of the Legislative Council?

14. Does the Bill allow or authorise the amendment of an Act only by another Act?

15. Does the Bill affect parliamentary privilege in any manner?

16. In relation to uniform legislation where the interaction between state and federal powers is concerned: Does the scheme provide for the conduct of Commonwealth and State reviews and, if so, are they tabled in State Parliament?
APPENDIX 4
SCHEDULE 3, SENTENCE ADMINISTRATION ACT 2003.

Section 4

Schedule 3 prisoner means a person described in Schedule 3 column 2.

Section 12A

The Board must give to the Attorney General a written report about a schedule 3 prisoner at the times set out in that schedule. The report must deal with the release considerations (and under the proposed amendment, the new cooperation provisions).

Schedule 3

<table>
<thead>
<tr>
<th>Division 1 — Current sentence types</th>
</tr>
</thead>
<tbody>
<tr>
<td>[Heading inserted by No. 45 of 2016 s. 15. ]</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description of prisoner</th>
<th>First report due</th>
<th>Subsequent reports due</th>
</tr>
</thead>
<tbody>
<tr>
<td>1.</td>
<td>A person serving a sentence of life imprisonment for an offence other than murder</td>
<td>7 years after the day on which the term began or is taken to have begun</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>2.</td>
<td>A person serving a sentence of life imprisonment for murder where a minimum period has been set under the Sentencing Act 1995 section 90(1)(a)</td>
<td>At the end of the minimum period</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>3.</td>
<td>A person serving a sentence of indefinite imprisonment</td>
<td>One year after the day on which the sentence began</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>4.</td>
<td>A Governor’s pleasure detainee subject to a sentence of detention imposed under The Criminal Code section 279(5)(b)</td>
<td>One year after the day on which the detention began</td>
<td>Every year after that</td>
</tr>
</tbody>
</table>

[Division 1 inserted by No. 45 of 2016 s. 15.]
### Division 2 — Former sentence types

*Heading inserted by No. 45 of 2016 s. 15.*

<table>
<thead>
<tr>
<th>Item No.</th>
<th>Description of prisoner</th>
<th>First report due</th>
<th>Subsequent reports due</th>
</tr>
</thead>
<tbody>
<tr>
<td>5.</td>
<td>A person serving a sentence of strict security life imprisonment commuted from a sentence of death under <em>The Criminal Code</em> section 679 (repealed by the <em>Sentencing (Consequential Provisions) Act 1995</em> section 26)</td>
<td>20 years after the sentence was commuted</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>6.</td>
<td>A person serving a sentence of life imprisonment commuted from a sentence of death under <em>The Criminal Code</em> section 679 (repealed by the <em>Sentencing (Consequential Provisions) Act 1995</em> section 26)</td>
<td>10 years after the sentence was commuted</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>7.</td>
<td>A person serving a sentence of strict security life imprisonment for wilful murder under <em>The Criminal Code</em> section 282(a)(i) (repealed by the <em>Criminal Law Amendment (Homicide) Act 2008</em> section 10) in respect of which no minimum term was set</td>
<td>20 years after the term began</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>Item No.</td>
<td>Description of prisoner</td>
<td>First report due</td>
<td>Subsequent reports due</td>
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<tr>
<td>8.</td>
<td>A person serving a sentence of life imprisonment for wilful murder under <em>The Criminal Code</em> section 282(a)(ii) (repealed by the <em>Criminal Law Amendment (Homicide) Act 2008</em> section 10) in respect of which no minimum term was set</td>
<td>12 years after the day on which the term began or is taken to have begun</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>9.</td>
<td>A person serving a sentence of life imprisonment for murder under <em>The Criminal Code</em> section 282(b) (repealed by the <em>Criminal Law Amendment (Homicide) Act 2008</em> section 10) in respect of which no minimum term was set</td>
<td>7 years after the day on which the term began or is taken to have begun</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>10.</td>
<td>A person serving a sentence of strict security life imprisonment where a minimum period has been set under — (a) the <em>Sentencing Act 1995</em> section 91(1) (as it was immediately before the commencement of the <em>Criminal Law Amendment (Homicide) Act 2008</em> section 19); or</td>
<td>At the end of the minimum period</td>
<td>Every 3 years after that</td>
</tr>
<tr>
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<td>Description of prisoner</td>
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</table>
| 11.     | A person serving a sentence of life imprisonment for murder or wilful murder where a minimum period has been set under —  
  (a) the Sentencing Act 1995 section 90(1) or (2) (as it was immediately before the commencement of the Criminal Law Amendment (Homicide) Act 2008 section 19); or  
  (b) the Offenders Community Corrections Act 1963 section 40D (repealed by the Sentencing (Consequential Provisions) Act 1995 section 77) | At the end of the minimum period | Every 3 years after that |
<p>| 12.     | A person serving a sentence of life imprisonment for an offence other than murder imposed before the commencement of the Acts Amendment (Imprisonment and Parole) Act 1987 section 6 | 5 years after the day on which the term began or is taken to have begun | Every 3 years after that |</p>
<table>
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</tr>
</thead>
<tbody>
<tr>
<td>13.</td>
<td>A person serving a sentence of life imprisonment for an offence other than murder imposed on or after the commencement of the Acts Amendment (Imprisonment and Parole) Act 1987 section 6</td>
<td>7 years after the day on which the term began or is taken to have begun</td>
<td>Every 3 years after that</td>
</tr>
<tr>
<td>14.</td>
<td>A person subject to a direction or sentence under The Criminal Code section 661 or 662 (repealed by the Sentencing (Consequential Provisions) Act 1995 section 26)</td>
<td>For section 661 — 2 years after the day on which the detention began</td>
<td>Every year after that</td>
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<td></td>
<td></td>
<td>For section 662 — one year after the day on which the detention began</td>
<td></td>
</tr>
<tr>
<td>15.</td>
<td>A person in, or regarded as being in, strict or safe custody by virtue of an order under The Criminal Code section 282 (repealed by the Criminal Law Amendment (Homicide) Act 2008 section 10)</td>
<td>One year after the day on which the detention began</td>
<td>Every year after that</td>
</tr>
</tbody>
</table>

[Division 2 inserted by No. 45 of 2016 s. 15.]
Standing Committee on Legislation

Date first appointed:
17 August 2005

Terms of Reference:
The following is an extract from Schedule 1 of the Legislative Council Standing Orders:

‘4. Legislation Committee
4.1 A Legislation Committee is established.
4.2 The Committee consists of 5 Members.
4.3 The functions of the Committee are to consider and report on any Bill referred by the Council.
4.4 Unless otherwise ordered, any amendment recommended by the Committee must be consistent with the policy of the Bill.’