

PAROLE, POLITICS AND PENAL POLICY

ARIE FREIBERG, LORANA BARTELS, ROBIN FITZGERALD AND
SHANNON DODD*

This article examines the most recent changes in Australian parole laws, policies and practices in the context of the changing relations between legislatures, the courts and parole authorities. It argues that legislatures, purportedly reflecting public opinion, have become less willing to trust either the courts or parole boards and have eroded their authority, powers and discretion. It provides examples of legislative changes that have altered the purposes of parole and introduced mandatory or presumptive non-parole periods, as well as overriding, by-passing and restricting parole.

I INTRODUCTION

Parole is a form of conditional release of offenders sentenced to a term of imprisonment, which allows an offender to serve the whole or part of their sentence in the community, subject to conditions. It plays a significant part in the Australian criminal justice system. In September 2017, there were 15 402 persons on parole across Australia,¹ the highest number on record. With Australian prisoner numbers currently around 41 300 and continuing to rise,² the number of people on parole, or considered to be eligible for parole, is only likely to increase.

However, for as long as custodial sentences have been in existence, any form of release prior to the expiration of the sentence imposed by a court has been viewed by the public with some scepticism, commonly being regarded as a form of unwarranted leniency or kindness to prisoners who may not deserve it, and as mendacious, undermining or derogating from the ‘true’ sentence handed down by the judge. There is also commonly a concern that releasing offenders on parole poses a danger to the community.

In fact, public attitudes toward parole are more ambivalent and nuanced than media reports would suggest. In telephone interviews with 1200 adults across Australia, Fitzgerald et al³ found that 46 per cent of respondents agreed that offenders should be released to serve the last part of their sentence in the community under supervision, while 38 per cent disagreed. In addition, 68 per cent agreed that the community has an obligation to assist a person’s re-entry into the community after prison. Apart from any public views on parole, research consistently shows that parole supervision can be an effective re-entry tool.⁴ Most recently, Australian

* Arie Freiberg, LLB (Hons) (Melb); LLM (Monash); LLD (Melb), Emeritus Professor, Monash University; Lorana Bartels, BA LLB LLM (UNSW); PhD (UTas); Professor and Head, School of Law and Justice (UC) and Honorary Associate Professor, University of Tasmania; Robin Fitzgerald, BA (McGill); MA (SFU); PhD (Carleton), Senior Lecturer, University of Queensland; Shannon Dodd, LLB (JCU); MCCJ (Griffith); BA (Hons) (UQ). The authors acknowledge the earlier contributions of Adrian Cherney to this project. This paper is funded in part by ARC grant DP150100569.

¹ Australian Bureau of Statistics, *Corrective Services, Australia*, (September Quarter 2017, Cat No 4512.0, 2017).

² Ibid.

³ Robin Fitzgerald, Lorana Bartels, Arie Freiberg, Adrian Cherney and Shannon Buglar, ‘How Does the Australian Public View Parole? Results from a National Survey on Public Attitudes Towards Parole and Re-entry’ (2016) 40 *Criminal Law Journal* 307.

⁴ See eg Michael Ostermann, ‘How Do Former Inmates Perform in the Community? A Survival Analysis of Rearrests, Reconvictions, and Technical Parole Violations’ (2015) 61 *Crime & Delinquency* 163; Gennaro Vito,



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research indicates that parolees are less likely to reoffend than comparable offenders released without supervision.⁵ In spite of this, a number of recent high-profile catastrophic failures of the system, involving the commission of serious crimes by offenders on parole, have led to calls for reform of parole systems or even their complete abolition.⁶

This article examines the most recent changes to Australian parole laws, policies and practices in the context of the changing relations between legislatures, the courts and parole authorities. It argues that legislatures, purportedly reflecting public opinion or community views, have become less willing to trust either the courts or parole boards and have gradually, but consistently, eroded the latter's authority, powers and discretion. It also argues that victims' interests have been not only recognised — generally appropriately — but, in some circumstances, elevated to the extent that they conflict significantly and adversely with those of offenders.

In Part II of this article, we outline the changing perceptions of parole and the new parole landscape which is emerging as a result of a number of recent inquiries into the system. Part III examines how the balance of power between legislatures, the courts and parole authorities has altered and argues that while legislatures, legitimately, have the final democratic authority to decide where sentencing and release power lies, their willingness to circumscribe, remove, override or overrule the discretion vested in courts and parole authorities in the name of ill-defined 'community expectations' results in parole policies that are often unjust, expensive and possibly counter-productive. Part IV examines the growing interests and roles of victims in parole decision-making and Part V concludes with some observations about the relationships between parole, politics and penal policies.

II THE CHANGING MEANING OF PAROLE

A *Initial Approaches to Parole*

Forms of release on licence prior to the expiration of a term of imprisonment have been in existence in Australia since early colonial times.⁷ Modern Australian parole systems are of

George Higgins and Richard Tewksbury, 'The Effectiveness of Parole Supervision: Use of Propensity Score Matching to Analyze Reincarceration Rates in Kentucky' (2015) *Criminal Justice Policy Review*. doi:10.1177/088740341560917.

⁵ Wai-Yin Wan, Suzanne Poynton, Gerard van Doorn and Don Weatherburn, 'Parole Supervision and Re-offending: A Propensity Score Matching Analysis', (Trends and Issues in Crime and Criminal Justice No 485, Australian Institute of Criminology, 2014).

⁶ It has been estimated that between 2006 and 2013 in Victoria alone, some 15 murders were committed by offenders who were on parole: see Ian Callinan, *Review of the Parole System in Victoria* (Corrections Victoria, 2013), 82, citing a submission by Shine Lawyers. More recently, parolee Yacqub Khayre was shot dead by police in Melbourne after killing a member of the public, taking a person hostage and wounding a police officer. The case led to calls for a presumption against parole for offenders with links to terrorism and violent extremism. Khayre had a history of suspected extremism, having been acquitted of his role in the 2009 plot to attack the Holsworth Army Barracks in Sydney: Fergus Hunter, 'Malcolm Turnbull Pushes for National Parole Laws to Keep Terror Offenders Locked Up', *The Age* (online) 7 June 2017 <<http://www.theage.com.au/federal-politics/political-news/malcolm-turnbull-pushes-for-national-parole-laws-to-keep-terror-offenders-locked-up-20170606-gwlyzw.html>>.

⁷ See Janet Chan, 'Decarceration and Imprisonment in New South Wales: A Historical Analysis of Early Release' (1990) 13 *University of New South Wales Law Journal* 393.

more recent origin, dating from the 1950s in Victoria⁸ and Queensland⁹ and later in New South Wales (NSW) (1966),¹⁰ Tasmania (1975)¹¹ and other states and territories.¹² In its early days, parole was regarded as ‘a socially progressive response to imprisonment’¹³ intended to assist offenders’ reintegration into the community and promote their rehabilitation. This rationale reflected a mix of then dominant views about ‘care for the oppressed, a distaste for imprisonment and a persistent faith in ... the “scientific” treatment of the criminal’.¹⁴ In the 1970s, these rehabilitative elements were exemplified in the NSW case of *R v Portolesi*,¹⁵ which took the view that the purpose of the non-parole period was primarily to set a time which allowed the Parole Board to assess a prisoner’s suitability for release, although this view was not necessarily shared by other jurisdictions.¹⁶ The High Court ultimately determined in *Power v The Queen* that the whole sentence of imprisonment should be regarded as a punishment for the crime and the non-parole period was the ‘minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention’.¹⁷ However, the High Court also observed that the legislative intention in allowing the fixing of a period where the prisoner can be released to parole is

to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.¹⁸

Since then, the courts have continued to recognise the rehabilitative and reintegrative purposes of parole.¹⁹ The NSW Law Reform Commission (‘NSWLRC’) likewise accepted in its 2015 report on parole that ‘the key objective of parole is to reduce reoffending by providing for an offender’s supervised reintegration into the community’.²⁰

⁸ See *Penal Reform Act 1956* (Vic). A form of parole existed in Victoria from 1907; this provided for the release of prisoners on probation as determined by the Indeterminate Sentences Board: see *Indeterminate Sentences Act 1907* (Vic).

⁹ See *Offenders Probation and Parole Act 1959* (Qld), although there had been an earlier form established in 1937.

¹⁰ See *Parole of Prisoners Act 1966* (NSW).

¹¹ See *Parole Act 1975* (Tas).

¹² Under Commonwealth law, release on parole of federal prisoners is by order of the federal Attorney-General: *Crimes Act 1914* (Cth) s 16F(1). There is no independent, federal parole authority, despite recommendations by the Australian Law Reform Commission that such a body be established: see Australian Law Reform Commission, *Same Time, Same Crime: Report, Sentencing of Federal Offenders* (2006) ch 23.

¹³ Chris Cunneen, Eileen Baldry, David Brown, Melanie Schwartz and Alex Steel, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate, 2013) 53–7; see also Victorian Sentencing Advisory Council (VSAC), *Review of the Adult Parole System: Report* (2012).

¹⁴ James Thomas and Alex Stewart, *Imprisonment in Western Australia: Evolution, Theory and Practice* (University of Western Australia Press, 1978) 30, cited in Neil Morgan, ‘Parole and Sentencing in Western Australia’ (1992) 22 *Western Australian Law Review* 94, 101.

¹⁵ *R v Portolesi* [1973] 1 NSWLR 105.

¹⁶ See eg *Rutherford* (Unreported, Victorian Court of Appeal, 5 December 1974).

¹⁷ *Power v The Queen* (1974) 131 CLR 623, 628. See generally Cunneen et al, above n 13, 53–7.

¹⁸ *Power v The Queen* (1974) 131 CLR 623, 629.

¹⁹ See eg *R v Moffitt* (1990) 20 NSWLR 114; *R v Carter* [2003] NSWCCA 243.

²⁰ NSW Law Reform Commission, *Parole* (Report No 142, 2015) 50.

Notwithstanding this, a retreat from the ‘rehabilitative ideal’ that shaped crime control and corrections policies was evident from the mid-1980s²¹ and coincided with intensified criticism of parole in Australia on a number of grounds. First, the ‘truth in sentencing’ movement regarded parole, remissions,²² pre-release and temporary leave schemes as giving too much power to executive authorities and undermining the ‘proper’ sentence imposed by the courts and consequently misleading the public as to the real nature of a sentence.²³ Second, the regime was regarded as being unduly favourable to offenders and less so to victims, who saw offenders ‘walking free’ before serving their due (if inadequate) time in custody. Third, it was regarded as creating an unnecessary risk to the community, as an offender who was released to parole was regarded as being given an opportunity to offend which would not be available if he or she had been kept in custody for the duration of the sentence imposed by the court.²⁴

The changing attitudes to parole also reflected larger shifts in penal philosophies and policies expressed in criminal justice systems more generally. These included the emerging ascendancy of risk and actuarial models of justice, the pervasive influence of managerialism, the overdue recognition of the role of victims in the criminal justice system and the growth of penal populism.²⁵ This growth was accompanied by a new intolerance toward expert-administered systems,²⁶ including bodies such as parole boards, which were no longer ‘self-directing and subject to little restraint’.²⁷

B *Rupture — Inquiries and the New Parole Landscape*

Against a background of increasing community anxiety about crime, rising penal populism and government responses to ‘mass-mediated anger’,²⁸ a small number of high profile incidents set in motion a series of inquiries and legislative and administrative reforms to parole.

In September 2012, Jill Meagher was raped and murdered by parolee Adrian Bayley in Melbourne. Her death sparked a national outcry and prompted a highly critical review of Victoria’s parole system by former High Court judge Ian Callinan AC QC.²⁹ In response,

²¹ David Garland, *The Culture of Control: Crime and Social Order in Contemporary Society* (Oxford University Press, 2001).

²² From the late 1980s, most jurisdictions abolished remissions, so that a prisoner could generally not be released from custody prior to the expiration of the non-parole period: see eg *Sentencing Act 1989* (NSW); Cunneen et al, above n 13, 53. In Tasmania, the Legislative Assembly passed the *Corrections Amendment (Prisoner Remission) Bill 2017* (Tas) in November 2017. The Bill was before the Legislative Council at the time of writing.

²³ Arie Freiberg, ‘Truth in Sentencing?: The Abolition of Remissions in Victoria (1992) 16 *Criminal Law Journal* 165; NSWLRC, above n 20; Walter Sofronoff, *Queensland: Parole System Review, Final Report* (Department of Justice and Attorney-General, 2016).

²⁴ Tasmania Law Reform Institute, *Sentencing* (Final Report No 11, 2008); NSWLRC, above n 20.

²⁵ See Malcolm Feeley and Jonathon Simon, ‘The New Penology: Notes on the Emerging Strategy of Corrections and its Implications’ (1992) 30 *Criminology* 449; Garland, above n 21; John Pratt, *Penal Populism* (Routledge, 2007); Jonathon Simon, *Governing Through Crime: How the War on Crime Transformed American Democracy and Created a Culture of Fear* (Oxford University Press, 2007).

²⁶ Ian Loader, ‘Fall of the “Platonic Guardians”: Liberalism, Criminology and Political Responses to Crime in England and Wales’ (2006) 46 *British Journal of Criminology* 561.

²⁷ Cunneen et al, above n 13, 55.

²⁸ Ian Loader, ‘Playing with Fire? Democracy and the Emotions of Crime and Punishment’ in Susanne Karstedt, Ian Loader and Heather Strang (eds), *Emotions, Crime and Justice* (Hart Publishing, 2011) 347, 347, citing Loader, above n 26.

²⁹ Callinan, above n 6.

Victoria's parole system has subsequently undergone extensive reform.³⁰ In July 2016, an elderly woman in Townsville was allegedly killed by a man who had been released to parole only hours before. The Queensland Government responded by announcing an inquiry by former Solicitor-General Walter Sofronoff QC.³¹ On the release of the Sofronoff report in February 2017, the Queensland Government committed to implementing all but two of Sofronoff's 91 recommendations.³² These inquiries are part of a long line of reviews into parole in Australia, with two other inquiries into parole in Victoria undertaken immediately before the Callinan review,³³ two recent reviews in NSW,³⁴ and five in Western Australia between 1979 and 2005.³⁵

An examination of these inquiries reveals a somewhat mixed penal terrain with respect to the inquiries' reports and recommendations. While the majority of the recommendations favoured more and tighter restrictions on parole, it would be misleading to suggest that there were not also remedial or progressive recommendations that sought to address the flaws in the criminal justice system that were exposed by those inquiries. While this article focuses upon what we consider to be the negative aspects of some of the reforms, we recognise that the parole systems in most jurisdictions are far from perfect. Overall, the many inquiries can be characterised as representing a continuum of views, ranging from the narrow, legalistic and critical approach to parole, adopted by Callinan, to the more progressive and reintegration-focused approach of Sofronoff. As O'Malley has argued, modern shifts in penal policy can often present a 'bewildering array'³⁶ of developments, rather than a single consistent line of argument. Nonetheless, an analysis of the recommendations and legislative changes flowing from these inquiries reveals five overarching themes.

First, there is the prioritisation of community safety over all other relevant considerations in parole decision-making.³⁷ Callinan, in particular, recommended an increasingly safety-oriented and risk-averse policy and practice on the part of both those granting parole and administering it, and claimed that 'the balance in relation to the grant of parole...may have been tilted too far in favour of offenders'.³⁸ The emphasis on community safety can also be seen in

³⁰ Between 2004 and 2012, there was one significant amendment to the *Corrections Act 1986* (Vic) relating to parole. Between 2012 and 2017, there were some 15 amendments to the Act relating to parole.

³¹ Sofronoff, above n 23.

³² Queensland Government, *Response to Queensland Parole System Review Recommendations* (2017) <<https://parolereview.premiers.qld.gov.au/assets/government-response-to-qpsr-recommendations.pdf>>.

³³ James Ogloff, *Review of Parolee Reoffending by Way of Murder* (Department of Justice, 2011); VSAC, above n 13.

³⁴ See NSWLRC, above n 20. The NSW Government also commissioned a review of parole decisions in relation to sex offenders by Justice James Wood AO QC. This report has not been released publicly. For discussion, see Lorana Bartels, 'Parole and Parole Authorities in Australia: A System in Crisis?' (2013) 37 *Criminal Law Journal* 357.

³⁵ See Kevin Parker, *A Report on Parole, Prison Accommodation and Leave from Prison in Western Australia* (Attorney General's Department, Western Australia, 1979); Western Australia Inquiry into the Rate of Imprisonment, *Report of the Committee of Inquiry into the Rate of Imprisonment* (1981); Joint Select Committee on Parole, Parliament of Western Australia, *Report of the Joint Select Committee on Parole* (1991); Western Australia, *Report of the Review of Remission and Parole* (1998); Western Australia Inquiry into the Management of Offenders in Custody and in the Community, Dennis Mahoney, *Report* (State Law Publisher, 2005).

³⁶ Pat O'Malley, 'Volatile and Contradictory Punishment' (1998) 3 *Theoretical Criminology* 175, 175.

³⁷ See Part III B 1 below.

³⁸ Callinan, above n 6, 11.

recommendations relating to specific offender groups presumed to be most dangerous to public safety, for example, sexual and/or violent offenders.

A second overarching theme involves increasing limits being imposed on the discretion of the courts to set non-parole periods through the use of mandatory or presumptive non-parole periods. Courts are becoming less trusted by legislatures to choose an ‘appropriate’ punishment for the crime.³⁹

A third theme is the questioning or undermining of the discretion of parole boards to make decisions involving perpetrators of serious violent or sexual offences and, more recently, other serious offences. In such cases, parole board decisions may be reviewed by additional panels, or are required to be made by differently constituted panels.⁴⁰

The fourth theme that arises in the inquiry reports is the elevation of victims’ rights. This is clearly related to the preceding themes and was a prominent feature in the Callinan and Sofronoff reviews, as well as the 2015 NSWLRC report. The Sofronoff inquiry addressed perhaps the most significant issue that reflects concern for the victims of crime and their families and affects a prisoner’s eligibility for parole – the ‘no body, no parole’ laws which are discussed further below in Part IV of this article.

The final overarching theme that arises in the inquiry reports reflects a shift in the rationale for parole from a prisoner-centred and reintegrative process to a process that is increasingly focused on a prisoner’s forfeiture of rights due to their offending behaviour. The forfeiture of rights theory⁴¹ suggests that, by violating the rights of others, a person forfeits their own right to life, liberty, or property. The Callinan inquiry, in particular, strongly reflects the sentiment of a prisoner’s progressive loss of rights by virtue of their offending behaviour. Specifically, Callinan stated that ‘convicted criminals are intentionally denied rights. It is an important object of the justice system that they are so denied’⁴²

III SHIFTING POWERS: ERODING THE AUTHORITY OF COURTS AND PAROLE BOARDS

Sentencing power, namely the power to decide how a person who has been found guilty of an offence should be dealt with, is distributed between the legislature,⁴³ the courts,⁴⁴ and the executive — in this case, parole boards. Parole systems vary in the degree of discretion they vest in the courts and parole boards, partly reflecting sentencing philosophies,⁴⁵ as well as

³⁹ See III A below.

⁴⁰ See III B 5 below.

⁴¹ See eg Christopher Wellman, ‘The Rights Forfeiture Theory of Punishment’ (2012) 122 *Ethics* 371.

⁴² Callinan, above n 6, 69.

⁴³ The legislative role is generally to create offences, set maximum penalties, create sanctions, provide guidelines as to their use and allocate decision-making responsibilities.

⁴⁴ The judicial role is to fix a sentence in relation to an individual case within the boundaries set by Parliament.

⁴⁵ In the United States, until around the 1970s, legislatures and courts vested a great degree of authority and trust in parole boards. Sentences tended to be highly indeterminate, leaving it to parole boards to decide on the appropriate time to release an offender. Criticisms of parole decision-making, in particular disparities in sentence length, lack of expertise in determining when a prisoner was fit to be released on parole and lack of due process led to the development of a ‘just deserts’ philosophy; this in turn created a more determinate sentencing system, which gave more power to the courts (and later sentencing commissions) and reduced that of parole boards: Richard Frase, ‘Sentencing Principles in Theory and Practice’ (1997) 22 *Crime and Justice* 363.

administrative exigencies, but predominantly the degree of trust shown by one arm of government in the others.

Historically, the power to release offenders prior to the expiration of their sentence lay with governments or the Crown exercising a form of the Royal Prerogative of Mercy. Parole has always been considered a privilege rather than a right, an executive, rather than judicial, function.⁴⁶ The establishment of independent parole boards from the 1950s, often chaired by retired or serving judicial officers, was designed to separate decisions about a person's liberty from political influence.⁴⁷ In the following sections, we identify how, over recent years and, in particular, following the recent inquiries described above, governments have diminished or removed the powers of courts and parole boards and restricted or explicitly guided their discretion in relation to parole release decisions. While accepting that parliaments are the ultimate democratically accountable body, in our view, the highly emotive and politically sensitive nature of decision-making in the criminal justice system, whether by judicial officers or parole boards, makes it desirable that these officeholders exercise their judgement independently and free of political considerations. As Sofronoff stated recently, '[w]e must, at all costs, avoid taking measures that are politically appealing but are either of no use or that even make matters worse'.⁴⁸ The reality, however, is that parole, politics and penal policy are closely intertwined.

A *Legislatures and the Courts*

The relationship between legislatures on the one hand and the courts and parole boards on the other is determined by the parameters created by the former to govern the latter. Parliaments may decide that parole should not play any part in a sentence, for example, in relation to very short sentences of imprisonment. They may also give the courts extensive authority in relation to parole, for example, by allowing them to release an offender on parole immediately after imposing the sentence, as is the case in Queensland.⁴⁹ In addition, they may also give courts discretion whether to set a non-parole period or determine in advance when an offender will be released on parole without reference to either a court or parole board, as is the case with 'automatic parole'.⁵⁰ Finally, they may give courts discretion as to the length of the non-parole period, with further discretion vested in a parole authority as to whether to release the prisoner at the expiration of that period. As the following examples highlight, however, recent years have seen legislatures demonstrate their lack of confidence in the courts by restricting their discretion to set non-parole periods.

⁴⁶ See Callinan, above n 6, 22. See also Bartels, above n 34, 357.

⁴⁷ In the same manner, the discretion to prosecute, or appeal against sentence, was taken from Attorneys-General and vested in independent Directors of Public Prosecutions in the 1980s.

⁴⁸ Sofronoff, above n 23, 22.

⁴⁹ *Penalties and Sentences Act 1992* (Qld) s 160G.

⁵⁰ For example, where the law states that a prisoner will be released after a certain percentage of the sentence has been served. In NSW, release on parole at the expiration of the non-parole period occurs in relation to sentences of three years or less: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; in Queensland, this arises for sentences of three years or less, except in cases of certain offences: *Penalties and Sentences Act 1992* (Qld) s 160B(3); in South Australia, automatic parole operates in relation to sentences of five years or less (except for sentences imposed for sexual offences, offences involving personal violence or arson or serious firearm offences, or offenders who committed offences on parole or who have had parole cancelled for breaching conditions): *Correctional Services Act 1982* (SA) s 66; see VSAC, *Parole and Sentencing: Research Report* (2016) 3, fn 11.

1 *Mandatory or Presumptive Non-parole Periods*

In jurisdictions that have discretionary parole systems, legislatures set maximum penalties and give courts the power to set the maximum term of imprisonment in relation to the individual case, together with a non-parole period prior to which the offender cannot be released on parole. Parole boards are given the power to release offenders at the expiration of the non-parole period. The prevailing view of the High Court is that, in setting a non-parole period, a court should consider what minimum time should be served in prison as justice requires, having regard to all of the circumstances of the offence.⁵¹

In those jurisdictions where non-parole periods can be set by the courts, it is generally accepted that the period should be proportionate to the head sentence and the gravity of the crime and should not be determined mathematically. As Freiberg has noted

the length of the non-parole period and the length of the period on parole is a matter of discretion that will depend upon all of the circumstances of the case including the offender's prospects for rehabilitation, age (both young and old), criminal record and past parole history, and protection of the community.⁵²

In spite of this, governments have become less willing to accept the determination of the courts as to what, in the words of the High Court, 'justice' requires in an individual case. Instead, governments commonly express concern that court-imposed sentences in general, and non-parole periods in particular, may not adequately reflect 'community expectations', which they discern as being in favour of more severe sentences for the purposes of retribution, deterrence and incapacitation and as being antipathetic to parole.

In Victoria and the Australian Capital Territory (ACT), there is no legislative prescription, but anecdotal evidence suggests that non-parole periods are generally set at around two-thirds of the head sentence. As the discussion below demonstrates, however, most other jurisdictions are more prescriptive in their approach. Tasmania sets the non-parole period at half of the head ('operative') sentence.⁵³ In Western Australia, the non-parole period is set at half of the sentence for terms of four years or less, or two years less than the term for longer sentences.⁵⁴

One response to what many politicians consider to be inadequate sentences is to introduce mandatory or presumptive non-parole periods which severely limit the courts' sentencing powers. Indeed, mandatory sentencing is a central and recurring theme in 'tough on crime' policies.⁵⁵ There are two ways in which such schemes can be created. One is a defined scheme, under which the non-parole period is specifically prescribed in legislation, as is the case with respect to murder in South Australia, where the non-parole period must be not less than 20 years.⁵⁶ The other is to set a percentage of the head sentence that must be served before the

⁵¹ *Power v The Queen* (1974) 131 CLR 623, 629.

⁵² Arie Freiberg, *Fox and Freiberg's Sentencing: State and Federal Law in Victoria* (Thomson Reuters, 3rd ed, 2014) 858.

⁵³ *Corrections Act 1997* (Tas) s 68.

⁵⁴ *Sentencing Act 1995* (WA) s 93.

⁵⁵ Sofronoff, above n 23, 103.

⁵⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(ab). This provision was introduced in 2002. Another example of a mandatory non-parole period can be found in the NSW law relating to 'one punch' assaults, which carries a mandatory minimum sentence of eight years: *Crimes Act 1900* (NSW) ss 25A, 25B. For discussion, see Julia

offender is eligible for parole, as is the case for serious violent offences in South Australia, where the non-parole period must be not less than 80 per cent of the total sentence.⁵⁷ However, the court may depart from these minima if there are ‘special reasons’.⁵⁸

In NSW, the legislation prescribes that non-parole periods cannot be set for sentences of six months or less.⁵⁹ In other cases, the non-parole period should be three-quarters of the head sentence unless the court decides there are special circumstances to order otherwise.⁶⁰ In 2003, NSW introduced a scheme of ‘standard non-parole periods’ in relation to a number of serious offences. This scheme arose in part from the NSW Government’s concern that the system of guideline judgments which had been developed by the Court of Criminal Appeal in that state to address sentencing disparity had been disapproved by the High Court⁶¹ and had proved to be inadequate in increasing sentencing tariffs and uniformity in sentencing. The stated objective of the scheme was ‘to provide additional guidance to the courts in sentencing to ensure that appropriate consideration is given to the actual minimum time an offender must spend in prison’,⁶² but the implicit objective was to seek popular support in a forthcoming election and to pre-empt calls for mandatory sentences.

Standard non-parole periods were introduced for 20 offences (and have since been extended to over 50 offences).⁶³ They were originally developed in relative haste and without extensive consultation and were subsequently held by the High Court to be a guide to judges, rather than a firm starting point for setting of the non-parole period,⁶⁴ thereby reflecting the Court’s general antipathy to legislative restrictions on courts’ sentencing discretion. The standard non-parole period system has been reviewed⁶⁵ and amended⁶⁶ a number of times, but has remained a feature of the NSW sentencing regime for a wide range of offences, subject to the High Court’s strictures as to how standard non-parole periods should be used.

Quilter, ‘One-punch Laws, Mandatory Minimums and “Alcohol-Fuelled” as an Aggravating Factor: Implications for NSW Criminal Law’ (2014) 3 *International Journal for Crime, Justice and Social Democracy* 81.

⁵⁷ *Crimes Act 1900* (NSW) s 32(5)(ba). On the meaning of these provisions see *R v A* [2011] SASCFC 5; see also Patrick Leader-Elliott, ‘Clarifying the Incomprehensible: South Australia’s Mandatory Minimum Non-parole Period Scheme’ (2012) 36 *Criminal Law Journal* 216.

⁵⁸ *Criminal Law (Sentencing) Act 1988* (SA) ss 32A(2)(b), (3).

⁵⁹ *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

⁶⁰ *Ibid* s 44(2). In such circumstances, the court is required to make a record of the reasons for its decision.

⁶¹ This had been generally disapproved by the High Court: *Wong v The Queen* (2001) 207 CLR 584.

⁶² New South Wales, Parliamentary Debates, Legislative Assembly, 23 October 2002, 5813 (Bob Debus), cited in Sarah Krasnostein, *Pursuing Consistency: The Effect of Different Reforms on Unjustified Disparity in Individualised Sentencing Frameworks* (PhD Thesis, Monash University, 2015) 238.

⁶³ *Crimes (Sentencing Procedure) Act 1999* (NSW) Pt 4, Div 1A.

⁶⁴ It follows that the High Court regards standard non-parole periods as only a guide for setting the head sentence, given the relatively fixed relationship between this and the head sentence in NSW: see *Muldock v The Queen* (2011) 244 CLR 120.

⁶⁵ See eg NSW Sentencing Council, *Standard Non-parole Periods: Background Report* (2011); NSWLRC, *Sentencing: Interim Report on Standard Minimum Non-Parole Periods* (Report No 134, 2012); NSWLRC, *Sentencing* (Report No 139, 2013).

⁶⁶ See *Crimes (Sentencing Procedure) Amendment Act 2006* (NSW); *Crimes (Sentencing Procedure) Amendment Act 2007* (NSW); *Crimes (Sentencing Procedure) Amendment (Standard Non-parole Periods) Act 2013* (NSW); *Crimes Legislation Amendment (Child Sex Offences) Act 2015* (NSW).

Other jurisdictions have adopted different methods of setting presumptive or mandatory non-parole periods.⁶⁷ For example, section 19AG of the *Crimes Act 1914* (Cth) prescribes minimum non-parole periods of 75 per cent of the total sentence for certain offences, namely, terrorism offences, treachery, treason and espionage.⁶⁸

In Queensland, offenders sentenced to life imprisonment for multiple murders or for a subsequent murder must serve a minimum term of 30 years imprisonment unless released sooner under exceptional circumstances. The minimum non-parole period for a single murder is 25 years if the victim was a police officer, and 20 years for any other murder or repeat serious child sex offence.⁶⁹ Since 1997, those convicted of serious violent offences are required to serve 80 per cent of their sentence before being eligible for parole, while other offenders must serve 50 per cent of the head sentence where no parole eligibility date has been set by the court.⁷⁰ In 2011, the Queensland Sentencing Advisory Council ('QSAC'), as it was then constituted, published a report on the introduction of minimum standard non-parole periods. The QSAC did not recommend in favour of such schemes, although it stated that if such a scheme were to be introduced, it should take the form of a standard percentage scheme.⁷¹ In 2012 and 2013, the conservative Newman Government introduced minimum non-parole periods, set at 80 per cent of the head sentence, for certain firearms offences, for members of criminal organisations,⁷² and for drug trafficking.⁷³

The non-parole period in the Northern Territory is set at not less than half of the sentence, but must be at least eight months.⁷⁴ Where a court is required to set a mandatory minimum sentence of 12 months actual imprisonment for specific violent offences, the non-parole period must be at least 12 months.⁷⁵ In 2007, the Northern Territory introduced a minimum non-parole period scheme for murder (20 or 25 years, depending upon the circumstances),⁷⁶ specified sex offences (at least 70 per cent of the head sentence),⁷⁷ offences against children under 16 (at least 70 per cent of the head sentence)⁷⁸ and a range of other offences (at least 50 per cent of the head sentence),⁷⁹ unless 'exceptional circumstances' exist.

⁶⁷ See Krasnostein, above n 62.

⁶⁸ *Crimes Act 1914* (Cth) s 19AG; *Criminal Code 1995* (Cth) ss 80, 91.

⁶⁹ *Criminal Code Act 1899* (Qld) sub-ss 305(1), (2).

⁷⁰ Sofronoff, above n 23, 103. See also *Penalties and Sentences Act 1992* (Qld) s 161B(3) (person declared to be convicted of a serious violent offence not eligible for parole until they have served 80 per cent of the head sentence); *Corrective Services Act 2006* (Qld) ss 181, 181A, 182, 182A, 183.

⁷¹ Queensland Sentencing Advisory Council (QSAC), *Minimum Standard Non-parole Periods: Final Report* (2011). It should be noted that the QSAC was abolished by the Newman Government in 2012 and reinstated by the Palaszczuk Government in 2016. For discussion, see Lorana Bartels, 'Sentencing Review 2015–16' (2016) 40 *Criminal Law Journal* 325, 334–5.

⁷² *Weapons and Other Legislation Amendment Act 2012* (Qld); *Criminal Law (Criminal Organisations Disruption) Amendment Act 2013* (Qld).

⁷³ See *Drug Misuse Act 1986* (Qld) s 5(2).

⁷⁴ *Sentencing Act 1995* (NT) sub-ss 54(1), (2).

⁷⁵ *Ibid* s 54(3), Division 6A.

⁷⁶ *Sentencing Act 1995* (NT) sub-ss 53A(1), (3).

⁷⁷ *Ibid* s 55.

⁷⁸ *Ibid* s 55A.

⁷⁹ *Ibid* s 54.

In Victoria, the Liberal–National Party Government, elected in 2010, introduced a system of presumptive minimum non-parole periods for various assault offences committed in circumstances of ‘gross violence’. In such cases, minimum terms of four years imprisonment must be imposed, or five years in the case of gross violence against emergency workers or custodial officers on duty, unless ‘special circumstances’ exist.⁸⁰ In 2014, a scheme of ‘baseline’ sentencing was introduced for seven serious offences⁸¹ finalised in the Supreme and County Court.⁸² The purpose of the scheme was to increase sentencing tariffs by increasing both head sentences and minimum non-parole periods for these offences. Under the scheme, which commenced in late 2014, a court was required to fix a non-parole period of 30 years if the relevant term of imprisonment was life imprisonment; 70 per cent of the head sentence if the head sentence was 20 years or more; or 60 per cent of the head sentence if this was less than 20 years.⁸³ In 2015, the scheme was held to be ‘incapable of being given any practical operation’ and ‘incurably defective’ by a Full Bench of the Supreme Court in *Director of Public Prosecutions v Walters (A Pseudonym)*.⁸⁴

In 2016, the Victorian Sentencing Advisory Council (‘VSAC’) completed a report on sentencing guidance which rejected mandatory sentencing in favour of a system of guideline sentencing or standard, (ie, presumptive) sentences.⁸⁵ The VSAC sought to preserve judicial discretion and therefore did not consider it appropriate for the standard sentence scheme to include a minimum non-parole period. In response, the Victorian Labor Government, which came to power in 2014, introduced a ‘standard sentencing scheme’, which would represent a guidepost to objective offence seriousness for a number of offences. Notwithstanding the VSAC’s position, the *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic), which received assent in August 2017, sets specific non-parole periods as a proportion of the total sentence, unless it is in the interests of justice for a shorter non-parole period to be imposed.⁸⁶

Presumptive, standard or mandatory non-parole periods suffer from a number of defects. Like other such schemes, they are prone to producing unjust parity between offenders, that is, they treat unlike cases alike. This can produce injustice in particular cases where there are mitigating circumstances, as well as delays in the courts and more severe sentences for impecunious offenders.⁸⁷ This approach may also disproportionately affect Indigenous offenders, who may

⁸⁰ *Crimes Act 1958* (Vic) ss 15A, 15B; see also VSAC, *Statutory Minimum Sentences for Gross Violence: Report* (2011).

⁸¹ The offences included murder (25 years), trafficking in a large commercial quantity of a drug of dependence (14 years), persistent sexual abuse of a child under 16 (10 years), sexual penetration with a child under 12 (10 years), incest with a child/step-child under 18 (10 years) and culpable driving causing death (9 years).

⁸² VSAC, *Baseline Sentencing Report* (2012).

⁸³ *Sentencing Act 1991* (Vic) s 11A.

⁸⁴ *Director of Public Prosecutions v Walters (A Pseudonym)* [2015] VSCA 303 [9]–[10] (Maxwell P, Redlich, Tate and Priest JJA).

⁸⁵ VSAC, *Sentencing Guidance in Victoria* (2016). It should be noted that presumptive sentences were the VSAC’s less preferred option.

⁸⁶ *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic), which received Royal Assent on 15 August 2017; see now *Sentencing Act 1991* (Vic) s 11A(4). It should be noted that the Victorian Liberal National Opposition announced that, if re-elected in 2018, they would introduce mandatory minimum terms for offenders found guilty of a second (or subsequent) violent offence: see Matthew Guy, ‘Taking Back Our State: The Liberal National Plan to Tackle Violent Reoffending’ (Media Release, 11 April 2017).

⁸⁷ *R v Clark* [2016] QCA 173 [6] (McMurdo P).

be more likely to commit offences covered by such schemes.⁸⁸ It is also likely to displace discretion from the court to prosecuting authorities, who, in negotiating guilty pleas, may accept a plea to an offence that is not subject to these laws in preference to a contested hearing on a charge that does carry a mandatory or similar non-parole period.

The Sofronoff review in Queensland strongly recommended the abolition of mandatory minimum non-parole periods, on the grounds that they are not necessary to protect the community because courts and parole boards should be trusted to do so at the time of sentence and consideration of parole eligibility respectively. In addition, Sofronoff correctly understood that serious offenders in fact require more, rather than less, time on parole. Furthermore, such legislative measures inappropriately remove discretion from the courts. As he observed:

Good laws are expressed to apply generally; the judges are entrusted to apply them to particular circumstances for the public good. Laws that restrict the consideration of relevant circumstances and require instead that relevant facts be ignored invariably create unintended and unforeseeable anomalies that tend against the public good in many surprising ways.⁸⁹

In spite of this astute observation, Sofronoff's recommendation that sentencing judges should be able to depart from the mandatory non-parole period if 'there are special circumstances or reasons [that] could result in sentences that are more suitable to achieve the purpose of the sentence'⁹⁰ was one of only two of his 91 recommendations that the Queensland Government rejected.⁹¹ This is particularly striking, given that NSW and South Australia, two other jurisdictions that set minimum mandatory non-parole periods as a percentage of the head sentence, do incorporate such 'special circumstances' provisions.

B *Legislatures and Parole Boards*

Across Australia, parole boards have been established to make decisions about the release of prisoners back into the community after the expiration of a non-parole period set either legislatively or judicially. These decisions are often complex and difficult and, when they sometimes prove to be erroneous, as evidenced by further offending with serious consequences, the boards' processes and judgements are commonly brought into question. Legislative responses to high profile failures have seen parole boards being provided with more explicit guidance as to how they should decide individual cases. Other outcomes include restricting their decision-making powers in relation to specific offenders or groups of offenders, removing their powers altogether and reposing these powers in other bodies and, in some cases, second-guessing the boards' decisions. All of these interventions manifest a progressive loss of faith in these independent bodies, an increasing aversion to risk and an extreme sensitivity to what governments perceive to be a growing lack of confidence amongst the community in the criminal justice system, a lack which often produces adverse electoral consequences.

⁸⁸ Justice Margaret McMurdo, 'Sentencing' (Speech delivered at the Queensland Magistrates State Conference 2011, Brisbane, 4 August 2011), cited in Krasnostein, above n 62, 239.

⁸⁹ Sofronoff, above n 23, 105.

⁹⁰ *Ibid.*

⁹¹ Queensland Government, above n 32, Recommendation 7.

1 *Changing the Purposes of Parole*

Like sentencing, the purposes of parole are mixed. They include reducing reoffending, rehabilitating the offender or providing the opportunity to reform, protecting the community, supporting reintegration into the community, providing an incentive for good behaviour in custody, enabling risk management and reducing the costs of imprisonment and prison overcrowding.⁹² Parole serves the interests of both the offender and the community, although, as noted above, the balance changed in the 1970s from the former to the latter.

Until recently, parole legislation did not articulate the criteria which parole boards should apply in deciding whether to release an offender on parole. With an increasing focus on managing risk and assuaging the fears of the community, legislatures have introduced provisions intended to guide parole boards' decision-making. In 2005, the South Australian Parliament introduced a provision to the effect that 'the paramount consideration of the Board when determining an application ... for the release of a prisoner on parole must be the safety of the community'.⁹³ In 2012, the Queensland Minister for Police and Community Safety issued Ministerial Guidelines to the Queensland Parole Board, stating that:

the highest priority for the Queensland Parole Board should always be the safety of the community. The Board should consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole.⁹⁴

The Sofronoff review of parole in Queensland also prioritised public safety, but emphasised the goal of reintegration as an important, albeit subordinate, goal. In Sofronoff's view, '[t]he only purpose of parole is to reintegrate a prisoner into the community before the end of a prison sentence to *decrease the chance that the prisoner will ever reoffend*. Its only rationale is to keep the community safe from crime'.⁹⁵ In terms of balancing the rights of prisoners with considerations of community safety, he took the position that what 'best serves community safety is also in the best interests of the prisoner'.⁹⁶

The increased emphasis on risk was also reflected in the VSAC's review of parole, which recommended that the Victorian Adult Parole Board should adopt a statement to the effect that

the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion.⁹⁷

This statement was adopted and amplified in 2013 in the *Corrections Amendment (Parole Reform) Act 2013* (Vic). Consequently, the *Corrections Act 1986* (Vic) now states that '[t]he Board must give paramount consideration to the safety and protection of the community in determining whether to *make or vary a parole order, cancel a prisoner's parole or revoke the*

⁹² NSWLRC, above n 20, 17. See also Bartels, above n 34.

⁹³ *Correctional Services (Parole) Amendment Act 2005* (SA); see now *Correctional Services Act 1982* (SA) s 67(3a). See also *Sentence Administration Act 2003* (WA) s 5B; Bartels, above n 34.

⁹⁴ *Parole Orders* (2012) (Qld) cll 1.2–1.3.

⁹⁵ Sofronoff, above n 23, 1 (emphasis in original).

⁹⁶ *Ibid.*

⁹⁷ VSAC, above n 13, 4.

cancellation of parole'.⁹⁸

Along similar lines, the NSWLRC recommended in 2015 that the parole legislation be amended to state that: '[t]he primary purpose of parole is to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of offending'.⁹⁹ The NSW Government recently passed the *Parole Legislation Amendment Act 2017* (NSW), which requires the NSW State Parole Authority (SPA) not to make a parole order unless it is satisfied that it is in the interests of the safety of the community, taking into account the risk to the safety of members of the community of releasing the offender on parole; whether the release of the offender on parole is likely to address the risk of the offender re-offending; and the risk to community safety of releasing the offender at the end of the sentence without a period of supervised parole or at a later date with a shorter period of supervised parole.¹⁰⁰

2 *By-passing Parole*

Parole operates within the confines of a sentence imposed by a court which sets the maximum term of imprisonment, beyond which the offender cannot be held in custody, and, in some cases, the minimum term before which the person cannot be considered for release from custody on parole.¹⁰¹ Since the mid-2000s, the fear that certain high-risk offenders, primarily sexual and violent offenders, who present an unacceptable risk of harm might be released into the community, either on parole or at the end of their sentence, has resulted in legislation that relegates parole boards to a secondary role in the management of such offenders.

In 2003, amid concerns that a particular sex offender might re-offend if released into the community at the expiration of his sentence, the Queensland Government passed the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), which created a scheme whereby certain prisoners could be continually detained in custody or under supervised release 'to ensure adequate protection of the community', as well as to provide continuing control, care, or treatment to facilitate their rehabilitation.¹⁰² Several other jurisdictions (NSW, Victoria, Western Australia and the Northern Territory) soon followed suit.¹⁰³ Under these laws, the primary responsibility for making a continuing detention order lies with a court, following an application by the Attorney-General or Director of Public Prosecutions. This application is to be made while an offender is serving a sentence of imprisonment in custody or in the community, including on parole. These provisions effectively override any judicial directions

⁹⁸ *Corrections Act 1986* (Vic) s 73A (emphasis added).

⁹⁹ NSWLRC, above n 20, 27.

¹⁰⁰ See now *Crimes (Administration of Sentences) Act 1999* (NSW) sub-ss 135(1), (2). Following the passage of *Parole Legislation Amendment Act 2017* (NSW), the SPA is also required to consider the risks to the safety of the community before making changes to parole conditions or revoking an offender's parole before their release. The SPA is now required to impose supervision as a condition of all parole orders, although there is scope for exemptions from or suspension of supervision in certain circumstances. Some of these provisions are yet to come into effect.

¹⁰¹ This leaves aside cases of court-ordered parole where offenders can be released into the community without serving any period in custody: see eg Queensland and the discussion above.

¹⁰² *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) sub-ss 3(a), (b).

¹⁰³ See *Serious Sex Offenders Monitoring Act 2005* (Vic), now *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic); *Crimes (Serious Sex Offenders) Act 2006* (NSW), now *Crimes (High Risk Offenders) Act 2006* (NSW); *Dangerous Sex Offenders Act 2006* (WA); *Serious Sex Offenders Act 2013* (NT).

for parole made at the time of sentence or any existing parole orders made by an independent parole authority.

In some jurisdictions, the relevant parole authority has the responsibility for the management of offenders on these orders, but decisions as to discharge from these orders, or their renewal, lie with the courts.¹⁰⁴ In NSW, high risk offenders are managed by the High Risk Offenders Assessment Committee; the SPA does not appear to play any role in this process.¹⁰⁵ In Victoria, serious sexual offenders have thus far been managed by the Detention and Supervision Order Division of the Adult Parole Board. However, following a review chaired by retired Supreme Court justice David Harper in 2015,¹⁰⁶ the Government introduced legislation to create an independent Post-Sentence Authority to replace the Detention and Supervision Order Division of the Adult Parole Board.¹⁰⁷ The Authority will be an independent statutory authority comprising no more than ten people, mostly retired judicial officers but including community representatives. The Adult Parole Board will therefore no longer have a role in the management and supervision of high risk offenders.

The political pressure placed on governments to limit an offender's chances of release has become particularly salient in relation to offenders convicted of terrorist offences. In 2016, the Commonwealth Government amended the *Criminal Code 1995* (Cth) to establish a scheme for the continued detention of offenders sentenced for a terrorist offence who are deemed to pose an unacceptable risk to the community.¹⁰⁸ This move was motivated by political concerns about the risks of terrorism and prisoner radicalisation, as well as calls by the Australian Federal Police to overcome weaknesses in the existing control order regime.¹⁰⁹ The legislation provides for the indefinite detention of terrorist offenders and means parole release will be limited where the offender has not shown signs of having disengaged from violent extremism and having been de-radicalised. What such signs of disengagement and de-radicalisation actually entail, though, is not the subject of any level of consensus among academic researchers or counterterrorism experts, with risk assessment tools largely in their infancy.¹¹⁰ The availability of parole (and, for that matter, bail) will become further limited following the recent national

¹⁰⁴ See eg *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) s 118; see also *Crimes (High Risk Offenders) Act 2006* (NSW) s 13; *Crimes (Administration of Sentences) Act 1999* (NSW) s 160A(1).

¹⁰⁵ *High Risk Offenders Act 2006* (NSW) Pt 4A.

¹⁰⁶ This was precipitated by the murder of a young woman by an offender who was on both bail and a supervision order; see David Harper, Paul Mullen and Bernadette McSherry, *Complex Adult Victim Sex Offender Management Review Panel: Advice on the Legislative and Governance Models under the Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) (2015).

¹⁰⁷ *Serious Sex Offenders (Detention and Supervision) Amendment (Governance) Act 2017* (Vic).

¹⁰⁸ *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth).

¹⁰⁹ See Attorney-General's Department, Submission on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 to the Parliamentary Joint Committee on Intelligence and Security (2016); Matthew Doran, 'Terrorists Could be Detained Indefinitely under Federal Government Proposal' ABC News (online), 25 July 2016 <<http://www.abc.net.au/news/2016-07-25/convicted-terrorists-may-be-jailed-indefinitely-under-new-plan/7657262>>; Charles Miranda, 'Police Demand New "Tool" to Hold Terrorists in Jail, According to Parliamentary Committee', News.com.au (online), 14 October 2016 <<http://www.news.com.au/national/crime/police-demand-new-tool-to-hold-terrorists-in-jail-according-to-parliamentary-committee/news-story/55d974996f6166d538d719cac4edd7ac>>.

¹¹⁰ John Horgan, 'Deradicalization or Disengagement? A Process in Need of Clarity and a Counterterrorism Initiative in Need of Evaluation' (2008) 2(4) *Perspectives on Terrorism* <<http://www.terrorismanalysts.com/pt/index.php/pot/article/view/32/html>>; Andrew Silke (ed), *Prisons, Terrorism and Extremism: Critical Issues in Management, Radicalisation and Reform* (Routledge, 2014).

agreement to establish a presumption against parole for offenders who have demonstrated support for, or have links to, terrorist activity.¹¹¹

3 *Restricting Parole Boards' Discretion: Ad Hominem and Similar Laws*

Legislators' trust in parole authorities' exercise of their discretion is often severely tested in the case of high profile, high risk and/or notorious offenders.¹¹² Fear of the danger posed by individual offenders alleged to be particularly dangerous to the community has led legislators to pass laws specifically aimed at those individuals, generally described as 'ad hominem' laws,¹¹³ or laws that apply to small, readily identifiable groups of people, but who are not specifically named. Such laws are generally regarded as offending the principle that laws should apply equally to all persons. Nevertheless, there have been several cases where governments have passed legislation to ensure that these offenders are not released when they might otherwise have been entitled to be considered for release on parole.

An early attempt to prevent the release from custody of a named person is found in the *Community Protection Act 1990* (Vic), which was specifically directed at Gary David, a person considered to be highly dangerous. The legislation provided that David could not be released from custody pending proceedings in the Supreme Court for his preventive detention. The Act was never put into effect, due to intense public opposition, and lapsed upon David's death in 1993.¹¹⁴

At around the same time, the NSW Government passed the *Community Protection Act 1994* (NSW). This legislation was directed solely at Gregory Kable, who, while not in custody at the time of the legislation, was to be the subject of an application for preventive detention. The legislation was subsequently held to be unconstitutional by the High Court in *Kable v Director of Public Prosecutions (NSW)*,¹¹⁵ on the ground that it damaged the institutional impartiality of the Supreme Court and amounted to a political exercise. However, this would appear to represent a highwater mark in the High Court's objection to such laws, as later preventive detention laws were found by the Court to be constitutional.¹¹⁶

¹¹¹ Council of Australian Governments, 'COAG Meeting Communiqué', 9 June 2017 <<https://www.coag.gov.au/sites/default/files/communique/20170609-communique.pdf>>. See also Michelle Grattan, 'COAG Agrees to New Push on Security After Melbourne Attack', *The Conversation*, 9 June 2017 <<http://theconversation.com/coag-agrees-to-new-push-on-security-after-melbourne-attack-79205>>. This agreement came in the wake of the Khayre case (discussed above n 6). The opaque and possibly political nature of federal parole decision-making is evident in the case of Bilal Khazal, a prisoner sentenced to 15 years imprisonment with a non-parole period of 12 years for terrorist offences. Khazal was denied parole by the federal Attorney-General at what has been described as a 'secret hearing': Chip Le Grand, 'No Parole for Infamous Terror Plotter Bilal Khazal', *The Australian* (online), 1 September 2017, <<http://www.theaustralian.com.au/national-affairs/national-security/no-parole-for-infamous-terror-plotter-bilal-khazal/news-story/f29fe8426c73c76662348fb29d0610d5>>. As noted above, n 12, there is no independent federal parole board.

¹¹² For a recent discussion, see John Pratt and Michelle Miao, *Penal Populism: The End of Reason* (Chinese University of Hong Kong Faculty of Law Research Paper No 2017-02, 2017).

¹¹³ Freiberg, above n 52, 71. These can be contrasted with laws that are of general application.

¹¹⁴ See C R Williams, 'Psychopathy, Mental Illness and Preventive Detention: Issues Arising from the David Case' (1990) 16 *Monash University Law Review* 161; Deidre Greig, *Neither Mad nor Bad: The Competing Discourses of Psychiatry, Law and Politics* (Jessica Kingsley Publishers, 2002).

¹¹⁵ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

¹¹⁶ See *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

In 1974, Kevin Crump and Allan Baker were convicted and sentenced in the NSW Supreme Court to life imprisonment on charges of murder and conspiracy to murder committed in a particularly callous manner. The sentencing judge declined to fix a non-parole period for either offender, remarking that, in this case, life should mean life.¹¹⁷ That observation did not have statutory force at the time it was made, but was given statutory consequence by legislation in 1999 and 2005. Between the time that the offenders were sentenced in 1974 and the time of their appeals to the High Court, the parole legislation was amended on a number of occasions. In *Baker*,¹¹⁸ the High Court held that the changes to parole legislation were not retrospective and that a court taking a past non-release recommendation into account in sentencing was not repugnant to the judicial power. In that case, an ad hominem argument was raised but not determined, as the legislation applied to a class of persons, not a named individual.

In 1997, Crump's life sentence was replaced by the NSW Supreme Court with a minimum term of 30 years and an additional term of imprisonment for the remainder of his life. That made him eligible for release in 2003, but only if the Parole Board made an order to that effect. Subsequent changes to the legislation created more stringent criteria for release on parole, which severely restricted the Parole Board's powers, however Crump still retained a minimal prospect of being released on parole. In 2001, further legislative amendments restricted the Board's discretion by providing that a person who fell into this classification of offender, namely, a serious offender who was the subject of a non-release recommendation, could only be considered for release if they were dying or permanently incapacitated. In Parliament, the government named eight other offenders to whom these provisions would apply. Although this did not amount to ad hominem legislation, as the statute itself did not name the specific offenders, it was clear that it was intended to apply to them and to so restrict the discretion of the Parole Board as to make it almost impossible for them to be released. The High Court held that the law was not constitutionally invalid and that

[t]he power of the executive government of a State to order a prisoner's release on licence on parole or in the exercise of the prerogative of mercy 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.¹¹⁹

Another example of ad hominem laws occurred recently in Victoria. Julian Knight was convicted in 1988 of the murder of seven people, the attempted murder of 46 people and injury to 19 others in the so-called Hoddle Street massacre, and sentenced to life imprisonment, with a non-parole period of 27 years. At the time of sentencing, there was no provision for a sentence of life without parole and it was widely considered by the community that his sentence was too lenient. In May 2014, before Knight's parole eligibility date was reached, the Victorian Government passed legislation specifically naming Knight and stating that the Parole Board must not make a parole order in relation to him, unless an application was made to the Board on his behalf. Furthermore, such an order could only be made if Knight was in imminent danger of dying, or was seriously incapacitated and, as a result, no longer had the physical ability to harm any person and he had demonstrated that he did not pose a threat to the community.¹²⁰

¹¹⁷ *Baker v The Queen* (2004) 223 CLR 513; *Crump v NSW* (2012) 247 CLR 1.

¹¹⁸ *Baker v The Queen* (2004) 223 CLR 513.

¹¹⁹ *Crump v NSW* (2012) 247 CLR 1, 19 (French CJ).

¹²⁰ *Corrections Act 1986* (Vic) s 74AA, introduced by the *Corrections Legislation Amendment Act 2015* (Vic). The Act also provides that the *Charter of Human Rights and Responsibilities Act 2006* (Vic) does not apply to this section.

The purpose of the legislation was to ensure that Knight would never be released on parole and it was clear that the government of the day lacked confidence in the Parole Board to decide whether Knight would in fact pose a threat to the community.

In March 2016, Knight applied to the Board for release on parole, which the Board rejected. An application to declare the legislation invalid was made to the High Court, on the grounds the legislation impermissibly interfered with the sentence imposed by the sentencing judge. Knight also invoked the decision in *Kable* to assert that appointing judicial members to a parole board is incompatible with the exercise of federal judicial power and was contrary to Chapter III of the Constitution. In August 2017, the High Court handed down its decision in *Knight v Victoria*,¹²¹ unanimously ruling that section 74AA of the *Corrections Act 1986* (Vic) did not interfere with sentences imposed by the Supreme Court. As a result, Knight will most likely never be released on parole, due to the highly restrictive criteria that the Board is required to apply. The Court did not find it necessary to decide the second question in this case, determining that this issue was ‘not appropriate for determination’.¹²²

Provisions similar to those that apply to Knight were also introduced in relation to prisoners who murdered police officers. Under section 74AAA of the *Corrections Act 1986* (Vic), which was inserted in 2016, the Parole Board is instructed not to make a parole order in relation to a prisoner with a non-parole period who had murdered a police officer, unless the Board is satisfied of the same criteria as those specified in relation to Knight described above, with subsequent legislation putting the application of this legislation ‘beyond doubt’.¹²³ This measure targeted, but did not name, Craig Minogue, one of three men who exploded a bomb at Melbourne police headquarters in 1986, killing one police officer and injuring 22 people. Minogue was sentenced to life imprisonment and was eligible for parole after 30 years imprisonment. Two other prisoners are in custody for killing police officers.¹²⁴ Peter Norden, a longtime prison chaplain, has argued that police killers should be dealt with by the justice system in the same way as all other prisoners. He added:

The alternative to passing this legislation would be to allow the parole board to make a decision to deny him parole. The parole board is supervised by very experienced Supreme Court and County Court judges and, by passing this legislation, ... the ... government is expressing a vote of no confidence in the adult parole board.¹²⁵

The same lack of confidence is also evident in provisions that permit governments or other bodies to overrule or override the decisions of parole authorities, further diminishing their authority.

¹²¹ *Knight v Victoria* [2017] HCA 29. For discussion, see Lorana Bartels, ‘Sentencing Review 2015–16’, *Criminal Law Journal* (forthcoming).

¹²² *Knight v Victoria* [2017] HCA 29 [6].

¹²³ Victoria, *Parliamentary Debates*, Legislative Assembly, 7 September 2017, 2696 (Lisa Neville). See now *Corrections Legislation Further Amendment Act 2017* (Vic).

¹²⁴ Claire Slattery and Jean Edwards, ‘Police Killers to Be Forced to Serve Full Terms under New Victorian Legislation’, *ABC News* (online), 6 December 2016 <<http://www.abc.net.au/news/2016-12-06/police-killers-to-serve-full-terms-in-victoria-under-new-law/8095090>>.

¹²⁵ *Ibid.*

4 *Overriding Parole Boards*

When establishing parole authorities, parliaments vest exclusive authority in those bodies to decide whether prisoners should be released from custody. Most, but not all, of these authorities are chaired by either serving or retired judicial officers and their decisions are generally not capable of being overridden by governments of the day, although the state may make a submission to a parole authority in relation to some offenders.¹²⁶ The virtue of having parole authorities that are independent of political influence is that they should be able to make their decisions on the grounds specified in the relevant parole legislation and/or policy, and not on the basis of community outrage or concern regarding a particular individual. It is not uncommon, when notorious prisoners are due for consideration for release, that the media, often alerted by correctional or law enforcement staff, draw these cases to public attention and campaign against their release. Governments are then put under pressure to respond. As the foregoing discussion on *ad hominem* and similar laws highlights, governments may respond by passing laws that, although not formally retrospective, have the effect of severely limiting the offenders' chances of release.

In some jurisdictions, governments could, until relatively recently, override parole board decisions to release prisoners without explanation, which had the effect of undermining both judicial and executive decision-making. In South Australia, for a number of years, the Government, through the Executive Council, had the power to veto the Parole Board's decision to release a life sentence prisoner on parole, a power that it had reportedly exercised on 10 occasions over 18 months.¹²⁷ In 2016, this power was removed, with the creation of the new office of Parole Administrative Review Commissioner,¹²⁸ whose function is to review a decision of the Board on the application of the Attorney-General, the Commissioner of Police or the Commissioner for Victims' Rights. There are no formal grounds for review, but the Parole Administrative Review Commissioner must examine the decision on the evidence or material that was before the Board and any further evidence that the Commissioner decides to admit.¹²⁹

In some jurisdictions, certain classes of prisoners are considered to be too politically sensitive or important to be left to a parole authority. In Western Australia, sections 25 and 27 of the

¹²⁶ Parole authorities' decisions regarding parole may be internally reviewed: see eg *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(2); *Corrective Services Act 2006* (Qld) s 196; *Sentence Administration Act 2003* (WA) s 115A; but courts' review of these decisions is generally limited to some form of judicial review on administrative law grounds, see eg Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic). Furthermore, because decisions are exempt from the rules of natural justice, they are not subject to judicial review under the *Administrative Law Act 1978* (Vic). Courts are generally not given the task of reviewing the merits of parole authorities' decisions, see eg *Craig v State of South Australia* [1995] HCA 58; *Attorney-General of New South Wales v Chiew Seng Liew* [2012] NSWSC 1223; *Minister for Corrections NSW v Elomar (No 2)* [2016] NSWSC 1040. A parole authority decision may also be challenged by way of a prerogative writ such as certiorari, mandamus or prohibition, see eg *Murray v NSW State Parole Authority* [2008] NSWSC 962. For general discussion, see Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners have a Right to Fairness before the Parole Board?' (2010) 32 *Sydney Law Review* 437.

¹²⁷ Sheradyn Holderhead, 'Judicial Reforms May End Government's Veto Powers over SA Parole Board Recommendations', *The Advertiser* (online), 30 May 2015 <<http://www.adelaidenow.com.au/news/south-australia/judicial-reforms-may-end-governments-veto-powers-over-sa-parole-board-recommendations/news-story/c88a7dc7271e64bb6143049c1e3e0f43>>.

¹²⁸ The first Commissioner appointed is retired Supreme Court judge David Bleby QC.

¹²⁹ See *Correctional Services (Parole) Amendment Act 2015* (SA), which introduced *Correctional Services Act 1982* (SA) ss 77A–77P.

Sentence Administration Act 2003 (WA) specify that, in cases where life sentences for murder or an indefinite imprisonment were imposed prior to 1996, the Governor, rather than the Prisoners Review Board, has the power to parole a prisoner. In such cases, the Governor will usually act on the advice of the relevant Minister, who must receive a report from the Prisoners Review Board on the matter. Prisoners denied parole in these circumstances receive a continued three year review. Recent high profile instances of this include the Governor's rejection of two applications for parole release for the 'Greenough axe murderer', William Patrick Mitchell.¹³⁰ The issue gained attention again in February 2017, in the lead-up to the Western Australian election, with Labor, then in Opposition, proposing to abolish the three year parole review entirely for some prisoners.¹³¹ Labor subsequently won the election, but this issue does not appear to have come before the Parliament yet.

5 Two-tier Consideration of Parole and Enhanced Parole Panels

A lack of trust in parole boards is also evidenced by processes introduced in some jurisdictions which require decisions in relation to some classes of offenders to be reviewed or reconsidered. Prisoners who have been convicted of sexual offences or serious violent or similar offences may be required to be considered first by a parole board and then by a review committee.

In Victoria, a two-tier system was adopted in 2014 for certain serious offenders, by establishing the Serious Violent Offender or Sexual Offender Parole Division of the Parole Board ('SVOSO') to consider the recommendations of the Board's other panels to release these offenders on parole.¹³² In 2017, the *Correctional Legislation Miscellaneous Amendment Act 2017* (Vic) was passed to extend these provisions to the offences of terrorism, foreign incursion offences, home invasion, carjacking and aggravated carjacking.¹³³ In Queensland, the Government has implemented Sofronoff's recommendation that, for certain classes of prisoners, the Parole Board must be constituted by five, rather than three, members, including the President or Deputy President of the Board, a professional member, a probation and parole officer, a police officer and a community member.¹³⁴ In NSW, the decision to release serious offenders rests with the SPA, but it needs to provide written reasons where it rejects the advice of the Serious Offenders Review Council, whose functions include providing advice to the SPA on the parole release of serious offenders.¹³⁵

¹³⁰ Sarah Taillier, 'Greenough Axe Murderer William Patrick Mitchell Loses Fresh Parole Bid', *ABC News* (online), 21 October 2016 <<http://www.abc.net.au/news/2016-10-21/greenough-axe-murderer-william-patrick-mitchell-loses-parole-bid/7956370>>.

¹³¹ Tim Clarke, 'Labor Pledges To Crack Down On Parole Considerations For Serial Killers', *Perth Now* (online), 16 February 2017 <<http://www.perthnow.com.au/news/waelection/labor-pledges-to-crack-down-on-parole-considerations-for-serial-killers/news-story/75dc4a7b77002c0174de1ccb18830549>>.

¹³² See eg *Corrections Amendment (Further Parole Reform) Act 2014* (Vic) and *Corrections Act 1986* (Vic) s 74AAB. The SVOSO is comprised of the Chair of the Parole Board, one full- or part-time member of the Board and other members of the Board selected by the Chair: *Corrections Act 1986* (Vic) s 74AAB(1).

¹³³ See *Correctional Legislation Miscellaneous Amendment Act 2017* (Vic).

¹³⁴ Sofronoff, above n 23, Recommendation 45. See now *Corrective Services Act 2006* (Qld) s 234, introduced by the *Corrective Services (Parole Board) and Other Legislation Amendment Act 2017* (Qld).

¹³⁵ See *Crimes (Sentence Administration) Act 1999* (NSW) ss 152, 197(1)(b).

IV ENHANCING THE ROLE AND INTERESTS OF VICTIMS

A *Victims' Voices*

Victims of crime have played an increasingly important role in criminal justice policy and practice, particularly since the 1960s. All Australian jurisdictions now provide for victim impact statements to be provided to courts at the time of sentence.¹³⁶ In addition, parole boards often include victim representation, although this is not necessarily required by statute.¹³⁷ Victims may be entitled to information about prisoners in custody through inclusion on a victims' register¹³⁸ or otherwise¹³⁹ and to make submissions to a board to be considered when deciding whether to release an offender on parole.¹⁴⁰ Such submissions may include the victim's views as to the effect of the offender's release on that victim and their family¹⁴¹ and on the terms and conditions of release. In its 2015 report on parole, the NSW Law Reform Commission¹⁴² recommended that registered victims:

- be given sufficient opportunity to make oral submissions to the SPA;
- should have the right to access documents that show the steps an offender has taken towards rehabilitation;
- be kept informed about the progress of decision-making;
- be notified that the offender has been granted parole; and
- be provided with a copy of the offender's parole conditions, or information where s/he has been refused parole.

It also recommended that the SPA should indicate, in cases where parole was refused, when the offender is likely to be next considered for parole. The NSW Government recently passed legislation 'to provide for notice to be given to registered victims of an adult offender of parole ... an opportunity for victims to make submissions in response and to require or enable other information relating to an adult offender to be given to registered victims of the offender'.¹⁴³

In another step toward informing victims and the general public more broadly, some jurisdictions have made some version of parole release decisions public. For example, the

¹³⁶ See *Crimes Act 1914* (Cth) s 16AAA; *Criminal Law (Sentencing) Act 1988* (SA) s 7A; *Sentencing Act 1991* (Vic) ss 8K–8S; *Penalties and Sentences Act 1992* (Qld) ss 179I–179N; *Sentencing Act 1995* (NT) ss 106A–106B; *Sentencing Act 1995* (WA) ss 24–26; *Sentencing Act 1997* (Tas) s 81A; *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 26–30; *Crimes (Sentencing) Act 2005* (ACT) ss 47–53.

¹³⁷ Sofronoff thought it desirable that a victims' group representative be on the Parole Board: Sofronoff, above n 23.

¹³⁸ See eg *Correctional Service Act 1982* (SA) ss 5, 85D; *Corrections Act 1986* (Vic) ss 30A–30C; *Corrections Act 1997* (Tas) s 87A; *Crimes (Administration of Sentences) Act 1999* (NSW) s 256; *Crimes (Sentence Administration) Act 2005* (ACT) ss 216, 216A; *Corrective Services Act 2006* (Qld) s 320.

¹³⁹ *Sentence Administration Act 2003* (WA) s 97D(2).

¹⁴⁰ *Correctional Service Act 1982* (SA) s 77(1)(d); *Corrections Act 1986* (Vic) ss 74A, 74B; *Crimes (Administration of Sentences) Act 1999* (NSW) s 68 (only in respect of serious offenders); *Sentence Administration Act 2003* (WA) s 5C; *Crimes (Sentence Administration) Act 2005* (ACT) ss 123, 124; *Corrective Services Act 2006* (Qld) s 188(3)(c).

¹⁴¹ See eg *Correctional Services (Parole) Amendment Act 2005* (SA); see now *Correctional Service Act 1982* (SA) s 77(1)(d).

¹⁴² NSWLRC, above n 20.

¹⁴³ Explanatory Memorandum, *Parole Legislation Amendment Bill 2017* (NSW) 2. See now *Crimes (Administration of Sentences) Act 1999* (NSW) s 256A.

Parole Board of Tasmania has published its decisions online since 2002. The Prisoners Review Board of Western Australia has published its decisions for release and cancellation online since 2007, while the NSW SPA has published a small number of high profile decisions since 2008.¹⁴⁴

B *No Body, No Parole Laws*

The most recent wave of reforms that reflect concern for victims of crime and affect a prisoner's eligibility for parole has been termed 'no body, no parole' legislation. The emotive appeal of these laws is clear and its appeal to victims and the general public is obvious. As Sofronoff observed:

Withholding the location of a body extends the suffering of victims['] families and all efforts should be made to attempt to minimise this sorrow.

As a matter of theory, such a measure is consistent with the retributive element of punishment. A punishment is lacking in retribution, and the community would be right to feel indignation, if a convicted killer could expect to be released without telling what he did with the body of the victim. The killer's satisfaction at being released on parole is grotesquely inconsistent with the killer's knowing perpetuation of the grief and desolation of the victim's loved ones.¹⁴⁵

'No body, no parole' laws were first enacted in South Australia in 2015,¹⁴⁶ followed in 2016 by Victoria and the Northern Territory. These laws require a parole authority to take into account an offender's cooperation with, or assistance to, authorities with respect to disclosing the whereabouts of the deceased's body. In South Australia, these laws provide that a parole board must not order that a prisoner serving a sentence of life imprisonment for an offence of murder be released unless satisfied that the prisoner has cooperated in the investigation of the offence (whether the cooperation occurred before or after the prisoner was sentenced to imprisonment).¹⁴⁷ The Northern Territory law¹⁴⁸ added a provision that extends these requirements to cases where a prisoner had been released on parole, their parole was cancelled, and the Board is subsequently considering whether to make a further parole order. Victoria's version of this law¹⁴⁹ differs in that it applies to the offences of conspiracy to murder,¹⁵⁰ accessory to murder or manslaughter, as well as murder, and is not restricted to sentences of life imprisonment.¹⁵¹

In his inquiry into parole, Sofronoff considered whether similar legislation ought to be introduced in Queensland, ultimately recommending that the Queensland Government should

¹⁴⁴ For discussion, see Bartels, above n 34.

¹⁴⁵ Sofronoff, above n 23, 234.

¹⁴⁶ See *Correctional Services (Parole) Amendment Act 2015* (SA), now *Correctional Services Act 1982* (SA) s 67(6).

¹⁴⁷ To that extent, this provision is wider than a 'no body, no parole' law, as it applies to cooperation more generally, whenever it occurs. Indeed, Sofronoff noted that the South Australian legislation 'was described in parliament during the Second Reading debate as being better known as a 'no cooperation, no parole' system': Sofronoff, above n 23, 234.

¹⁴⁸ *Parole Amendment Act 2016* (NT), now *Parole Act* (NT) s 4B.

¹⁴⁹ *Justice Legislation Amendment (Parole Reform and Other Matters) Act 2016* (Vic), now *Corrections Act 1986* (Vic) s 74AABA.

¹⁵⁰ It should be noted that, in the case of conspiracy to murder, there may in fact be no murder and therefore no body.

¹⁵¹ In Victoria, the maximum sentence for murder is life imprisonment, which can be imposed with or without a non-parole period; a court can also impose a sentence of a fixed term with or without a non-parole period.

introduce legislation like 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 offender on parole unless satisfied that the offender has cooperated in the investigation of the offence. The *Corrective Services (No Body, No Parole) Amendment Act 2017* (Qld) was passed unanimously by the Queensland Parliament in August 2017, at which time amendments to include striking causing death, interfering with a corpse, and accessory after the fact to manslaughter were included in the legislation.

Electorally appealing as these laws may be, they run counter to current sentencing laws and undermine the sentencing judge's decision. Traditionally, an offender's cooperation with, or assistance to, authorities has been a significant factor taken into account in sentencing. The courts have generally held that failing to disclose the whereabouts of the deceased's body may only amount to the absence of mitigation, rather than being an aggravating factor.¹⁵² Failure to reveal the whereabouts of a body may indicate a lack of remorse or that the offender has reduced prospects of rehabilitation, but is generally not considered to be relevant in assessing the objective gravity of the offence itself.¹⁵³ Requiring an accused to reveal the whereabouts of a victim's body has been regarded as being:

tantamount to treating the accused's conduct of his or her defence as an aggravating factor; and ... it is no longer permitted to take that view. An accused is entitled to conduct his or her defence within the bounds of the law and should not be prejudiced in the exercise of that right.¹⁵⁴

The 'no body, no parole laws' have the effect of superseding the judge's original decision and possibly extending the offender's sentence by many years. In relation to a life sentence with a non-parole period for murder, this provision effectively turns the sentence into one of life imprisonment which may have the paradoxical result of judges imposing a less severe sentence, such as one with a determinate head sentence instead of life imprisonment, to avoid this consequence. The length of the sentence and the parole period should be set by a judge at the time of sentence, taking into consideration all relevant factors, including the offender's cooperation with law enforcement authorities and remorse, factors that are known at the time of sentence. Parole decisions should generally respect the decisions of the court and should only take into account post-sentence behaviour if it relates to the risks posed by an offender should they be released into the community. Using parole as a coercive post-sentence tool could be regarded as effectively constituting a post-facto punishment, a form of double jeopardy.

V CONCLUSION

In recent years, parole has attracted an unprecedented amount of law making in most Australian states and territories, often spurred on by high profile murders or other violent offences committed by parolees. The resulting inquiries into parole systems have produced a volatile and somewhat contradictory¹⁵⁵ mix of penal policies and legislative provisions. The longer term consequences of the changes are yet to be realised. Certainly, some of the recommendations and legislative changes are intended to remedy patent flaws in existing systems — for example, efforts to increase the diversity of boards by requiring Aboriginal and Torres Strait Islander

¹⁵² *R v Cavkic (No 2)* [2009] VSCA 43. See also Freiberg above n 52, 414.

¹⁵³ *R v Wilkinson (No 5)* [2009] NSWSC 432; *R v Brougham (No 2)* [2015] SASCFC 127.

¹⁵⁴ *R v Cavkic (No 2)* [2009] VSCA 43 [134] (Vincent and Nettle JJA and Vickery AJA).

¹⁵⁵ O'Malley, above n 36.

members,¹⁵⁶ attempts to manage board members' caseloads, designing training programs for new board members,¹⁵⁷ and efforts to expand the quality and reach of re-entry services.¹⁵⁸ However, many of the other changes reflect a shift in a different direction. Our review of the recent swathe of reforms reveals an underlying political response that shows an aversion to risk, coupled with a desire to give succour to victims and appease a presumed public concern about parole.

Certainly, Australian parole reforms need to be viewed within the pervasive context of risk-thinking that has dominated penal policy in many Western democracies in recent years and underpinned rises in imprisonment rates in these places.¹⁵⁹ Back end criminal justice processes such as parole release have previously been observed to be particularly vulnerable to the 'over caution' that has guided criminal justice policy in recent decades.¹⁶⁰ Simon has described risk-thinking in parole release and breach decision-making in the Californian example as a 'waste management model' in which parolees are viewed as a dangerous class of 'life-time correctional clients'.¹⁶¹ While there are points of resistance, the tenor of the recent Australian reforms largely squares with the risk paradigm. Rising imprisonment rates will almost certainly follow in Australian states and territories for at least four reasons. First, more restrictive handling of parole will lead to increases in suspensions and cancellations, which are already associated with 'significant churn through prisons';¹⁶² for example, in 2016, close to one-fifth of Queensland prisoners were in custody as a result of parole suspension. Second, reductions in conditional release are likely to be associated with rising recidivism rates, since evidence suggests that conditional release from prison provides the necessary components of effective reintegration in the form of supervision and supportive programming that are not possible through full term or unconditional release.¹⁶³ Third, a reduction in the number of prisoners granted parole as a result of more restrictive criteria will mean that more prisoners will be held in custody beyond their earliest eligibility date.¹⁶⁴ Finally, an increasing number of prisoners who are eligible for parole are choosing not to apply for parole, possibly due to a perception that they are likely to breach parole, which would result in them spending longer in custody in those jurisdictions where 'street time' may not be counted.¹⁶⁵

¹⁵⁶ See Queensland Government, above n 32, Recommendations 39 and 42.

¹⁵⁷ Ibid Recommendation 47.

¹⁵⁸ Ibid Recommendation 33.

¹⁵⁹ Garland, above n 21. See also Cunneen et al, above n 13. The same pressures are also evident in relation to bail policy, where there have been many legislative changes in recent years following a number of high profile cases of bail breaches. Remandees now comprise some 33 per cent of the prison population, a considerable increase over recent years: see ABS, above n 1.

¹⁶⁰ Nicola Padfield and Shadd Maruna, 'The Revolving Door at the Prison Gate: Exploring the Dramatic Increase in Recalls to Prison' (2006) 6 *Criminology & Criminal Justice* 329, 339. See also A Keith Bottomley, 'Dilemmas of Parole in a Penal Crisis' (1984) 23 *Howard Journal of Crime and Justice* 24; Roger Hood and Stephen Shute, *Parole Decision-making: Weighing the Risk to the Public* (Research Findings No 114, Home Office, 1999).

¹⁶¹ J Simon, 'Criminology and the Recidivist' in David Shichor and Dale Sechrest (eds), *Three Strikes and You're Out: Vengeance as Public Policy* (Sage, 1996) 24, 26.

¹⁶² Sofronoff, above n 23, 84.

¹⁶³ Wan et al, above n 5. Also see Ilyana Kuziemko, 'How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed-sentence Regimes' (2013) 128 *Quarterly Journal of Economics* 371.

¹⁶⁴ See Parliamentary Accounts and Estimates Committee, Parliament of Victoria, *Hansard*, 14 May 2014, 3, where it was estimated that there were some 600 additional people in prison in Victoria as a result of recent parole reforms.

¹⁶⁵ VSAC, *Victoria's Prison Population 2005 to 2016* (2016) 55.

Many of the recent changes discussed in this article also reflect the greater reluctance of legislatures to rely on courts or parole boards as the final arbiters of sentencing and release powers. In fact, the recent changes mark a further erosion in the authority and power of these two bodies, which will likely result in unintended costs and threats to civil liberties. To be sure, legislatures hold the legitimate authority to decide where sentencing and release powers lie and the recent changes described here are ostensibly intended to reflect public wishes. However, our analysis shows that governments at both ends of the political spectrum have supported tougher responses to parole following high-profile parole violations and media reports of community outrage.¹⁶⁶ In addition, Australian public sentiment toward parole appears to be more nuanced than legislatures may expect, with a mix of support for and opposition to correctional policies and practices, including parole.¹⁶⁷

Research has consistently demonstrated that prisoners released to parole supervision are less likely to reoffend than those serving full sentences and released without supervision.¹⁶⁸ Nonetheless, there is also good evidence that changes are required to improve parole systems. In particular, there is a need for increased funding for prison rehabilitation and education programs and re-entry services, as well as social safety nets more generally, including adequate funding for housing, support for people with mental illness and/or substance abuse issues and the availability of employment options for people with a prison record.¹⁶⁹

Parole is an imperfect system. As retired Supreme Court judge, the Hon Dennis Mahoney AO QC noted in his review of the Western Australian parole system, ‘Things will go wrong and people will make mistakes: That is Reality’.¹⁷⁰ Courts will also make mistakes, as will governments. To date, Australian governments have resisted the temptation to abolish parole

¹⁶⁶ Political criticism of parole boards can also be misdirected, with perceived failures in some cases resulting from a lack of communication between relevant authorities, which might help inform parole board decision-making. This was highlighted by the recent case of former Brighton gunman, Yacub Khayre, who, in spite of a history of links to violent extremism, was released on parole. The Victorian Parole Board stated they had not received any information from police or national security agencies about Khayre being on a terror watchlist before releasing him on parole. The failure to share relevant information and intelligence in this case has led to new arrangements whereby parole authorities will be able to access information on offenders from the Australian Security Intelligence Organisation and the Australian Federal Police: see Stephanie Anderson and James Hancock, ‘Parole Board Was “Never told” Brighton Siege Gunman Yacub Khayre Was on Terror Watch List’, *ABC News* (online), 7 June 2017 <<http://www.abc.net.au/news/2017-06-07/adult-parole-board-never-told-brighton-gunman-on-terror-list/8596626>>; Kylar Loussikian, ‘Terrorist Information Sharing: PM Announces New National Security Laws’, *Daily Telegraph* (online), 10 June 2017 <<http://www.dailytelegraph.com.au/news/nsw/terrorist-information-sharing-pm-announces-new-national-security-laws/news-story/ae2256ca4f123fdffb2e10a68dd3881e>>.

¹⁶⁷ See Fitzgerald et al, above n 3.

¹⁶⁸ See eg Wan et al, above n 5; Ostermann, above n 4; Vito, Higgins and Tewksbury, above n 4.

¹⁶⁹ See eg Joan Petersilia, *When Prisoners Come Home* (Oxford University Press, 2003); Margaret Giles, *Study in Prison Reduces Recidivism and Welfare Dependence: A Case Study from Western Australia 2005–2010* (Trends and Issues in Crime and Criminal Justice No 514, Australian Institute of Criminology, 2016); Mindy Sotiri, *An Exploration of Best Practice in Community-based Reintegration Programs for People Leaving Custody in the US and the UK* (Report to the Winston Churchill Memorial Trust of Australia, 2016); Mindy Sotiri and Alex Faraguna, ‘Shown the Exit: A Snapshot of Issues Facing People Leaving Custody in NSW in 2016’ (2016) 29(10) *Parity* 50; Michelle Denton, Michele Foster and Robert Bland, ‘How the Prison-to-Community Transition Risk Environment Influences the Experiences of Men with Co-occurring Mental Health and Substance Use Disorder’ (2017) 50 *Australian and New Zealand Journal of Criminology* 39; Kristofer Bitney et al, *The Effectiveness of Reentry Programs for Incarcerated Persons: Findings for the Washington Statewide Reentry Council* (Washington State Institute for Public Policy, 2017).

¹⁷⁰ Mahoney, above n 35, 15.

completely, but too often they have succumbed to perceived community pressure to restrict parole and the independence and powers of parole authorities, notwithstanding evidence that not all members of the community hold views opposed to parole. Parole, like sentencing, should remain in the hands of impartial and independent bodies free of political influence and legislatures should keep in mind that ultimately, an effectively functioning parole system provides the community with a valuable mechanism for promoting the safety of the community.¹⁷¹

¹⁷¹ Ogloff, above n 33, 2.