Law Council
OF AUSTRALIA

Commonwealth Parole Board Bill 2025 and Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025

Senate Standing Committees on Legal and Constitutional Affairs

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Acknowledgements

The Law Council is grateful to the New South Wales Bar Association for contributing to this submission. We also acknowledge the involvement of the Law Council's National Criminal Law Committee.

Executive summary

The Law Council of Australia strongly supports the establishment of a Commonwealth Parole Board to make independent, risk-informed decisions about the conditional release and management of federal offenders. We therefore welcome the Government's progress in this important area of reform.

While the Law Council supports the passage of the Commonwealth Parole Board Bill 2025 and the Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025, we have identified several areas where we feel the proposed framework can benefit from further attention. These areas relate to:

- the reliance on non-legislative guidelines to set out important procedural aspects of the Parole Board, and the absence of an obligation to consult on the development of such guidelines;
- the absence of a legislatively enshrined right to appear before the Parole Board;
- the absence of a legislatively enshrined right to legal representation and assistance when preparing submissions to the Parole Board and any subsequent appearance;
- the minimum qualifications of the Chair and Deputy Chair, noting the important functions delegated to these positions;
- the need to promote gender equality on the Parole Board and ensure that it consists of individuals with a diverse range of lived experiences, including First Nations people, culturally and linguistically diverse communities, and persons with knowledge or experience of disability; and
- the importance of public reporting on the Parole Board's activities, including information on demographics of parole applicants, and data on federal parole outcomes in relation to offence types.

The Law Council thanks the Committee for its consideration of these matters.

Recommendations

- **The Commonwealth Parole Board Bill 2025 (the CPB Bill) should be amended to require that guidelines developed under section 13 are to be subject to stakeholder consultation and, where appropriate, publicly available.**
- **The CPB Bill should be amended to include an opportunity for offenders to appear at a hearing before the Board where the authority is of the opinion that the information currently before it does not justify releasing the person on parole.**
- **In the alternative, section 23 should be amended to list considerations that must be taken into account when determining whether an interview should be conducted with a person being considered for parole.**
- **The CPB Bill should be amended to include an express recognition of a federal offender's right to legal representation or assistance.**
- **Passage of the Bills must be accompanied by additional funding for the provision of legal assistance for federal offenders interacting with the Commonwealth Parole Board.**
- **Proposed subsection 29(3) should require that both the Chair and Deputy Chair are enrolled as legal practitioners. Consideration should also be given to requiring a minimum level of practising experience in a superior court for a sufficient number of years.**
- **Proposed paragraph 29(4)(b) should include reference to the desirability of ensuring equal gender representation on the Parole Board.**
- **Proposed subsection 29(5) should include reference to individuals with a diverse range of lived experiences, including First Nations people, culturally and linguistically diverse communities, and persons with knowledge or experience of disability.**
- **The CPB Bill should provide that the Parole Board is not bound by the rules of evidence.**
- **The Parole Board annual report should be required to report on further matters, subject to confidentiality and privacy requirements, such as the demographics of parole applicants and data on federal parole outcomes in relation to offence types.**

General comments

1. The Law Council of Australia welcomes the opportunity to provide a submission to the Legal and Constitutional Affairs Legislation Committee's (the **Committee**'s) review of the Commonwealth Parole Board Bill 2025 (the **CPB Bill**) and the Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025, together referred to as 'the **Bills**'.

2. Release on parole engages several connected and important statutory purposes including:

   - the protection of the community;
   - the rehabilitation of the offender; and
   - the reintegration of the offender into the community.[1]

3. These purposes provide essential context for considering the amendments proposed by the Bills. Importantly, while those three purposes cover different ground they interact and, in some respects, overlap. No pre-eminence or priority is given to any one purpose.[2] As Chief Justice French commented in *Hogan v Hinch*, '[r]ehabilitation, if it can be achieved, is likely to be the most durable guarantor of community protection and is clearly in the public interest'.[3]

4. The Law Council has for many years supported the establishment of a Commonwealth Parole Board tasked with making independent, risk-informed decisions about the conditional release and management of federal offenders and other detained persons. Our 2022 Position Paper, *Principles Underpinning a Federal Parole Authority*, continues to set out the Law Council's vies on the key design principles for the Parole Board: namely independence, transparency, procedural fairness, and accountability.[4]

5. The current legislative framework is no longer appropriate given the significant rise in Commonwealth criminal prosecutions and convictions since 1990. Among other things, it provides that the Attorney-General, or their delegate, is the decision maker in relation to an offender's release on parole or licence, and requires parole to be considered only annually following the end of the non-parole period. This legislative framework has been described as 'labyrinthine'.[5]

6. We have long argued that individuals incarcerated for federal offences should have their application for liberty considered in a transparent and accountable manner. This is better supported through the establishment of an independent statutory body with

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1 *Crimes Act 1914* (Cth), s 19AKA.
2 *Khawaja v Attorney-General (Cth)* (2022) 293 FCR 396; [2022] FCA 334 at [15] (Thawley J).
3 *Hogan v Hinch* [2011] HCA 4, [32].
4 Law Council of Australia, 'Principles underpinning a federal parole authority' (Position Paper, November 2022), available at <https://lawcouncil.au/resources/policies-and-guidelines/position-paper-federal-parole-authority>.
5 *R v Carroll* [1991] 2 VR 509 at 514. See also Justice Mark Weinberg, 'The Labyrinthine Nature of Federal Sentencing' (Keynote address, Current Issues in Federal Crime and Sentencing Conference, National Judicial College of Australia and ANU College of Law, Canberra, 11 February 2012).

the power to make parole decisions. An independent Parole Board addresses the risk of perceived political pressure or interference in parole decisions and brings the federal process in line with state and territory jurisdictions.

7. While we support the passage of the Bills, there are aspects of the proposed Parole Board that fall short of our recommended approach. These areas for improvement are outlined in this submission.

8. We note with disappointment the extremely truncated timeframe in which to engage with this inquiry. A public consultation period of six working days between referral and closing of submissions (five for those in Victoria) is unacceptably short and will undoubtedly limit the breadth and quality of feedback received by the Committee from civil society.

9. This timeframe has impeded the Law Council's ability to meaningfully consult with our members, and appropriately scrutinise the Bills for the benefit of the Committee and the Parliament more generally. Noting that it is relatively early in the 48th Parliament, we urge the Committee to take proactive steps to address unreasonable opportunities for consultation that might inhibit future inquiries of the Committee and, in turn, democratic participation in Parliamentary lawmaking.

Feedback on the CPB Bill

Reliance on guidelines

10. Proposed section 13 of the CPB Bill states that the Chair of the Parole Board is empowered to issue guidelines on a range of matters relating to the performance of the Parole Board's functions and procedures. The CPB Bill further states that such guidelines will not be legislative instruments, and may be published if the Chair considers it appropriate to do so.[6]

11. The CPB Bill proposes that guidelines may be issued in relation to important aspects of the Parole Board's procedures, including:

- how the Parole Board is to be constituted when considering particular matters or classes of matters;[7]
- whether or not the Parole Board should conduct an interview for the purposes of making a decision about a federal offender;[8]
- setting higher requirements as to quorum and the default majority voting rule;[9]
- the making of Parole Board decisions without a meeting;[10] and
- arrangements for managing conflicts of interest.[11]

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6 Commonwealth Parole Board Bill 2025 (Cth) sub-ss 13(3) and (4).
7 Ibid para 13(1)(a).
8 Ibid s 23.
9 Ibid subs-s 20(2).
10 Ibid para 21(2)(b).
11 Ibid para 13(1)(d).

12. We note that guidelines developed under the proposed framework require no consultation nor require that they are subject to a review mechanism. Considering the significance of a number of matters delegated to guidance, we submit that there should, at the very least, be consultation requirements set out in the primary legislation.

13. We further note that the Chair has a discretion to make the guidelines public under proposed subsection 13(4). As guidelines will likely establish processes and procedures by which a parole decision is assessed, the Law Council recommends that any guidelines developed under proposed section 13 should be published. It is, however, appropriate that the Chair retain some discretion to publish guidelines relating to internal matters or administrative considerations of the Parole Board.

Recommendation

- **The CPB Bill should be amended to require that guidelines developed under section 13 are to be subject to stakeholder consultation and, where appropriate, publicly available.**

Opportunity to appear before the Parole Board

14. Proposed section 23 of the CPB Bill states that, for the purposes of making a decision about a federal offender, the Parole Board may conduct interviews in accordance with the guidelines (if any). This approach falls short of any right or expectation of a hearing.

15. Our 2022 Position Paper, *Principles Underpinning a Federal Parole Authority*, sets out our view that federal offenders ought to have the opportunity to appear before the Commonwealth Parole Board where the Board is of the opinion that the information currently before it does not justify releasing the person on parole.[12] Hearings need not be lengthy, however they represent a critical opportunity to test material prior to forming decisions and mitigate the risk of conclusions being reached on the basis of misunderstanding or error.

16. The opportunity to attend a hearing is also important noting that decisions of the Parole Board will be subject to narrower grounds for judicial review when compared with state and territory equivalents.[13] For example, we note that New South Wales framework expressly provides for judicial review in circumstances where information relied upon by its parole board is said to be 'false, misleading or irrelevant'.[14] In the absence of a similar provision at the Commonwealth level, we submit that hearings represent a straightforward, pre-emptive mechanism to improve decision making accuracy.

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[12] Law Council of Australia, 'Principles underpinning a federal parole authority' (Position paper, November 2022)

[13] See, e.g., *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5; *Judiciary Act 1903* (Cth) s 39B.

[14] *Crimes (Administration of Sentences) Act 1999 (NSW)* s 155, see also s 176.

17. The opportunity to attend a hearing is an important component of procedural fairness. We therefore consider that it should be included in the primary legislation rather than deferred to guidelines. In our view, parole decisions might be meaningfully improved by amendment to the primary legislation to require an opportunity for persons likely subject to an adverse outcome to appear before the Board.

18. In the alternative, proposed section 23 should set out the considerations that must be taken into account when determining whether an interview with the person being considered for parole ought to be conducted.

Recommendations

- **The CPB Bill should be amended to include an opportunity for offenders to appear at a hearing before the Board where the authority is of the opinion that the information currently before it does not justify releasing the person on parole.**
- **In the alternative, section 23 should be amended to list considerations that must be taken into account when determining whether an interview should be conducted with a person being considered for parole.**

Legal assistance

19. Federal offenders may have significant difficulties in exercising rights and remedies relating to parole without access to legal assistance.

20. The 'Statement of compatibility with human rights' states that the CPB Bill 'does not formally embed procedural fairness requirements or an offender's right to representation'.[15] Instead, 'existing procedural fairness obligations and review avenues will continue to apply, and an offender may engage legal representation or support should they wish to do so.'[16] A similar statement is made in relation to the Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025.

21. The Law Council supports a stronger express recognition, in the primary legislation, of a person's right to be legally represented. As one example, we refer to section 66 of the *Administrative Review Tribunal Act 2024* (Cth).[17]

22. In our view, federal offenders should have access to legal assistance for the provision of submissions to the Parole Board and for representation when appearing before the Board. Legal support should also be provided for individuals seeking judicial review of an adverse decision. In these instances, federal offenders should

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15 Explanatory Memorandum, Commonwealth Parole Board Bill 2025 and the Commonwealth Parole Board (Consequential and Transitional Provisions) Bill 2025 (Cth) [25].

16 Ibid.

17 We expressed some reservations about the removal of legal representatives under this provision in Law Council of Australia, Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs, *Inquiry into the Administrative Review Tribunal Bill 2023 and the Administrative Review Tribunal (Consequential and Transitional Provisions No.1) Bill 2023* (2 February 2024) 22–23, available at <https://lawcouncil.au/resources/submissions/administrative-review-tribunal-bills-2023>.

be provided with information on how to obtain legal assistance, which should extend to representation at any appearance before the Parole Board.

23. We submit that the establishment of the Commonwealth Parole Board should be accompanied by the necessary investment in additional legal assistance funding to assist federal prisoners: to respond to notices of intent to refuse parole; to represent them at any interviews; and, if necessary, to challenge adverse decisions.

24. This position reflects the Law Council's longstanding *Policy Statement on Rule of Law Principles* which provides that everyone should have access to competent and independent legal advice.[18]

25. We note that extending the length of incarceration in situations where parole may be suitable represents a significant cost to the public. These costs are likely to be minimised through the appropriate provision of legal assistance, resulting in overall savings to government. Benefits of legal representation include improving a parole applicant's ability to:

    - provide all relevant information and make more robust planning at first instance;
    - respond to an adverse comments letter from a prison within the three weeks that is ordinarily given; and
    - request a reconsideration when circumstances change rather than waiting for the next scheduled 12-month review.

Recommendations

- **The CPB Bill should be amended to include an express recognition of a federal offender's right to legal representation or assistance.**
- **Passage of the Bills must be accompanied by additional funding for the provision of legal assistance for federal offenders interacting with the Commonwealth Parole Board.**

Qualifications of the Chair and Deputy Chair

26. Proposed subsection 29(3) states that at least one of the Chair or the Deputy Chair must be enrolled as a legal practitioner, and has been so enrolled for at least 5 years. While it is appreciated that this approach seeks to ensure that at least one full-time member has recognised legal skills, this may result in the Chair not having a legal qualification or not being enrolled as a legal practitioner. In our view, given the important functions delegated to the Chair, including on the issuing of guidelines as discussed above, it is preferable to require that the Chair have adequate legal qualifications and experience.

27. Further, both the Chair and Deputy Chair are empowered to make significant decisions relating to the Parole Board, and the Deputy can assume the Chair's

[18] Law Council of Australia, *Policy Statement: Rule of Law Principles* (March 2011), available at <https://lawcouncil.au/resources/policies-and-guidelines/rule-of-law-principles>.

responsibilities in a number of circumstances. As such, it is our strong preference that both the Chair and Deputy Chair are legally qualified.

28. While we appreciate that the 5-year period of enrolment requirement exists in other contexts, including as an eligibility for appointment to the High Court of Australia,[19] we are concerned that there is insufficient regard to practice experience in federal and state criminal law and parole matters. Consideration should be given to requiring a minimum level of practising experience in a superior court for a sufficient number of years (e.g., 10 years), in addition to enrolment as a legal practitioner.

29. The Law Council observes that these qualifications represent minimum standards of attainment and implores the government to carefully consider the character, merit and community standing of future appointments to the Board. Ensuring that all appointment are persons who, in addition to meeting qualification requirements also possess demonstrated leadership qualities, seniority or stature in their field of endeavour, probity, and the vision and the stewardship capacity to build and guide new organisations is vitally important to the success of the Commonwealth Parole Board.

Recommendation

- **Proposed subsection 29(3) should require that both the Chair and Deputy Chair are enrolled as legal practitioners. Consideration should also be given to requiring a minimum level of practising experience in a superior court for a sufficient number of years.**

Composition of the Parole Board

30. Proposed subsection 29(4) of the CPB Bill states that, in recommending the appointment of the members of the Parole Board, the Minister must ensure that the Board, taken as a whole:

    - possesses an appropriate mix of qualifications, experience and knowledge, having regard to the functions of the Parole Board; and
    - reflects as closely as possible the composition of the community at large.

31. Proposed subsection 29(5) then sets out an inexhaustive list of qualifications, experience or knowledge that a person may possess to be considered for recommendation for a position on the Parole Board. While this statutory guidance is welcome, the Law Council suggests that express reference could be added to individuals with a diverse range of lived experiences, including First Nations people, culturally and linguistically diverse communities, and persons with knowledge or experience of disability. Given that subsection 29(5) is inexhaustive, such an addition might better communicate the value of relevant lived experience or knowledge in the absence of a direct link to an established profession or field of study.

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[19] *High Court of Australia Act 1979* (Cth) s 7(2).

32. More generally, the membership of the Parole Board should reflect the demographic diversity of the community. To this end, regard should be had to ensuring equal representation of women, and community representation should include members who are representative of Australia's First Nations and multicultural population.

Recommendations

- **Proposed paragraph 29(4)(b) should include reference to the desirability of ensuring equal gender representation on the Parole Board.**
- **Proposed subsection 29(5) should include reference to individuals with a diverse range of lived experiences, including First Nations people, culturally and linguistically diverse communities, and persons with knowledge or experience of disability.**

Exclusion of rules of evidence

33. While an administrative decision-making body is not generally bound by the 'rules of evidence', it would be preferable for the Bills to expressly exclude the application of the rules of evidence. In this respect, for example, section 52 of the *Administrative Review Tribunal Act 2024* (Cth) provides that the Administrative Review Tribunal is not bound by the rules of evidence, but may inform itself on any matter in such manner as it considers appropriate.

34. Excluding the application of the rules of evidence affords bodies making administrative decisions, such as those proposed to be made by the Parole Board, a greater level of flexibility—their decisions are still based upon evidence that has rational probative force, and they can deliver natural and substantive justice. We note that Schedule 1, Part 2, subsection 11(3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) expressly states that the NSW State Parole Authority 'is not bound by the rules of evidence'.

Recommendation

- **The CPB Bill should provide that the Parole Board is not bound by the rules of evidence.**

Reporting

35. Proposed section 44 of the CPB Bill provides that the Chair must report annually on the Parole Board's activities during the period. This will extend to reporting on:

    - the activities of the Parole board during the financial year in relation to its functions;
    - a description of the caseload of the Parole Board during the financial year; and
    - any emerging issues relating to the functions of the Parole Board.

36. The Law Council strongly supports this reporting requirement, and the subsequent obligation for the Minister to table the report within 15 sitting days of receiving it. This reporting process will be essential for transparency and accountability, and is important for organisations that may need to determine the need for the provision of assistance and funding.

37. However, to ensure the Parole Board reporting is of sufficient detail, we submit that the CPB Bill should further prescribe matters for reporting, subject to confidentiality and privacy requirements, including information on the demographics of parole applicants, and data on federal parole outcomes in relation to offence types.

Recommendation

- **The Parole Board annual report should be required to report on further matters, subject to confidentiality and privacy requirements, such as the demographics of parole applicants and data on federal parole outcomes in relation to offence types.**

Participation by the Secretary of the Attorney-General's Department

38. The Secretary of the Attorney-General's Department may participate as a member of the Board in certain circumstances, including where the Chair, Deputy Chair, or a sessional member is not readily available to attend the meeting or participate in making the decision.[20]

    While this may appear to be a practical solution in circumstances where a member of the Board is not available, it may give rise to a perception that the statutory body is not sufficiently independent from the Attorney-General. In such circumstances, it may be appropriate instead to utilise acting appointments under proposed section 33.

[20] Commonwealth Parole Board Bill 2025 (Cth), s 24.

About the Law Council of Australia

The Law Council of Australia represents the legal profession at the national level; speaks on behalf of its constituent bodies on federal, national, and international issues; promotes and defends the rule of law; and promotes the administration of justice, access to justice, and general improvement of the law.

The Law Council advises governments, courts, and federal agencies on ways in which the law and the justice system can be improved for the benefit of the community. The Law Council also represents the Australian legal profession overseas, and maintains close relationships with legal professional bodies throughout the world. The Law Council was established in 1933, and represents its constituent bodies:

- the Australian Capital Territory Bar Association;
- the Law Society of the Australian Capital Territory;
- the New South Wales Bar Association;
- the Law Society of New South Wales;
- the Northern Territory Bar Association;
- the Law Society Northern Territory;
- the Bar Association of Queensland;
- the Queensland Law Society
- the South Australian Bar Association;
- the Law Society of South Australia;
- the Tasmanian Bar;
- the Law Society of Tasmania;
- the Victorian Bar Incorporated;
- the Law Institute of Victoria;
- the Western Australian Bar Association;
- the Law Society of Western Australia; and
- Law Firms Australia.

Through these bodies, the Law Council represents more than 107,000 Australian lawyers.

The Law Council is governed by a board of 23 Directors: one from each of the constituent bodies, and six Executive members elected by Directors. The Directors meet quarterly to set objectives, policy, and priorities for the Law Council. Between Directors' meetings, responsibility for the policies and governance of the Law Council is exercised by the Executive members, led by the President. In 2025, the Law Council Executive comprises:

- Ms Juliana Warner, President
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- Ms Elizabeth Shearer, Treasurer
- Mr Lachlan Molesworth, Executive Member
- Mr Justin Stewart-Rattray, Executive Member
- Mr Ante Golem, Executive Member

The Chief Executive Officer of the Law Council is Dr James Popple.

The Law Council's Secretariat is based in Canberra. Its website is www.lawcouncil.au.