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Hon James Wood AO QC  
Chairperson  
NSW Law Reform Commission  
GPO Box 5199  
Sydney NSW 2001

**Re: Inquiry into the parole system in NSW**

Dear Mr. Wood,

Thank you for the opportunity to make a submission concerning the Commission's reference on the parole system in NSW.

In response to the Commission's invitation to make 'additional submissions' on this reference, and with a view to some questions raised in Question Papers 1 and 3, this submission canvasses the significance of Australia's international human rights treaty obligations for the NSW parole system. Australia is a party to the International Covenant on Civil and Political Rights (ICCPR) and the Convention on the Rights of the Child (CRC).<sup>1</sup> These contain relevant human rights guarantees, which are binding on NSW pursuant to the customary international law principle that the conduct of an organ of a territorial unit of a State shall be considered an act of that State.<sup>2</sup> Any reform of the NSW parole system must, therefore, be framed in accordance with these obligations in order to avoid Australia incurring international legal responsibility. Key rights that must be protected in the context of a parole decision are:

- Right to liberty and security of the person (ICCPR Art. 9);
- Right to liberty of movement (ICCPR Art. 12);
- Right to humane treatment in detention (ICCPR Art. 10);
- Right to life (ICCPR Art. 6);
- Right to familial protection and freedom from unlawful attacks upon one's family or home (ICCPR Arts. 17, 23); and

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<sup>1</sup> The ICCPR was signed in New York on 16 December 1966 and entered into force on 23 March 1976. Australia ratified this treaty on 13 August 1980. See 23 *Australian Treaty Series* [1980]. The CRC was signed in New York on 20 November 1989 and entered into force on 2 September 1990. Australia ratified the CRC on 16 January 1991. See 4 *Australian Treaty Series* [1991].

<sup>2</sup> International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001, Supplement No. 10 (A/56/10), chp.IV.E.1, Article 4, available at [http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9\\_6\\_2001.pdf](http://legal.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf) (accessed 7 November 2013); *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, judgment of 26 February 2007, *ICJ Reports 2007* 43, [385].



- The obligation to give primary consideration to children's best interests (CRC Art. 3).

#### **Retention and objectives of parole (Q.1.1)**

Parole should be retained, in line with Australia's treaty obligations. Art.10(3) of the ICCPR provides that 'the penitentiary system shall comprise treatment of prisoners the essential aim of which shall be their reformation and social rehabilitation'. If it is accepted that parole establishes a framework for the supervision and support of offenders on their initial return into the community,<sup>3</sup> as well as providing incentives for prisoners to reform during incarceration, then the obligation in Art. 10(3) would be best met by retaining parole in NSW.

The objectives of the NSW parole system should be reformation and social rehabilitation of prisoners. As noted above, ICCPR Art. 10(3) provides that this shall be the 'essential aim' of any State party's penitentiary system. Art. 10(1) requires, further, that parolees be treated with humanity and with respect for their inherent dignity.

Public safety objectives surrounding the parole system may also be framed in terms of ICCPR rights. Individuals in the community into which parolees are released have the right to life and security of person (Arts. 6(1) and 9(1)) and to familial protection and freedom from unlawful attacks upon one's family or home (Arts. 17 and 23(1)). Pursuit of these objectives would suggest that the NSW parole system should promote reduced recidivism through the creation of viable community reintegration pathways for offenders and the provision of appropriate post-release support.

The NSW parole system should be designed with the objective of ensuring simultaneous regard for all the aforementioned rights, without derogating from the 'essential' rehabilitative aim prescribed in ICCPR Art 10(3). The ICCPR requires that States Parties 'adopt legislative, judicial, administrative, educative and other appropriate measures in order to fulfil their legal obligations'.<sup>4</sup>

#### **Considerations which should inform the parole decision (Q. 3.2 and 3.3)**

Legislative standards and institutional practice surrounding the grant or refusal of parole must be informed by Australia's human rights treaty obligations. Aside from the need to work towards reformation and social rehabilitation of the offender and ensure protection of the rights of the broader community, mentioned above, regard should be had in any parole decision to the rights of members of a prospective parolee's family, especially those of any children for whom the parole applicant is a significant figure.

Australia is required to prioritise children's best interests under the CRC in 'all actions concerning children'. The expert committee mandated by treaty participants to supervise CRC implementation has advised that this extends to 'all decisions and actions that directly or

<sup>3</sup> Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners have a Right to Fairness before the Parole Board?' (2010) 32 *Sydney Law Review* 437, 437.

<sup>4</sup> Human Rights Committee, *General Comment No. 31* (2004), available at <http://www2.ohchr.org/english/bodies/treaty/comments.htm> at [7] (accessed 7 November 2013).

indirectly affect children'. The committee indicates that 'detailed procedures' to ensure this are appropriate wherever a decision will have a 'major impact' on a child.<sup>5</sup>

Standards surrounding parole decisions must also ensure that the ICCPR Art. 17(1) protection against 'arbitrary or unlawful interference' with privacy or family is upheld. Interference with a prospective parolee's family or privacy may be arbitrary despite being lawful, if that interference is inconsistent with ICCPR aims or otherwise unreasonable. The expert committee charged with supervising States' performance of their ICCPR obligations (the UNHRC) has declared:

The introduction of the concept of arbitrariness [in ICCPR Art. 17(1)] is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.<sup>6</sup>

In considering Art 17(1) protection, the UNHRC noted that:

[T]he requirement of reasonableness...impl[ies] that any interference...must be proportional to the end sought and be necessary in the circumstances of any given case.<sup>7</sup>

Thus, legislation should be designed to ensure that, in considering an offender's parole application, the parole board has reasonable regard to the circumstances of the applicant's individual case, including the implications of any refusal or grant for the applicant's family and the best interests of any children concerned. Any refusal of parole must be conditional upon a context-specific finding of necessity and proportional to the right-protecting end sought by that decision.

### **Procedural fairness surrounding parole decisions (Q.3.15, 3.16 and 3.17)**

The ICCPR's guarantees of procedural fairness are primarily aimed at individuals following arrest on a criminal charge, during pre-trial detention or while at trial (Arts. 9(2) and (3), 10 and 14). Nonetheless, offenders before a parole board do benefit from the right not to be subject to arbitrary detention. Protection against arbitrary detention arises out of the ICCPR's guarantees of the right to liberty (Art. 9(1)) and liberty of movement (Art 12(1)). Affording parole applicants procedural fairness would protect against their arbitrary detention.

According to the UNHRC, lawful detention may be arbitrary if it is inappropriate, unjust, unreasonable or lacks predictability.<sup>8</sup> In the context of lawful detention of a non-citizen, the same committee has concluded that:

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<sup>5</sup> CRC, above n 1, Art. 3; Committee on the Rights of the Child, *General Comment No. 14* (2013), available at <http://www2.ohchr.org/english/bodies/crc/comments.htm> at [19]-[20] (accessed 7 November 2013).

<sup>6</sup> Human Rights Committee, *General Comment No. 16* (1988), available at <http://www2.ohchr.org/english/bodies/treaty/comments.htm> at [4] (accessed 7 November 2013).

<sup>7</sup> *Toonen v Australia* Communication No 488/1992, UN Doc CCPR/C/50/D/488/1992 at [8.3].



in order to avoid characterisation of arbitrariness, detention should not continue beyond the period for which the State can provide appropriate justification... the State party [must] demonstrat[e] that, in light of the [detainee's] particular circumstances, there were no less invasive means of achieving the same ends.<sup>9</sup>

This interpretation of arbitrariness has been endorsed in Australia by the full Federal Court in *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri*.<sup>10</sup> That case concerned the detention of an asylum seeker. Nonetheless, it is submitted that these authoritative interpretations of the effect of ICCPR guarantees against arbitrary detention are applicable to any continuance of detention through parole refusal.

It is our opinion that appropriate, just, reasonable, predictable and non-arbitrary decision-making, consistent with Australia's international legal obligations, would be more easily achieved if procedural fairness were afforded to prisoners at parole hearings.

The key elements of procedural fairness that would protect against arbitrary detention are:

- The right to put a case before the parole board (Q. 3.15);
- Access to the reasons for denying parole (Q. 3.16); and
- The right to appeal against a refusal to grant parole, and seek judicial review (Q. 3.17).

A final relevant procedural matter is unreasonable delay. Art. 9(4) of the ICCPR provides that:

Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

In the United Kingdom, the equivalent provision in Art. 5(4) of the European Convention on Human Rights has been interpreted to protect offenders whose hearing before the parole board was delayed.<sup>11</sup> It is submitted that similar protection against unreasonable delay is owed to parole applicants in Australia pursuant to ICCPR Art. 9(4); legislative standards surrounding parole decision-making should reflect this.

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<sup>8</sup> *Van Alphen v The Netherlands* Communication No 305/1988, UN Doc CCPR/C/39/D/305/1988 at [5.8]; *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 126 FCR 54 at [144].

<sup>9</sup> *Kwok v Australia* Communication No 1442/2005, UN Doc CCPR/C/97/D/144/2005 at [9.3].

<sup>10</sup> *Al Masri*, above n 8 at [152].

<sup>11</sup> For example, *R (Loch) v Secretary of State for Justice* [2008] EWHC 2278.



### **Conclusion**

We note that the second round of Question Papers to be released by the Commission will raise further issues of international law. For example, the ICCPR and CRC impose several obligations on Australia relevant to parole for juveniles. We look forward to making further submissions on these topics. In addition, we would be pleased to elaborate on any of the foregoing matters of international law, should the Commission so request.

Yours sincerely,

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