PRISONERS REVIEW BOARD
WESTERN AUSTRALIA

GPO Box C127
PERTH WA 6839

TELEPHONE: (08) 9423 8700
FACSIMILE: N/A

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

Dear Chairperson

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

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

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

> **66B. Board not to release or recommend release unless prisoner cooperates or victim's remains located**
>
> 1) The Board must not make a release decision, or take release action, in relation to a relevant prisoner in custody for a homicide offence or homicide related offence unless the Board is satisfied that –
>
> a) the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or
>
> b) a member of the Police Force knows the location of the remains of the victim of the homicide offence.

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

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

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

areas of a statutory report to the Attorney General and any recommendations contained therein.

Penalty for murder

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

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

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

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

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

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

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

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

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

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

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

(6A) If the offence is committed by a juvenile offender in the course of conduct that constitutes an aggravated home burglary and the court sentences the offender under subsection (5)(a) but does not impose a term of life imprisonment, it —

(a) must, notwithstanding the Young Offenders Act 1994 section 46(5a), impose either —
(i) a term of imprisonment of at least 3 years; or
(ii) a term of detention under the Young Offenders Act 1994 of at least 3 years, as the court thinks fit; and
(b) must not suspend any term of imprisonment imposed; and
(c) must record a conviction against the offender.

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

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

(6) A court that does not sentence a person guilty of murder to life imprisonment must give written reasons why life imprisonment was not imposed.
[Section 279 inserted by No. 29 of 2008 s. 10; amended by No. 25 of 2015 s. 5.]

Section 90 of the *Sentencing Act 1995* provides that:

(1) A court that sentences an offender to life imprisonment for murder must either —
(a) set a minimum period of —
(i) at least 15 years, if the offence is committed by an adult offender (within the meaning given in The Criminal Code section 1(1)) in the course of conduct that constitutes an aggravated home burglary (within the meaning given in that section); or
(ii) at least 10 years, in any other case, that the offender must serve before being eligible for release on parole; or
(b) order that the offender must never be released.
(2) Any minimum period so set begins to run when the sentence of life imprisonment begins.
(3) A court must make an order under subsection (1)(b) if it is necessary to do so in order to meet the community's interest in punishment and deterrence.
(4) In determining whether an offence is one for which an order under subsection (1)(b) is necessary, the only matters relating to the offence that are to be taken into account are
(a) the circumstances of the commission of the offence; and
(b) any aggravating factors.
[Section 90 inserted by No. 29 of 2008 s. 19; amended by No. 25 of 2015 s. 24.]

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

Under Western Australia's current *Criminal Code*, by section 7 thereof:

7. Principal Offenders

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

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

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

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

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

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

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

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

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

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

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

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

(a) attempting to commit; or

(b) inciting another person to commit; or

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

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

10F. Charge of conspiracy, alternative convictions on

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

(e) committing the principal offence; or

(f) attempting to commit the principal offence; or

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

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

The penalty for conspiring to commit murder is set out in section 558 of the *Criminal Code*:

558. Conspiracy to commit indictable offence

(1) Any person who conspires with another person —

(a) to commit an indictable offence (the principal offence); or

(b) to do any act or make any omission in any part of the world which, if done or made in Western Australia, would be an indictable offence (the principal offence) and which is an offence under the laws in force in the place where it is proposed to be done or made, is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is liable —

(a) if the principal offence is punishable on indictment with imprisonment for life — to imprisonment for 14 years;

(b) in any other case — to half of the penalty with which the principal offence is punishable on indictment.

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

(3) Without limiting subsection (1), the application of subsection (1) extends to a conspiracy under which an offence is to be committed, or an act or omission done or made, by a person other than the persons conspiring with each other.

[Section 558 inserted by No. 4 of 2004 s. 42; amended by No. 70 of 2004 s. 34(6) and (7).]

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

562. Accessory after the fact to indictable offence

(1) Any person who becomes an accessory after the fact to an indictable offence (the principal offence) is guilty of a crime.

(2) A person guilty of a crime under subsection (1) is liable —

(h) if the principal offence is punishable on indictment with imprisonment for life — to imprisonment for 14 years;

(i) in any other case — to half of the penalty with which the principal offence is punishable on indictment.

Summary conviction penalty: for an offence where the principal offence may be dealt with summarily, the lesser of —

(a) the penalty with which the principal offence is punishable on summary conviction; or

(b) the penalty that is half of the penalty with which the principal offence is punishable on indictment.

[Section 562 inserted by No. 4 of 2004 s. 44; amended by No. 70 of 2004 s. 34(8) and (9).]

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

142. Strict security life imprisonment, exercise of Prerogative in case of

If in the exercise of the Royal Prerogative of Mercy an order is made in relation to a person serving a sentence of life imprisonment in respect of which an order has been

made under section 90(1)(b), the Minister must cause a copy of the order and a written explanation of the circumstances giving rise to it to be tabled in each House of Parliament within 15 sitting days of that House after it is made.
[Section 142 amended by No. 29 of 2008 s. 22(3).]

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

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

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

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

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

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

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

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

It is of relevance to point out that the release of a prisoner serving a life sentence for murder under, section 90(1)(b) of the *Sentencing Act 1995*, involves no action by the Board and accordingly would not be controlled by the provisions of the Bill. Moreover, the release under the exercise of the Royal Prerogative of Mercy of a prisoner serving any other sentence for murder, which presumably can arise, will also not be controlled by the provisions of the Bill.

Whilst it will undoubtedly be said that it is the Executive Council which determines a release in the exercise of the Royal Prerogative of Mercy and that the Executive Council will have regard to whether (a) the prisoner has cooperated with a member of the Police Force in the identification of the location, or last known location, of the remains of the victim of the homicide offence; or (b) a member of the Police Force knows the location of the remains of the victim of the homicide offence, the same can apply now to any proposed Executive Council decision to release such an offender to parole, as uniquely in Australia, only in Western Australia, it is also the Executive Council which determines the release of all prisoners serving a life sentence.

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

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

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

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

Empathy
In addition to my comments above, it is important to understand empathy and how it, or lack thereof, is not considered to be a good predictor of risk. Should the Board be required to reject the possibility of release if the whereabouts of the remains of a deceased victim have not been disclosed by the prisoner, then it can be said that the safety of the community is no longer the over-riding or paramount consideration. In such cases, it may be argued that a prisoner has 'demonstrated' a level of empathy for the victim or the family members of a

deceased victim by disclosing the location of remains of the victim. However, the Board has trouble with this notion and the over-reliance, by some, on the presence of empathy when evaluating a prisoner's risk. The Board cautions against an overreliance on a prisoner's empathy as a release consideration and recognises that it does not hold a central motivational role in the adoption of future pro-social behaviour nor is it considered to assure any basis for social change.

Current practice by the Board – statutory reports

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

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

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

- **Violence Risk Scale (VRS):** The VRS is a fourth generation violence risk assessment tool designed to integrate risk, need, responsivity and treatment change factors relevant to violent offenders. It contains both static and dynamic factors, and is used to assess offenders' level of violence risk, identify treatment targets linked to violence and to evaluate an offender's readiness for change. It can also be recoded after treatment to give a quantitative measure of change on identified treatment targets.
- **VRS-SO:** The VRS-SO is also a fourth generation violence risk assessment tool designed to integrate risk, need, responsivity and treatment change factors relevant to sexual offenders. It contains both static and dynamic factors, and is used to assess offenders' levels of risk, identify treatment targets linked to sexual offending and to evaluate an offender's readiness for change.
- **Spousal Assault Risk Assessment Guide (SARA):** The SARA is a clinical checklist of 20 risk factors for spousal assault identified in the empirical literature. The SARA has been found to relate significantly to the risk of spousal assault recidivism.
- **VRAG:** The VRAG is a 12-item actuarial scale widely used to predict risk of violence within a specific time frame following release in violent offenders.
- **Historical Clinical Risk tool (HCR-20):** The HCR-20 assesses the risk of general violence by examining both static and dynamic factors.
- **PCL-R:** The PCL-R (Hare 1991 and 2002) is an observer rating scale of symptoms related to psychopathic personality disorder. The evaluator makes ratings on twenty individual items based on interview and case history information. In short, the PCL-R assesses the extent to which an individual's personality structure conforms to the clinical construct of psychopathy. The score obtained is an important component of other risk assessment tools including "structured professional judgement". The PCL-R score has gradually come to be recognised as a very useful indicator of likely future recidivism for general, violent and, to a lesser degree, sexual offending.

(b) the circumstances of the commission of, and the seriousness of, an offence for which the prisoner is in custody;

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

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

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

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

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

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

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

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

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

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

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

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

prisoner's risk and how these gains may be translated into the community setting and incorporated into any release planning.

(h) the behaviour of the prisoner when subject to any release order made previously;

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

(i) the likelihood of the prisoner committing an offence when subject to an early release order;

Again, psychological assessments provided by the Corrective Services are the primary source of information for the Board when considering this provision.

(j) the likelihood of the prisoner complying with the standard obligations and any additional requirements of any early release order;

The Board is provided with reports from the Community Corrections Officer and psychological reports which address this provision. The Board also considers the prisoner's own written or verbal (via video-link) submission and parole plan.

(k) any other consideration that is or may be relevant to whether the prisoner should be released.

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

Recent history of risk assessments

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

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

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

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

In light of the limitations of relying solely on human judgment to assess risk, second generation risk assessment tools made use of additive point scales (Austin, 1983; Gottfredson, 1987; Hoffman, 1994) and comprised of items relating to such things as

criminal history and mental illness diagnoses (Campbell et al., 2009). As a result, these second generation tools provided the early foundations for more standardised risk assessment tools that were to follow which incorporated into the risk assessment process quantifiable measures of risk. Despite this important advancement, second generation tools were criticised on the grounds that they were largely devoid of theory, and the relative importance of factors (the weights assigned to different factors) included in such risk validation of the COMPAS Risk Assessment Classification assessment tools was still established by professional consensus, rather than through statistical methods (Brennan et al., 2009).

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

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

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

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

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

Furthermore, each of the risk prediction instruments, in terms of their explanation and their practical application, highlights that it is the dynamic factors which are of most relevance when conducting a comprehensive assessment of an offender's level of risk. Yet, it could be

viewed that the current Bill gives a static factor, not a dynamic or changeable one, more weight over any other consideration. When applying the release considerations to a particular prisoner's case, the release considerations may not be considered on their merit as section 66B would be the overriding and ultimate consideration. As outlined, the Bill would ultimately be in conflict with section 5C of the *Sentence Administration Act 2003* (WA) and would create an 'absolute rule' that the Board cannot recommend release on parole unless the remains of the deceased victim are located.

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

Prisoner's incapacity to assist

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

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

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

> **21. Powers of superior courts**
> If an accused is acquitted by a superior court or on appeal of an offence on account of unsoundness of mind, the court —
> (a) if the offence is a Schedule 1 offence — must make a custody order in respect of the accused;
> (b) if the offence is not a Schedule 1 offence — may make an order under section 22 in respect of the accused.

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

> **19. Procedures**
> (1) If the judge who decides that the accused is not mentally fit to stand trial —
> (a) is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit, the judge must make an order under subsection (4); or
> (b) is not so satisfied, the judge must adjourn the proceedings in order to see whether the accused will become mentally fit to stand trial.
> (2) Proceedings may be adjourned under subsection (1)(b) for any period or periods a judge thinks fit but the proceedings must not be adjourned for longer than a total period of 6 months after the finding that the accused is not mentally fit to stand trial.
> (3) If proceedings are adjourned under subsection (1)(b), a judge must make an order under subsection (4) —
> (a) if at any time the judge is satisfied that the accused will not become mentally fit to stand trial within 6 months after the finding that the accused is not mentally fit; or

(b) if at the end of 6 months after the finding that the accused is not mentally fit to stand trial the accused has not become mentally fit.

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

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

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

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

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

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

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

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

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

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

Conclusion

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

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

Yours sincerely,

His Honour Judge Robert Cock QC
CHAIRPERSON
PRISONERS REVIEW BOARD

21 September 2017