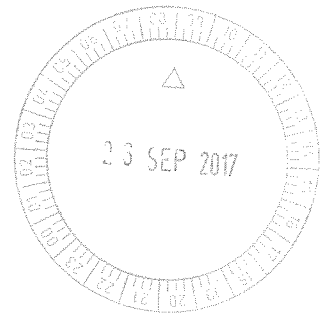




Office of the Director General
Government of **Western Australia**
Department of **Justice**



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Hon. Dr Sally Talbot MLC
Standing Committee on Legislation
GPO Box A11
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Dear Dr Talbot

SENTENCE ADMINISTRATION AMENDMENT BILL 2017

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

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

1. The exact offences for the 12 identified eligible prisoners: 5 of the 12 prisoners were convicted of the offence of murder (s279 of *The Criminal Code*) and the other 7 were convicted of the offence of wilful murder (s278 of *The Criminal Code* – now repealed).
2. Indicate the ability for the Prisoners Review Board (PRB) to take into account the mental capacity of a prisoner in its deliberations – if no ability, should one be introduced into the legislation?

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

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

- The degree of risk the prisoner poses to the community – which will include the extent to which a person's mental capacity affects their risk of reoffending;
- The likelihood of the prisoner complying with the standard obligations and any additional requirements of a release order – to assess whether a prisoner has the mental capacity to understand and comply with a parole order;
- Any remarks made by the Judge during sentencing - this will often include comments relating to mental capacity and also the extent of any cooperation prior to trial as these are both factors the court must take into account when sentencing;
- The prisoner's behaviour in custody, insofar as it may be relevant to determining how they may be likely to behave when released; and

- Whether a prisoner has participated in programs while in custody and if not, the reasons why not – the latter may be that a person has insufficient mental capacity to participate in treatment programs.

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

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

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

3. Provide a list of stakeholders with whom the Department consulted in the development of the Bill: consultation took place with the Prisoners Review Board, Solicitor General, Corrective Services, Western Australia Police, the State Solicitor's Office and Parliamentary Counsel's Office.
4. Were there any changes in the Bill made as a result of consultation? This information is regarded as Cabinet in Confidence and cannot be provided.
5. Consider where there should be a statutory review period: section 122 of the Act has a statutory review period.
6. Would the prisoner get a copy of the police report regarding cooperation?

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

...The considerations which inform the required content are an evident legislative intent that the person the subject of the decision know, with sufficient particularity, the reasons why the decision was made against his or her interests, in order that they can understand why the decision was made, take any remedial action which might encourage a more favourable decision in the future, and exercise the right of review conferred by S115A of the Act. The specificity intended by the legislature is apparent from the express power to withhold some or all of the reasons in some circumstances...

...the person affected by the decision must be made aware of the information that was before the Board at the time it made its decision, in order that he or she can assess whether that information was incorrect or irrelevant or omitted relevant information.

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

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

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

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

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

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

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

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



Dr Adam Tomison
DIRECTOR GENERAL

19 September 2017