

**REVIEW  
OF THE PAROLE SYSTEM IN  
VICTORIA**

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## Chapter 1 – Introduction

I was appointed on 16 May 2013 by the Minister for Corrections and Minister for Crime Prevention, the Hon Edward O’Donohue, to conduct a review of the system of parole in Victoria, pursuant to the following terms of reference:

*The Victorian Government is committed to strengthening the parole system and the management of prisoners on parole. The effectiveness of the Adult Parole Board (the Board) is fundamental to the integrity of the parole system.*

*To ensure the Board continues to operate effectively and is able to respond to current reforms and shifting demands, Mr Ian Callinan, former High Court Judge, will be engaged to:*

- *examine the Board’s current operations, its construct and membership, having regard to best practice and an examination of parole systems operating in other Australasian jurisdictions;*
- *cover the legislative framework, composition of the Board and the role of victims in the parole process;*
- *provide options for increased transparency in Board decision making in Victoria.*

*Mr Callinan will report to the Minister for Corrections by 1 July 2013 [later extended].*

Mr Robert Cornall AO was appointed as senior consultant to assist me, having, as he does, long and varied experience in the law and public administration. Mr Jonathan Horton, a Barrister, was appointed Counsel to assist. Both of these have played a major role in the conduct of the review and the preparation of this report. I was greatly assisted by [REDACTED] who was seconded by the Department of Justice (the Department) to provide support for our endeavours.

The Department, upon my appointment, made a presentation to us, and drew our attention to the relevant legislation and departmental documents explaining the functions and composition of the Adult Parole Board. The Department provided the report of the Sentencing Advisory Council of the Adult Parole System made in March 2012, reviews undertaken within the Department, and a comparison of the parole systems and bodies in the other Australian States and Territories, and some overseas jurisdictions. I was provided with a report made by Professor James Ogloff and the Office of Correctional Services Review in

August 2011, focussing on nine serious re-offending prisoners who committed murder whilst on parole<sup>1</sup>. I also read a range of learned articles on sentencing, parole, its purposes and the experiences of those administering it both in Australia and overseas.

The Parole Board, however, engages in practices and procedures the detail of which are not legislated or necessarily stated in the associated official documents. One document of much importance is the Adult Parole Board's Manual which sets out guidelines for the grant of parole.

I met Justice Curtain, present Chairperson of the Adult Parole Board and other members of it. Those assisting me met the Chair and some of the members of the New South Wales Parole Authority and observed one of its review hearings.

We had discussions with Mr David Provan, the General Manager of the Adult Parole Board on two occasions and attended part of a session of a panel of the Board during hearings of what I would describe as *second* reviews of cancellations of parole. I will say something more about this later.

Our discussions with officers of Victoria Legal Aid who fill the role performed elsewhere by Public Defenders' offices were constructive and followed up by a helpful written submission to us. We also separately consulted Ms Carmel Arthur, a member of the Adult Parole Board, and three experienced members of it, the Hon Bernard Teague AO, Judge David Jones AM and Mr Ross Betts.

A list of the persons we consulted and those who made submissions is **Appendix 1**.


Our reading included the learned papers and texts set out in the bibliography (**Appendix 2**).

The Hon Philip Cummins met us and gave us the benefit of his considerable experience as a senior Barrister, Supreme Court Judge, member of the Parole Board, Chair of the Law Reform Commission and a leading advocate of victims of crime.

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<sup>1</sup> He also had regard to two other cases, because they had attracted media attention. Neither of those offenders was on parole at the time of the murders. One offender committed murder shortly after parole had been granted, but before his release. The other committed murder some six years after the expiry of his parole.

We also spent time with Ms Jan Shuard who is the Commissioner of Corrections Victoria.

 of Caraniche Pty Ltd, a provider of programmes in prison for the reformation of drug and alcohol addicts and for violent and sexual offenders, gave me the benefit of her considerable knowledge of prison affairs and the conduct of offenders both before and after release from detention

Other meetings took place: with the Chief Justice of Victoria, the Honourable Marilyn Warren AC, with the Chief Judge of the County Court, Judge Rozenes AO QC, the Chief Magistrate, the Director of Public Prosecutions, Victoria Legal Aid and Professor Ogloff himself. The Chief Commissioner of Victoria Police and Deputy Commissioner Ashton also made time available to me to discuss their views of the parole system. I had the benefit of a consultation with Mr Len Norman, an experienced manager of prisons and currently General Manager of Barwon Prison, a maximum security prison with a capacity of 417 prisoners. The Hon Frank Vincent AO, a very experienced judge and former Chair of the Board was also consulted. We read and considered written submissions provided by Shine Lawyers who represent a number of victims of serious crime

Mr Cornall and I met representatives of the Victorian Association for the Care and Resettlement of Offenders (VACRO)<sup>2</sup>, the Australian Community Support Organisation (ACSO)<sup>3</sup> and Jesuit Social Services<sup>4</sup> who, under contract with the State and otherwise, are concerned with the improvement of the lives of offenders and potential offenders, the reintroduction of prisoners into society, and the housing, supervision and care of serious sexual offenders upon their release from prison, whether on final release or on parole. All of these people are to be greatly admired. They have dedicated themselves to this under-rewarded and thankless task in a society which does not always understand, and tends to undervalue their work. Misunderstanding often lies in a failure to appreciate that many of the causes of crime are social and that if potential criminals can be diverted into leading different lives, society and its economy will greatly benefit.

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What we heard from these people and staff in the Department deserves repeating. Many offenders suffer mental disabilities, not always self-inflicted. There were sad stories of children affected in the womb by the alcoholism or drug addition of their mothers. They included children from both dysfunctional and drug or alcohol affected households. Violence occurs routinely in some households. Parents and step-parents randomly move in and out of some families. Prison itself can be, for some, a school of crime.

On release, even well-intentioned offenders who are ill-equipped to survive in a non-institutional setting can lapse. The vast majority of offenders reside in three or four of the hundreds of postcodes of Victoria. People in prison for years find a different world when they emerge from its gates. It is rare that they have a family to which they can turn for support. Wives, husbands and partners have moved elsewhere. Some formerly simple face-to-face transactions can only be conducted electronically, a medium with which many of them are unfamiliar. Whether released finally or on parole, many prisoners will be adrift within hours. It is difficult for them to find jobs.

That having been said, it is important to understand that modern prisons are different from the prisons of the past. I had a very useful consultation with Mr Len Norman, the General Manager of the Barwon (High Security) Prison who has had a quarter of a century of experience in the corrections system. He informed me that there are trade shops and other training facilities in most prisons. Prisoners are encouraged to do useful work. For some, it is the first time that they have had to apply themselves over a period, to useful tasks. Those minded to undertake it and others are encouraged to educate themselves, and to avail themselves of external education which can readily be made accessible to them. In prison they are given training for a period before their release on the changed fundamentals of daily existence which they will encounter outside the prison. They do not leave prison destitute. A compulsory savings system is in place ensuring the setting aside of a portion of the small earnings which they make for doing work in prison. On release from a term of about four or five years, an offender will have some \$2,000 to \$3,000 in hand to tide him or her over for at least a short period. ██████ prisoners have also had the advantage before release, either on parole or after serving a full term, of leave from time to time for varying, but generally, short periods to do work or to live in the community.

Mr Norman's long experience is that some persistent male offenders tend to mature at about age 35-40 and do not offend thereafter. Others actually inform him on their release that

they expect to see him again in the near future. He does not doubt that there are some people who are simply incorrigible. [REDACTED]

[REDACTED]

Prisons are expensive to build and run. Crime has increased. Prisons populations are growing<sup>5</sup>. It costs much less to release an offender on parole than to keep him – the majority of offenders are men – in prison.

Parolees cannot be supervised around the clock. It is well known that surveillance, of any kind, to be effective, will be labour intensive. It cannot be overlooked that many experienced offenders well understand the system and are capable of manipulating it. A capacity for manipulation can have other implications, some of which I refer to below. Parole supervisors are often young women with reason to be intimidated by violent and strong or overbearing men as well as some (fewer) women offenders. My impression was that the parole officers, as with the staff of the charities involved, are highly conscientious and do whatever could be reasonably expected of them.

There are further problems. The turnover of staff supervising parolees is high. Talented young people tend to take up positions as their first form of full-time employment but look for, and find other, better paid positions elsewhere subsequently. The salary and conditions of staff who supervise parolees tend to be inferior to those of workers in comparable government or other agencies such as Child Protection Services. Accordingly, Corrections Victoria finds it difficult to attract and hold staff, especially mature, experienced people.

[REDACTED] If serious offenders, particularly serial offenders, are to continue to be released into the community on

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<sup>5</sup> Victorian Sentencing Advisory Council, *Victoria's Prison Population 2002 to 2012* (May 2013).

parole there will need to be more parole officers, and parole officers with better experience than is currently the case, to supervise them.

I am also satisfied that there needs to be more training of parole officers. At present, there are not separate streams supervising parolees [REDACTED]

[REDACTED] The supervision of serious violent or sexual offenders obviously calls for greater experience and training than the supervision of offenders on Community Correction Orders.

The managers of the various categories of persons under supervision do not have an opportunity of actually overseeing the work of the parole officers in the field, except on rare occasions. Experienced managers need to be provided with the opportunity to do this, and to train and mentor the parole officers and other supervisory staff in the course of the actual work to be done.

The fact is, however, that it is impossible under any circumstances to ensure that every parolee comply with every condition of parole. Our consultations satisfied me that breaches of parole are very frequent, sometimes go undetected or are left unremarked. This is the consequence, in part at least, of the limits of the resources of the Department.

It was important that I hear the views of victims and agencies and others who support them. All made relevant and useful suggestions that I have taken into account in writing this Report. It is clear that victims do not believe that their fears and views are always given the consideration that they should be given by the Parole Board. They believe that they are sometimes given insufficient notice of the possibility of release on parole of the person at whose hand they have suffered. This is a valid complaint. It confirmed my preliminary opinion that the Parole Board approaches the so-called EED (Earliest Eligibility Date) as an imperative, almost as if it would be failing in its duty if it did not consider a grant of parole in time to enable the release of a prisoner on the EED<sup>6</sup>.

Another valid complaint of victims is that often the media, the prisoner and others are informed of Parole Board decisions before they are. That is more than insensitive. It could even on occasions put a victim at risk because he or she might wish to, but not have time to, take steps to protect himself or herself, by, for example changing address.

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<sup>6</sup> It was suggested to us that there was a noticeable increase in the number of people released on parole before Christmas. I checked this but found that the figures did not indicate this to be so.



All of the views of the victims need to be addressed and this I try to do in the Measures that I suggest later in this Report. To do this is not to seek to displace the role of the State as the apprehender, prosecutor and incarcerator of criminals: it is simply to pay due regard to people who, by sorry experience, have acquired a real sense of a prisoner's propensities and actions.

Later I refer to the more recent history of parole in Victoria and the various sentencing regimes of it within the last 30 or so years. It is apparent to me that what was intended as a form of transparency in sentencing has had an unintended consequence of raising an expectation, if not of automatic parole, at least of a high expectation of it on the expiration of a specified non-parole period, if the offender's conduct in prison has not been unsatisfactory. Indeed it is no accident I think that the acronym 'EED' is customarily used and contains within it an assumption of parole. No doubt the overcrowding and expense of prisons provide a further incentive for release as soon as possible. I was surprised to hear that the Department has officers who go out into the prisons to tell prisoners that the expiration of their non-parole period is imminent and generally assist them to prepare for the process by which their release is decided upon. The Department also distributes brochures to a similar effect, one of which is **Appendix 4** to this Report. I do not condemn this, but I do think that it helps to create the impression that release is an entitlement rather than a privilege. That type of thinking can induce a widespread understanding which tends not to be questioned, and becomes part of the process itself. Prisoners become *de facto* 'clients'. This is to confuse the Department's, and, I fear, the Parole Board's statutory and Executive obligations, principally to the public at large, with the provision of a 'service' to prisoners. In his work *The Regulatory Craft*<sup>7</sup>, Malcolm K Sparrow discusses the administrative dangers of this type of misunderstanding:

*The important features that distinguish regulatory and enforcement agencies from the rest of government are precisely the important features that they share. The core of their mission involves the imposition of duties. They deliver obligations, rather than services.*

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*Of course, the prescriptions for customer service and process improvement can be useful in the regulatory context and have been applied to considerable effect by many agencies. But they will never be enough; these ideas are unlikely to provide complete or satisfactory prescriptions for regulatory reinvention or reform, because regulatory*

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<sup>7</sup> Brookings Institution (2000) at 2-3 [footnote omitted].

*functions represent an anomaly in the context of customer-driven government. When people are arrested or fined or have their license revoked or their property seized, most often they are not pleased. Government does not seek to serve them in that instant. In many cases government creates an experience for them that is by design unpleasant. Of course, those being arrested, fined or forced into compliance are entitled to be treated fairly and with human dignity. But when law is put in action against them, they receive treatment they did not request, did not pay for directly, will not enjoy, and will not want to repeat. In this context, the notions of quality governance in the widest circulation simply fall short. The notion of a customer falls short. Regulators need a broader vocabulary so that they can think in terms not only of customers but of stakeholders, citizens, obligatees, objects or targets of enforcement, beneficiaries, taxpayers, and society.*

The business of crime and punishment is an unpopular one. It is reputed to have been said by a Premier of one State that the way to deal with a rival was to give him or her, the portfolio of prisons. There are practical realities which must be grasped and which everybody concerned in the system must take into account in making decisions. Whatever may be said of the causes of crime, most societies will have little tolerance for any treatment of convicted persons with indulgence or too much leniency. Due regard to enlightened humanitarianism must always be had, but so too must regard be had to the sentencing regime which now makes it clear that judges should treat prison as in the nature of a last resort for offenders<sup>8</sup>. Another reality is that most people who are in prison are not there after they have committed only once offence.

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<sup>8</sup> *Sentencing Act 1991* (Vic) s 5 provides (extracts only):

- (1) *The only purposes for which sentences may be imposed are-*
  - (a) *to punish the offender to an extent and in a manner which is just in all of the circumstances;*  
*or*
  - (b) *to deter the offender or other persons from committing offences of the same or a similar character; or*
  - (c) *to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated; or*
  - (d) *to manifest the denunciation by the court of the type of conduct in which the offender engaged; or*
  - (e) *to protect the community from the offender; or*
  - (f) *a combination of two or more of those purposes.*
- (3) *A court must not impose a sentence that is more severe than that which is necessary to achieve the purpose or purposes for which the sentence is imposed.*
- (4) *A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a sentence that does not involve the confinement of the offender.*
- (4B) *A court must not impose a sentence that involves the confinement of the offender unless it considers that the purpose or purposes for which the sentence is imposed cannot be achieved by a drug treatment order.*

Our consultations with the Adult Parole Board were most helpful. The Board afforded us every courtesy and assistance that it could. It was apparent from an inspection of the Board's premises, even without the careful and full briefing which was provided to us by the Corrections Victoria, that the Board is under-resourced. It uses a system of paper files of which there are thousands and which, if electronically transcribed, could be reviewed by the Board much more expeditiously and efficiently. The Board maintains four copies of each file for each prisoner, a master copy and one for each member of the panel deciding whether to grant parole. Additionally, every consideration of parole requires a degree of familiarity, invariably to be achieved quickly, with the offender's file, running often to dozens and dozens of pages.

All of this having been said, the stark truth is that any deliberation about the suitability of a prisoner for parole, must take into account that the resources for supervision, and the enforcement of the conditions of parole are always likely to be less than ideal: the system of criminal justice will always be in competition for funds with other important activities of government. As sympathetic as governments might be to the need to prevent crime and improve the conditions of those who might be inclined to commit it, there will always be much less sympathy for those who have committed crimes and accordingly, a political and social limitation will inevitably exist upon funds available for rehabilitation and the general reintegration of offenders into the community.

I do say that, relatively early in my work, I formed an impression that the balance in relation to the grant of parole, its cancellation and the revocation of cancellations may have been tilted too far in favour of offenders, and sometimes, even very serious offenders. Our (Mr Cornall's, Mr Horton's and my) attendance at a session of the Adult Parole Board and the observations that I made there, reinforced this impression as had other observations that I made and the literature and statistics that I had read. I also formed a clear view that the Parole Board should be, if safety to the public is truly to be the paramount consideration, more risk averse than it has become. Almost every informed person to whom I spoke either volunteered or accepted the correctness of this proposition [REDACTED]

[REDACTED] Before, however, expanding upon that, I think it important to provide some overview of historical and current attitudes to crime, punishment and reform as well as related matters. In my opinion it is important, indeed necessary, to know something of the historical context in order to understand present attitudes

and practices of those responsible for the administration of the parole system. Equally, it is important to make it clear that I am well aware of the potential social and personal benefits of parole, and the strides made in providing for it.

## **Chapter 2 - Brief Historical Overview: Crime, Punishment and Reform**

It is as well in any study of the topic to bear in mind the wisdom of Sir Winston Churchill, who as Home Secretary, in a speech in the House of Commons on July 20, 1910, said<sup>9</sup>:

*The mood and temper of the public in regard to the treatment of crime and criminals is one of the most unfailing tests of civilisation of a country. A calm and dispassionate recognition of the rights of the accused against the State, and even of convicted criminals against the State, a constant heart-searching by all charged with the duty of punishment, a desire and eagerness to rehabilitate in the world of industry all those who have paid their dues in the hard coinage of punishment, tireless effort towards the discovery of curative and regenerative processes, and an unfaltering faith that there is a treasure, if you can only find it, in the heart of every man – these are the symbols which in the treatment of crime and criminals mark and measure the stored-up strength of a nation, and are the sign and proof of the living virtue in it.*

The words which Churchill spoke, as consistent as they might be with our modern attitudes to the treatment of prisoners, convey principles and ideals that had gained hard-won, but still not universal, acceptance. People are accustomed to holding and making strong political and emotional responses to almost all positions on crime and punishment. Before the 18<sup>th</sup> Century, questions of how prisoners ought be treated, and the objects to be achieved by their incarceration, were not of public or governmental concern in the way they are today.

Those matters became the subject of applied thought and a subject of concern, initially at least, to a small group of people, motivated by, predominantly, philanthropic sentiments inspired by the Christian faith. In considering what ought to be, in modern times, the response to concerns about the treatment of offenders, their rehabilitation and the tolerances which ought to be permitted in ensuring adequate protection of the community, it is relevant to have regard to the circumstances in which these changes occurred.

Until the late 19<sup>th</sup> Century, imprisonment in English prisons was for the purpose of detaining an alleged offender awaiting his or her trial or punishment. Imprisonment was not invariably punishment in itself. Punishment might be corporal or capital. One principal

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<sup>9</sup> Parliamentary Debates (Hansard), House of Commons, Vol 19, 20 July 1910 at 1354.

purpose of prolonged imprisonment was to enforce the payment of debt, a matter today for private law.

Imprisonment principally therefore served to ensure the offender's presence at trial and to remove him or her from the community to prevent the commission of further offences (sometimes referred to today as negative protection). Prisons were privately run, and the operators of them sought to profit, including by charging those who were incarcerated. A Parliamentary Inquiry into Gaols in 1729 found that a large number of inmates had starved to death and that prisoners died daily<sup>10</sup>.

Charles Dickens's works were in part social commentary. He had experienced poverty, witnessed the harsh conditions of English prisons, and observed the invidious fragility of the poor and the sick. His novels brought to public attention the oppressive and often corrupt conditions of early 19<sup>th</sup> Century prisons. Dickens's father had been incarcerated at the Marshalsea prison in Southwark for failure to pay his debts to a baker. Dickens's mother and her three youngest children joined her husband in the prison. For a time, Charles Dickens lived nearby and ate breakfast with his family in the prison and dined with them after work. Such was possible because of the flexible arrangements which, for payment, might be made. For those who could afford them, there were access to bars and shops and the possibility of day release (including to attend paid employment and therefore to pay off debt). For those who could not afford such dispensations (often debtors), treatment was very different: cramped conditions and starvation were commonplace. We know that the conditions which Dickens himself witnessed were oppressive. The novels, especially *Little Dorritt*, *The Pickwick Papers* and *David Copperfield*, convey the utter hopelessness of the ordinary detainee.

In Dickens's time there was no State welfare, and it fell to philanthropic organisations, almost all of some Christian religious disposition, to help those in need of it. It was not until 1840 that attendance at school became compulsory. In 1870, the *Education Act* was passed, and secular schools were established for all 5 to 13 year olds. This was the first statute to deal specifically with the provision of education in Britain. A system of school boards was

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<sup>10</sup> *Journal of the House of Commons*, 14 May 1729, 'Enquiry into the State of Gaols' at 378a. 'A Day seldom passed without a Death, and, upon the advancing of the Spring, not less than Eight or Ten usually died every 24 hours'.

established to build and manage schools in areas where they were needed. The boards were elected bodies and drew funding from local rates.

Quite separate from Dickens's powerful literary images of these oppressive conditions was the applied thought of Jeremy Bentham, one of the most influential thinkers of the Enlightenment. During the late 18<sup>th</sup> and early 19<sup>th</sup> Centuries, much of his work was directed to devising appropriate features of punishment. He articulated, for example, many of the principles we would today take to be so well established as to assume they are our own modern inventions. Punishment ought to correspond, he said, with the different circumstances and sensibilities of different offenders, everything ought be done to render it impressive to the populace (so that it might deter), it ought to be just as severe as necessary to achieve its end, and it ought to be remissible or revocable. Bentham too actually imagined a model prison, the '*Panopticon*', in which surveillance could be maintained over inmates without their knowing that they were under observation.

Bentham was opposed to the death penalty (a penalty then routinely imposed) and thought it desirable that punishment seek to reform the offender, take away his or her power of doing injury, and furnish an indemnity of sorts to the injured party<sup>11</sup>.

The '*Bloody Code*', as the system of English laws and punishments became known, was a criticism of the numerous property crimes (including property of small value) which attracted the death penalty.

There were many responses to the severity of punishment. First, there were practical philosopher theorists such as Bentham who argued for, and wrote about, ways in which the system of punishment might be improved. Secondly, there emerged influential philanthropists who assumed the role of advocates for reform by Parliament and by taking direct action. Thirdly, transportation emerged as a means by which capital punishment might be avoided.

I say something below about the last two of these: of the reforming philanthropists in order to understand their motivations in seeking to bring about a system of the kind existing today; and of transportation because it provides a basis for understanding the conditions in which the Australian Colonies as destinations of punishment came to be established, albeit that in Victoria transportation played a less central role than in some of the other Colonies.

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<sup>11</sup> L. Stephen (1900), *The English Utilitarians*, Volume 1, at 267.

The reforms which the 19<sup>th</sup> Century saw can in large part be traced to a group of wealthy people who were mostly related, and who, because of the part of London in which they lived, became known as the *Clapham Sect*. The members of it were mainly evangelical Christians. They shared a view that slaves ought be liberated, that the slave trade ought be abolished, and that the penal system required reform. It was by their work that Victorian morality flourished<sup>12</sup> and by their influence, exercised by some of their number as Members of Parliament, that their views were given practical effect.

William Wilberforce (a contemporary of Jeremy Bentham) was one of the most influential of that group. As a member of the House of Commons (35 years in total) he engaged in prison reform, and led and supported campaigns to restrict capital punishment and the severe punishments imposed by the Game Laws<sup>13</sup>. Wilberforce supported the work of Elizabeth Fry, a Quaker and prison reformer. She too had witnessed the conditions in prisons of the time and was influential in the passage of the *Gaols Act* 1823 which legislated for regular visits to prisoners by chaplains, for the payment of gaolers (instead of fees paid by prisoners) and prohibited the use of irons and manacles<sup>14</sup>.

The Clapham Sect and Elizabeth Fry had as their primary inspiration, Christian principles. That is not to suggest for a moment that their aspirations were widely accepted at the time. Quite the contrary. Wilberforce worked for twenty years before achieving his goal of abolishing the slave trade and even longer (some 33 years) before the abolition of slavery itself. He selflessly put at risk his own funds, his political career, his position in society, and the relationship he had with industrialists and the wealthy and landed classes.

Likewise, Elizabeth Fry was criticized for her influential role: as a woman, she should, her detractors alleged, observe her duties as a wife and mother.

It was in this context that transportation was established to the Australian Colonies. Crime was rife, gaols were overcrowded, and the Bloody Code had by this time swelled to define yet more offences for which the death penalty was prescribed. In response, the

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<sup>12</sup> '[T]he ethos of Clapham became the spirit of the age': S Tomkins (2010) *The Clapham Sect: How Wilberforce's Circle Transformed Britain*, Hudson Lion, at 248.

<sup>13</sup> W Hague (2007), *William Wilberforce: The Life of the Great Anti-Slave Trade Campaigner*, HarperPress at 447.

<sup>14</sup> Albeit that questions have been raised as to the Act's effectiveness owing perhaps to the absence of inspectors to ensure that its provisions were complied with. Fry and her brother (Joseph Gurney), in 1819, wrote *Prisons in Scotland and the North of England* which came to the attention of the Scottish and English prison reformer and one of the first Inspectors of Prisons, Frederic Hill.



historical records suggest, juries under-assessed the value of stolen property so as to ensure that the offender escape execution. The response of the British Government, having by then lost the American Colonies, was to establish transportation to, initially, Botany Bay and to Van Diemen's Land.

Transportation itself was a harsh penalty. The convicts were sent far away from home on a long and dangerous journey. Once they arrived, and especially in the early days of the Colonies, famine was not uncommon. There was, however, the possibility of their early release (on tickets of leave), an immature form of parole, for good behaviour, and the freedom to find employment, own property and to marry. Some were pardoned, absolutely or conditionally. Upon the completion of a sentence, a convict might return to Britain, or might avail himself or herself of a grant of land.

For the terribly poor and underprivileged, this system had the advantage of providing opportunities for early release, and, most importantly, of the grant of land at the conclusion of their sentences. They were able to achieve, land being plentiful, what they were unlikely ever to achieve in Britain: not only the social status which ownership of land then brought with it, but also the capacity to own a place on which to live and from which to derive an income. The early Colonies, by the mechanism of land grants in particular, permitted greater social mobility than did England at the time.

It was inevitable that the Colonies' laws would make provision for the presence of a large number (and for the first few decades, the predominant number) of convicted criminals. The law of defamation, for example, required that, for the defence of truth to succeed, not only had the imputation to be true, but also the publication of it had to be in the public interest<sup>15</sup>. This feature of the law – one different from the English common law at the time – recognised that it would have been true to have said of many people in the early Colony at the time, including the rehabilitated, that he or she was a convicted criminal<sup>16</sup>.

Victoria, once it assumed a separate political existence from New South Wales in July 1851, did not have a penal character of the kind of either New South Wales or Van Diemen's Land. Few convicts (some 1,750) were sent there between 1844 and 1849, mostly from

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<sup>15</sup> Recently changed to accord with the British position: *Defamation Act 2005 (Vic)* s 25.

<sup>16</sup> P Mitchell 'The Foundations of Australian Defamation Law' (2006) 28 *Sydney University Law Review* 477 at 494.

Pentonville Prison, having served part of their sentences there. Pentonville was then a modern prison and it too instituted progressive approaches to rehabilitation, one feature of which was transportation with the possibility in the Colonies of a ticket of leave<sup>17</sup>. Convicts received, upon arrival, a pardon, conditional upon their not returning to Britain within the term of their original sentence. These convicts tended to be literate and to have experience in trades and manufacturing. 1849 saw the end of transportation of convicts to the Port Phillip district.

I draw from this brief overview that, however harsh and oppressive we might now consider transportation and the associated arrangements to have been, it had some ameliorating features, and relevantly, a recognition of the merits of redemption, and a consequential system of freedom akin to that of a free man, for good behaviour.

This early Colonial period saw the development in some of the penal Colonies of reforms which advanced the objectives of the reformers which I have mentioned above.

Alexander Maconochie was born in Scotland in the late 18<sup>th</sup> Century. He was a Naval officer who spent two years as a prisoner of war of the French. He was, it has been said, the only major official concerned with transportation who himself had spent time in custody. In 1837, Maconochie was appointed Private Secretary of the Lieutenant-Governor of Van Diemen's Land. In that capacity, he came into close contact with pressing questions of penal reform. He wrote a *Report on the State of Prison Discipline in Van Diemen's Land* in 1838 which, after editing, was sent to English Colonial officials. That report sought to shift focus from punishment to reform, there being no purpose, he thought, in punishing a criminal for his past without offering some incentive for his future. His *Crime and Punishment: The Mark System, Framed to Mix Persuasion with Punishment and Make Their Effect Improving, Yet Their Operation Severe*, published in 1846, has had some considerable influence, in particular, on notions of probation and parole<sup>18</sup>.

In particular, Maconochie advocated reward for prisoners for good behaviour, for labour, and for engaging in group therapy. None of this had before been tried in England or

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<sup>17</sup> H L Witmer, 'The History, Theory and Results of Parole' (1927-1928) 18 *American Institute of Criminal Law and Criminology* 24 at 34.

<sup>18</sup> Dickens himself approved of Maconochie's plans and recommended them to heiress and Christian philanthropist, Baroness Angela Burdett-Coutts: J Barry, *Australian Dictionary of Biography*, Alexander Maconochie (1787-1860).

Australia. A House of Commons Committee in 1837 endorsed part of the plan (not group therapy however). In 1840, Maconochie was offered the post of Commandant on Norfolk Island, then the last destination of the most intractable convicts. There he implemented his scheme, by dismantling the gallows, giving each man a plot of fertile land, and inculcating a sense of value or respect for property. Maconochie's methods, despite their success, led to his recall. He maintained, nonetheless, after his return to London, his interest in penal reform, publishing both his *Crime and Punishment: The Mark System* and a statistical study of his experience on Norfolk Island. He became Governor of a new prison in Birmingham.

Maconochie's work is a genuine and informed proposal to treat prisoners well, but also to recognise the pressing realities which necessarily attend punishment. There must, as Maconochie wrote, be some reliance placed upon the prisoner's own motivation to improve, to be liberated and, to achieve that, to be rehabilitated. At the same time, the State assumes an obligation to ensure that a system exist in which prisoners are given every incentive to be rehabilitated.

The extent to which our modern systems of probation and parole can be traced to Maconochie's work have been the subject of a number of detailed studies<sup>19</sup>. Different views are taken, but even those which would attribute to him a smaller role than traditionally understood, nevertheless give him credit for developing the idea of stages of prison discipline, and for providing prisoners with the opportunity of exercising choices upon which their progress or redress would depend<sup>20</sup>. Another possibility is that out of his useful ideas of prison discipline and from the ticket of leave system, came the modern idea of parole<sup>21</sup>.

The balancing of these matters in public decision-making is a difficult task. The public tend to desire and call for the harsh treatment of offenders. Those directly concerned or well acquainted with their treatment tend, on the other hand, to urge patience and compassion. Victims too when their voices are heard remind us of their hurt, of the very heavy injury which the offender has perpetrated, and the risk, it follows, of repetition of it.

The public perception of these matters is markedly affected by what they read, hear or see of them in the media. That reporting can be seriously incomplete, misleading, or, worse,

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<sup>19</sup> For example, S White, *Alexander Maconochie and the Development of Parole* (1976) 67 *The Journal of Criminal Law and Criminology* 72 and H L Witmer, *supra*.

<sup>20</sup> S White, *op cit* at 88.

<sup>21</sup> H L Witmer, *op cit*, at 31.

designed to provoke an immediate strong and not necessarily rational emotional reaction to, for example, a sentence. Opinion polls regularly show that members of the public would wish criminal courts to be harsher in the sentences they impose. Research, however, reveals some interesting features about the effect of the way in which the media report them (being the primary source of information about sentencing decisions). In one study, some participants within a group were provided with either media reports of sentences, or an extract of facts from official documents. 63 per cent of those provided with a media report considered the sentence to have been lenient. Only 19 per cent of those who read the summary of official documents, however, held that view<sup>22</sup>.

In a more modern context, we might understand the concepts to which the Victorian philanthropists in particular gave expression as the triumph of love and compassion over disgust and shame for those who have committed crimes, especially violent or sexual ones.

One of the most difficult tensions to be resolved in fixing punishments, whether it be at the legislative or adjudicative levels, is the balancing of personal responsibility with the need, as the Victorian philanthropists have taught, to show compassion and maintain human dignity.

The modern philosopher Martha Nussbaum in her study of the role which emotions play in our thought processes *Upheavals of Thought: The Intelligence of Emotions* (2003), considers how in public life, institutions might appropriately be motivated by compassion. She shows how it is possible for compassion and responsibility to co-exist the better to inform approaches to crime and punishment. The position which Nussbaum advocates is that we abandon a simple [simplistic] dichotomy between compassion and responsibility, by taking full measure of the harms that can befall citizens beyond their own doing, and then using compassion as the motive by which to secure all the basic support that will underpin and protect human dignity.

One particular insight of Nussbaum is her observation that every society feels and acts upon the feeling of disgust: motivated by a basic desire to be 'non-animal' and fear of mortality. Motivation by disgust, she argues, is particularly unreliable. And compassion is the means by which we might avoid acting on it, and identify the point at which a person is to

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<sup>22</sup> J V Roberts and A N Dobb, 'News Media Influences on Public Views of Sentencing' (1990) 14 *Law and Human Behavior* 451.

take full responsibility for his or her conduct, after proper allowance (and proper allowance only) has been made for the circumstances which might have been beyond that person's control.

I have considered it desirable to set out, however briefly, these historical facts and ideas so that there is some context to my consideration of the parole regime in Victoria, drawing upon, as I do, the history and purpose of parole regimes, and, more generally, the balance which has historically been struck between philanthropic intervention and personal responsibility. To act in ignorance of these developments, or to misunderstand them, is to misconstrue the wider tradition which informed the parole system in Victoria.

This brief historical survey also shows that, while it is important not to lose sight of the ideals of humanity, tolerance, repentance and reform, it is at least equally important to keep a careful eye on the realities of the threat to society of recidivists at large, and the futility in some cases of the most careful and individually crafted programmes for the release and reform of some offenders.

Whilst enlightened Western democratic society, influenced as it is by Christian principle that no-one should be regarded as beyond redemption, the truth is that some people simply are incorrigible. Not every parolee seizes, as did Victor Hugo's Jean Valjean, the opportunities now offered for redemption and forgiveness.

[REDACTED]

Since 2008, arrests for cancellation of parole have risen from 189 to an estimated 800 (401 so far) this year. [REDACTED]

[REDACTED]

Numerous studies have sought to quantify the effectiveness of parole systems. Those statistics are not always analysed consistently. One commentator in the United States however found that in one highly populated East Coast State, after three years parolees are predicted to recidivate at a 1 per cent lower rate compared with unconditionally released inmates. Those who are assigned supervision terms of 3 or more years, are predicted to have an 8 per cent lower recidivism rate. The author points out<sup>23</sup>, and I agree, that parole release

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<sup>23</sup> M Ostermann, 'Active Supervision and Its Impact Upon Parolee Recidivism Rates' (2013) 59 *Crime and Delinquency* 487.

can become too lenient, decisions for it lacking any oversight and lacking in statistical evidence of effectiveness<sup>24</sup>.

Another US study found parole supervision to have little effect on overall re-arrest rates<sup>25</sup>. Although rearrest rates for 'discretionary parolees' were some 8 per cent lower overall than those released unconditionally, it is only in respect of violent offences that the re-arrest rate is lower. For other categories of alleged offences, such as drugs and property-related arrests, discretionary parolees have higher rearrest rates.

A study conducted in the United Kingdom and Wales focused on reconviction rates using data from the Prison Service's Inmate Information System database<sup>26</sup>. It concluded that parolees *did* have lower reconviction rates than offenders released at the end of their full sentence, but that the difference was small. It is possible, the study concluded, that for some serious offenders, parole has a greater effect on reducing recidivism than for other categories of offending such as a violent and sexual offending<sup>27</sup>.

There are numerous other studies to which I had regard<sup>28</sup>. Few seem to claim for parole other than a modest benefit over unconditional release.

I would only add to this historical overview that the power to grant parole is and has always been regarded as an Executive function. The fact that a board exercises that power does not in any way divorce it from the Executive and convert it into a judicial body. There is a useful discussion of the Executive prerogative in the *American Law Review*<sup>29</sup>. The author there deals with the system in the United States which sometimes culminates in the execution of murderers. The author, however, goes back to the origins of the grant of clemency as an Executive function:

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<sup>24</sup> M Ostermann, *op cit*, at 490.

<sup>25</sup> A Solomon, V Kachnowski and A Bhati, *Does Parole Work?: Analyzing the Impact of Postprison Supervision on Rearrest Outcomes* (Urban Institute, March 2005).

<sup>26</sup> T Ellis and P Marshall, 'Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners' 33 *The Australian and New Zealand Journal of Criminology* 300.

<sup>27</sup> *Ibid* at 306 citing M Brown 'Serious Offending and the management of public risk in New Zealand' (1996) 6 *British Journal of Criminology* 18.

<sup>28</sup> Other examples include I Kuziemko, 'How should inmates be released from prison? An assessment of parole versus fixed-sentence regimes' (2013) 128 *Quarterly Journal of Economics* 371 and Australian Institute of Criminology (R Broadhurst), *Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?* (1990).

<sup>29</sup> J D Barnett 'Executive, Legislative, and Judiciary in Pardon' (1915) 49 *American Law Review* 684. See also J Harrison, (2000-2001) 13 *Federal Sentencing Reporter* 147.

*The King's power of pardoning arises from his having the executive power in him. A pardon is an act of grace, proceeding from the power intrusted with the execution of laws.*

...

*The power to pardon, to remit, and to restore resulted to him [the King] as a necessary consequence of this theory.*

Recent historical research from Queensland<sup>30</sup> provides an insight into the way in which assistance can be obtained from the judiciary in the Executive consideration of the possible commutation of the death penalty. That research shows that the sentencing judge would be asked to provide a report upon a case in which the death penalty had been imposed if there were a possibility of commutation, and, on some occasions, even invited to address the Cabinet or Executive Council on the case. The practice always was, however, for the Judge who was there strictly on invitation, to absent himself during the deliberations of the Cabinet or Executive Council<sup>31</sup>. Even in those distant pre-federation times, the distinction between the judicial function of trial and the Executive function of the implementation of the punishment was maintained.

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<sup>30</sup> Harrison Tait, Research Thesis, *Death Penalty in Queensland Before its Abolition*, LLM Candidate, University of Queensland, 2013.

<sup>31</sup> Ibid.

## Chapter 3

### The System in Victoria

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The concept of parole in Victoria is traceable to the use of ticket of leave arrangements for convicts to which I referred in the preceding Chapter. A ticket of leave was a document given to convicts when granting them freedom to work and live within a given district of the Colony before their sentence expired or they received a pardon. Tickets only went to the industrious and well behaved, and only to those who had been in the Colony for two to three years.

The whole notion of parole has likewise been to regard it as an Executive concession. Parole only came to be known by that name when it was introduced in the United States. The name denotes the giving of the prisoner's word, and emphasises its nature as a concession and the importance of reciprocity: good behaviour in exchange for Executive indulgence. The theory of it has always been one of a concession for earned and justified confidence in the good behaviour (in and out of prison) of the prisoner; and, where the release is not contrary to the public sense of the community from which they come<sup>32</sup>. It has been said that parole is the prize to be attained by obedience and diligence and good conduct in prison<sup>33</sup>. That is, in my view, to say too little. Good behaviour in prison is not the be all and end all. It should be regarded as only one, albeit an indispensable one, of several conditions that a prisoner must satisfy, such as an unlikelihood of reoffending, insight into his or her failures, and their consequences, and the merits of a lawful life henceforth.

#### **Legislative history**

The *Indeterminate Sentences Act* 1907 (Vic) was the first statute in Victoria to consolidate the concepts of conditional release by establishing indeterminate sentences, and to enable the release on probation of prisoners sentenced to them. It also established the Indeterminate Sentences Board to determine whether to release prisoners with indeterminate sentences from prison on probation. The Second Reading Speech for that Bill shows that sentences of that kind were considered desirable for the community protection they might

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<sup>32</sup> A W Butler, 'Treatment of the Released Prisoner' (1910-1911) 1 *Journal of American Criminal Law and Criminology* 403

<sup>33</sup> H L Witmer, *op cit* at 47.



afford, as a kind of negative protection. Multiple shorter sentences, which serious offenders might otherwise have received, were thought, then at least, to put the community at undue risk in the periods between those sentences. The criminological thought of the time was central to this idea: it considered many offenders to be 'instinctual' and who would therefore continue to offend no matter what the intervention.

Even at this early time, it was recognised that not all repeat offenders were in this category, some being affected by their circumstances. A view was held, and expressed, that these offenders should be capable of being reformed and that society ought give them the opportunity to do so. For these reasons, the *Indeterminate Sentences Act* contained provisions relating to probation and rehabilitation.

The *Penal Reform Act 1957* established the Adult Parole Board and the foundation of the parole system that operates today. It also established the first system of parole in Victoria and abolished indeterminate sentences (and the Indeterminate Sentences Board), such sentences being considered to have undesirable features. Indeterminacy of sentence gave rise to a concern that the length of a sentence was uncertain and therefore lacked transparency. It also left a prisoner in doubt as to when his or her sentence could or would determine. It was thought too that the Courts had lost some faith in the idea of a reformatory sentence. The Act also established a new procedure to apply what were seen as the best features of the older legislation to sentences of twelve months or more<sup>34</sup>.

The principal reasons for the new legislation, according to this Speech, were the supervision and guidance which were to be provided by parole officers within the new system, and the resulting reduced risk to the community. There was an expectation that intervention by these officers would more effectively facilitate rehabilitation of prisoners released on parole than what was described as the 'carrot' of probation for prisoners with indeterminate sentences. It was accepted that releasing prisoners on parole would be a 'calculated risk' and that suitability should be assessed according to 'background, social and criminal history and degree of sincerity' to reduce that risk.

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<sup>34</sup> Second Reading Speech, Parliamentary Debates (Hansard), Legislative Assembly, 1 December 1955, at 2385.

In his second reading speech for the Penal Reform Bill in 1955, the Chief Secretary and Attorney-General, Mr Rylah, referred to the developments which had occurred in the 20<sup>th</sup> Century in the field of penology<sup>35</sup>:

*The most significant development of this century has been the transition from the old regime of negative safe custody imposed equally on all to a positive treatment programme with appropriate classification of types. The purpose of this world-wide movement is not to make gaols pleasant places. No gaol is ever a pleasant place. Liberty is the most precious possession of mankind, though seldom appreciated until its loss is experienced. ...*

...  
*There is no safety in undue severity. There is no room for emotionalism. The reformable must be trained for citizenship; the deliberate and persistent offender must be removed from the community for a long period of time. ...*

...  
*Probation is not 'letting off'. The court has already proceeded to conviction, but in lieu of institutional treatment – or gaol – suitable offenders are given an opportunity on certain conditions to make good in the community. To grant probation is inevitably to take a risk since it leaves a convicted offender at large in the community with much of the normal man's freedom. It is a calculated risk which depends on the background, social and criminal history, and degree of sincerity of the individual offender. ...*

...  
*By this Bill, the Courts will determine the sentence which is the maximum time to be served, but will also set a term after which the prisoner becomes eligible for release on parole. If his conduct, his response to training, and his parole plans, indicate that during this minimum term that he is suitable for parole, a new board known as the Parole Board will have power to release him for the unexpired portion of his maximum sentence, and also power to recall him during that unexpired portion for breach of condition. ...*

...  
*The Parole Board will have an important function to perform in determining release dates, and in exercising power to recall, and, because of the importance of this work its chairman will be a Judge of the Supreme Court nominated by the Chief Justice. ...*

...  
*Unhappily, experience shows there is a hard core of persistent offenders who do not respond to any treatment programme. Though small in number, this group preys on the community and must be dealt with. Society could protect itself by incarcerating these people permanently, but the liberty of the subject is very dear and such a procedure would not be acceptable. Some measure of protection is provided by means of sentencing persistent offenders to preventative detention of up to ten years. ...*

Provisions of the kind introduced in the *Penal Reform Act* were consolidated in the *Crimes Act 1958 (Vic)*, were later legislated in the *Social Welfare Act 1973 (Vic)*, the

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<sup>35</sup> Second Reading Speech, Parliamentary Debates (Hansard), Legislative Assembly, 1 December 1955, at 2381-2383 and 2386-2387.

*Community Welfare Act* 1978 (Vic) and, finally, the *Corrections Act* (Vic) in 1986. Division 5 of Part 8 of that Act is the location of these provisions today.

It is worth noting some aspects of the evolution of the legislative scheme for parole which occurred over this period, before turning to consider in more detail the parole system which operates in Victoria today under the *Corrections Act*.

The *Crimes (Parole) Bill* 1965 amended the *Crimes Act* 1958 to exclude offenders serving sentences of fewer than 12 months from the Adult Parole Board's reach. The legislation made it mandatory for minimum terms of sentences of more than two years, and optional for sentences of between one and two years. The reason for doing so, according to the Second Reading Speech, was to reduce the heavy demands placed on the limited resources of Parole Services. In addition, there was acknowledgement that parole offered fewer benefits to prisoners imprisoned for shorter periods.

The Bill would also permit the Parole Board to grant remissions to persons earlier denied parole. Such persons, previously, were required to serve their full sentence if bail had been denied. This change was considered necessary to ensure prisoners had 'incentive or reward for good conduct or industry'.

The provisions relating to parole were transferred from the *Crimes Act* to the *Social Welfare Act* 1973 upon that Act's commencement. The new Act abolished the Female Parole Board (there being insufficient female prisoners to warrant a separate board) and the numbers of the reconstituted Adult Parole Board were increased from five to seven, with the inclusion of a female member and appointment of a full-time member. The Act also allowed the Board some discretion to continue parole in cases where parolees had re-offended and had been sentenced to terms of less than three months in prison. The reasoning for this change was that cancellation of parole for minor offences is unnecessary and that a warning might suffice.

In the late 1970s, the parole provisions were transferred to the *Community Welfare Services Act* 1978. The *Community Welfare Services (Extradition) Act* 1980 enabled the Parole Board to extradite to Victoria defaulting parolees who had travelled interstate. The Board previously had no such power.

The *Community Welfare Services (Director-General of Corrections) Act* 1983 established the Office of Corrections. The Director-General of Corrections replaced the Director-General of Welfare Services as a member of the Parole Board. That Act also provided for the appointment of a Deputy to act on the Board in the absence of the Director-General to provide the Board with greater operational flexibility.

The *Community Welfare Services (Pre-Release Programme) Act* 1983 enabled the Board to grant pre-release permits to some prisoners (although it included a provision for sentencing courts to veto release under this programme). Prisoners with permits were required to meet stringent conditions similar to those to which parolees are subject. The legislation provided a subsequent arrangement for a pre-release programme between time spent in custody and release on parole and time spent in custody and final discharge (for certain types of prisoners). The rationale which appears in the Second Reading speech for the Bill for the introduction of the pre-release programme was the assistance that it would offer to prisoners to integrate back into the community during the later stages of their prison sentences, and to improve their prospects of rehabilitation.

The *Parole Orders (Transfer) Act* 1983 enabled the transfer of parole orders from one State or Territory to another.

It was in 1986 that the *Corrections Act* was passed and provisions included within it relating to parole. The effect of those provisions, which operate today, are set out later in this Report.

Since that Act was passed, however, there have been some changes to the legislative scheme. The *Crimes (Mental Impairment and Unfitness to be Tried) Act* 1997 amended the legislation governing the detention, management and release of offenders found not guilty due to insanity or unfit to plead guilty for the same reason. The amendment transferred responsibility for decisions about release of these detainees from the Governor to the Judiciary, and brought with it an end to the Adult Parole Board's responsibility to prepare annual reports on such detainees to the Minister for Corrections.

The *Corrections and Sentencing Acts (Home Detention) Act* 2003 was introduced with the object of permitting low-risk offenders only to maintain such employment, family and community ties as were considered important for their rehabilitation and reintegration.

The legislation gave the Adult Parole Board a role in revoking home detention when detainees failed to meet conditions of their detention.

The *Corrections (Further Amendment) Act 2004* introduced a Victims Register and formalised the informal approach previously adopted by the Adult Parole Board in taking account of victims' concerns when granting parole and setting parole conditions. Information of this kind is used by the Board in setting geographical restrictions in parole conditions and conditions prohibiting offenders' contacting victims and victims' families.

The *Corrections (Amendment) Act 2013* also made adjustments to the parole system. It did so in response to the Sentencing Advisory Council's review. The changes included requiring that the Parole Board specify in its Annual Reports the purposes of parole and the general principles and factors taken into account by the Board. The Sentencing Advisory Council's Review also recommended, and the Amendment Act made provision for, improved information sharing between the Parole Board, Corrections Victoria and Victoria Police and greater power to the Board to cancel parole when offenders commit further offences while on parole.

Most recently, the *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013* prescribed how the Parole Board ought deal with parolees charged with, or convicted of, further offences or who infringe their parole conditions. The effect of these changes is considered below as part of the present legislative regime.

The Victorian Government has additionally recently foreshadowed amending the *Corrections Act* to make it an offence, to act or omit to act, to breach parole and introduced a Bill<sup>36</sup> to effect this.

### **The Current Parole Regime: Corrections Act 1986**

Under the *Corrections Act* as in force at the time of the writing of this part of the Report, the Adult Parole Board comprises one or more judges of the Supreme Court, the County Court and one or more Magistrates. These appointments (plus the appointment of any Associate Judges of the Supreme Court) are made by the Governor in Council on the respective recommendations of the presiding heads of the relevant Courts. One or more retired judges from these courts may also be appointed, but only as part-time members, by the

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<sup>36</sup> Corrections Amendment (Breach of Parole) Bill 2013 (introduced 25 June 2013).

Governor in Council. In addition to these, the Governor in Council independently appoints at least one part-time and one full-time member.

There are in fact currently 23 members of the Adult Parole Board. The Honourable Justice Curtain is the Chair of it, having only recently been appointed in place of the retiring Honourable Justice Whelan, also a Supreme Court judge. The other members of the Board are:

- a. 1 serving judge of the County Court (Judge Douglas);
- b. 3 serving Magistrates (Deputy Chief Magistrates, Mr Kumar and Ms Popovic and also Magistrate Fleming);
- c. 2 former Judges of the Supreme Court (Hon Justice Teague AO and the Hon Justice Coldrey);
- d. 2 former Judges of the County Court (Judge Shelton and Judge David Jones AM);
- e. 2 former Magistrates;
- f. 9 community members;
- g. 2 full-time members (both being Governor in Council appointments) ;
- h. the Secretary to the Department of Justice.

The Chair of the Board is the Judge of the Supreme Court<sup>37</sup>. The Chair<sup>38</sup> decides whether questions are ones of fact or law and determines any questions of law<sup>39</sup>. On other decisions, the majority view prevails, with the Chair having a second or casting vote<sup>40</sup>.

There is practically nothing in the legislation about how the Board is to inform itself and act in considering the grant of parole or whether to cancel it. The few such provisions as there are:

- a. state that the Board is not bound by the rules of natural justice<sup>41</sup>;

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<sup>37</sup> Section 62(2)(a).

<sup>38</sup> Who, if he or she is absent is to be one of those appointed as a Judicial member or an Associate Judge: s 65.

<sup>39</sup> Section 66(2).

<sup>40</sup> Section 62(4).

<sup>41</sup> Section 69(2).

- b. permit the Board to exercise its powers and functions in divisions, which divisions must consist of at least three members, at least one of whom must be a judge or retired judge (or Magistrate or retired Magistrate)<sup>42</sup>.

The legislation does not spell out any tests which the Board is to apply in deciding whether to grant parole.

On 20 May 2013, amendments to the *Corrections Act* took effect which refer to circumstances in which parole may or must be cancelled<sup>43</sup>. The effect of those provisions is that:

- a. if a parolee is *charged with* an offence that is punishable by imprisonment and alleged to have been committed during that person's parole period, and that parolee has convictions for a sexual offence or a serious violent offence, then the Board must cancel that person's parole unless satisfied that circumstances exist that justify parole being continued;
- b. if a parolee is *convicted* of an offence punishable by imprisonment, then the Board must cancel that person's parole unless satisfied that circumstances exist that justify parole being continued;
- c. where, however, a parolee of the kind mentioned in b. above has a conviction for a sexual or serious violent offence, and the conviction is for an offence of that kind committed in the parole period, then parole is automatically cancelled;
- d. the Board may revoke cancellations it has made<sup>44</sup>;
- e. where parole has been automatically cancelled, the Board may revoke that cancellation only if exceptional circumstances exist<sup>45</sup>.

In making these changes, the Minister for Corrections said in his Second Reading Speech for the Bill, that '*[t]hese reforms send a strong message that parole is a privilege and not a right and put community safety at the heart of the Adult Parole Board's deliberations*'<sup>46</sup>.

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<sup>42</sup> Section 64.

<sup>43</sup> *Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013*.

<sup>44</sup> Section 77A(1)

<sup>45</sup> Section 77A(2).

Concerns were expressed by those in the Prosecutions service whether these arrangements were, in all the circumstances desirable, on the ground that they might render an accused less likely to plead at an early stage given his or her susceptibility to immediate cancellation of parole upon the entry of a plea (in the case of offenders subject to automatic cancellation). Potential problems of this kind are, I think, not likely to present any real difficulty. The reasons for the new statutory approach outweigh the considerations against it. An early plea attracts sentencing mitigation. There is no guarantee for the offender that, if he or she plead guilty at a late stage, the time on parole in the community will be deemed to be time served<sup>47</sup>. Nor do I see any real difficulty in the fact that an offender who is on parole and who enters an early plea might need to be returned to custody immediately by reason of automatic cancellation. The Chief Judge of the County Court has made arrangements within his Court which take this possibility into account and which can now be considered to be relatively routine.

The detail of the Adult Parole Board's functions and the tests which it applies are to be found only in its internally compiled Members' Manual:

*Each case is considered by the Board individually on the basis of the material relevant to it.*

*There are legal principles which apply. There are also general principles which will be found in the many individual decisions made by the Board, and which Board members have endorsed.*

*Amongst the applicable legal principles are:*

- (1) The imposition of a sentence of imprisonment in respect of which a non-parole period is fixed is the imposition of one sentence. [R v Rajacic [1973] VR 636].*
- (2) The non-parole period is the minimum time that the sentencing judge or magistrate has determined justice requires that the offender must serve having regard to all the circumstances of the offence. [Power v The Queen (1974) 131 CLR 623].*
- (3) Parole is important for hope, self-esteem, the incentive to reform and for rehabilitation, but it is fundamentally not about conferring a benefit on an offender. Rather it is about the needs of the community, recognising that the community benefits from the rehabilitation of offenders. [Power v The Queen (1974) 131 CLR, 623, R v Currey [1975] VR 647, R v Oancea (1990) 51 A Crim R 141, Bugmy v The Queen (1990) 169 CLR 525, R v Shrestha (1991) 173 CLR 48, R v Krasnov (1995) 82 A Crim R 92, R v Yates (1998) 99 A Crim R 483].*

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<sup>46</sup> Parliamentary Debates (Hansard), Legislative Assembly, 6 February 2013 at 150 (Mr McIntosh).

<sup>47</sup> Justice Legislation Amendment (Cancellation of Parole and Other Matters) Act 2013 s 77C.



- (4) *In every case where there is a victim submission under s 74A of the Corrections Act that submission must be considered.*

*Mindful of these legal principles and of the provisions of the relevant legislation, the general principles which will be found in the Board decisions, and which Board members have endorsed, are the following:*

- (1) *Community safety is the paramount consideration in all decisions relating to the granting of parole.*
- (2) *In assessing community safety the Board considers:*
- (a) *whether there is an unacceptable risk to the community if the offender is released on parole; and*
  - (b) *whether the risk to the community will be greater if the offender does not have supervised release and support on parole.*
- (3) *In assessing whether the risk of releasing the offender on parole is acceptable, the Board has regard to:*
- (a) *the nature and severity of the harm that is risked (the particular outcome to be avoided, such as the commission of a violent offence); and*
  - (b) *the likelihood that the outcome will occur.*
- (4) *Subject to the paramount consideration of community safety, the Board seeks to facilitate the rehabilitation of the offender, recognising that the community benefits from the rehabilitation of offenders.*
- (5) *Many factors are potentially relevant to these considerations. Without being exhaustive, and without ranking factors in order of importance, relevant matters include:*
- (a) *the nature and circumstances of the offence;*
  - (b) *the offender's criminal history;*
  - (c) *the parole assessment and recommendation by Corrections Victoria;*
  - (d) *the offender's previous parole history, or the fact that it would be the offender's first parole;*
  - (e) *the parole plan;*
  - (f) *the offender's willingness to participate in offence specific and other programs;*

- (g) the offender's participation in offence specific and other programs;*
- (h) assessments and recommendations (if any) by appropriate clinicians or other professionals;*
- (i) submissions or representations by victims;*
- (j) submissions or representations by the offender;*
- (k) submissions or representations by other interested persons;*
- (l) comments by the sentencing court;*
- (m) conduct of the offender whilst in custody, including whether any positive drug test has been recorded;*
- (n) the fact that at the expiry of the non-parole period the offender will have served the minimum period which the sentencing court considered the justice of the case required be served;*
- (o) the likelihood of effective intervention after release should that be necessary or desirable;*
- (p) the special conditions which can, or should, be imposed;*
- (q) the proper administration of the system of corrections including the prison system and the parole system.*

*Often parole is granted on the EED [Earliest Eligibility Date] to an offender being considered for his/her first parole unless the offender:*

- Has refused to participate in offence specific programs*
- Has returned a positive urinalysis result*
- Has a number of prison incidents*
- Has no suitable accommodation available*
- Has outstanding matters for serious offences and bail has not been granted*
- Is participating in an offence specific program and the completion date is after the EED*
- Has secured accommodation at a residential facility but the availability date is not yet known or the residential facility has recommended a specific release date*

- *Is required to see the Board in person.*

***Importance of the Board Testing Material Before it***

*Members of the Board are reminded of the importance of testing the information that is put before them (for example, by questioning the community corrections officer who prepared the report) in order to satisfy themselves as much as possible of the accuracy, credibility of information.*

The list of factors appears comprehensive, but the order in which they are considered and the relevant importance to be attached to them are different matters. A recent recommendation of the Sentencing Advisory Council is that the safety of the community is the paramount consideration and that it should be so enshrined (as it has been now) in the Manual. As will appear, I would go further than enshrining it in the Manual, by coupling it with a redefinition of, or replacement of unacceptable risk as the test, in some cases at least, and would prescribe it by legislation.

Decisions of the Adult Parole Board have rarely sought to be judicially reviewed in Victoria. There was a recent case in which a prisoner was refused his application for a 'tentative date of release on parole'<sup>48</sup>. The prisoner was Julian Knight, who was convicted in 1988 of shooting 26 people in Hoddle Street, killing seven of them. Macaulay J refused to quash the 'alleged decision'. There was not, in his Honour's view, a decision which had a discernible or apparent effect upon rights. All the Adult Parole Board had done was to refuse to give an 'indication'. The proceeding, being therefore foredoomed to fail, was one which justified, in his Honour's view, refusal of leave to commence it.

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Whether to grant parole and the conditions attaching to any grant should be, and remain, a matter of unreviewable Executive prerogative. Not only do the historical and prerogative foundations justify this, but also economic considerations such as the cost of responding to applications and of the judicial resources required to deal with them. The Board's burden, by requiring the provision of reasons, for its essentially discretionary decisions, taking into account many factors, should not be increased.

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<sup>48</sup> *Knight v Adult Parole Board* [2013] VSC 97.

### **Indefinite detention**

I should also say something of the regime which exists in Victoria for the supervision, monitoring and detention of the more serious sexual offenders. That regime has relevance to parole because it is a regime by which offenders of a certain class may be detained from a date on which they might otherwise have been released whether on parole or not.

The *Serious Sex Offenders Monitoring Act 2005* (Vic) established a system that enabled the extended supervision of high-risk child-sex offenders beyond the terms of their sentences. In 2009, the Victorian Parliament enacted the *Serious Sex Offenders (Detention and Supervision) Act 2009* (*Sex Offenders Act*). One important effect of the change was to introduce a system by which an ‘eligible person’ who has committed a ‘relevant offence’ can not only be subjected to a regime for their supervision after completion of their custodial sentences<sup>49</sup>, but may also, in appropriate cases, be detained. Some judges, as with those of other States in which a regime of this kind has been introduced, can be discerned to have experienced a level of discomfort with the regime, and hesitate to make detention orders.

A scheme which provided for the detention of persons who have committed a serious sexual offence has operated in Queensland since 2003. It has survived a High Court challenge<sup>50</sup> and numerous detention orders have been made pursuant to it. A challenge to it, on constitutional grounds, was made in *Fardon v Attorney-General*<sup>51</sup>. Fardon argued that the regime offended the principle stated in *Kable v Director of Public Prosecutions (NSW)*<sup>52</sup>. That decision recognised State courts as part of a national scheme of courts which may exercise Commonwealth judicial power<sup>53</sup>. If State legislation purported to confer a jurisdiction upon a court which compromises the institutional judicial integrity of that court so that it is no longer an appropriate repository of Commonwealth judicial power, the

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<sup>49</sup> That was the effect of the 2005 Act.

<sup>50</sup> *Fardon v Attorney-General* (2004) 223 CLR 575.

<sup>51</sup> (2004) 223 CLR 575.

<sup>52</sup> (1996) 189 CLR 51 and applied in cases such as *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40, *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319, *South Australia v Totani* (2010) 242 CLR 1 and *Wainohu v State of New South Wales* (2011) 243 CLR 181.

<sup>53</sup> *Commonwealth Constitution*, Chapter III.

legislation is invalid as exceeding the legislative power of the (State) Parliament<sup>54</sup>. The State Courts must remain pure and unpolluted vessels for the reception of Federal judicial power.

A detailed study of *Fardon's Case* and the application of the *Kable* principle are unnecessary for present purposes. The point which the former establishes, however, is that a system of preventative detention (at least as provided by the Queensland Act) does not offend the *Kable* principle. While that principle is one which continues to evolve and develop<sup>55</sup>, the Queensland Act does enjoy High Court approval. (Amendments have, however, been made to that legislation since that case was decided.)

Under a like statutory scheme in Victoria, applications for supervision orders may be made to the Court which sentenced the offender, or, the County Court (if the sentencing Court was the Magistrates Court<sup>56</sup>). The Applicant is the Secretary of the Department of Justice.

Detention orders are sought from the Supreme Court by the Director of Public Prosecutions<sup>57</sup>, although if the Supreme Court thinks it inappropriate to make a detention order, it may make a supervision order<sup>58</sup>. The fact of vesting the DPP only with standing to apply for detention orders somewhat takes control from the Department. It also tends to give those applications a criminal flavour and a suggestion of a need for criminal standards and onuses of proof. It may be that these were a deliberate object of the *Sex Offenders Act*. They both, however, are factors which contribute to the difficulties which are evident in some of the cases which I consider below. There is an understandable if misguided tendency to view the regime as a system for punishing prisoners notwithstanding expiry of their sentence. The true purpose is however the security and safety of the community. Any mechanism which might reinforce any different view is best avoided. The DPP informed us that he was opposed to the reposing of the responsibility for applications in him principally because of its incompatibility with criminal practice

The regime in Victoria regulates in considerable detail the management of offenders at

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<sup>54</sup> Martin CJ in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 (affirmed on appeal to the High Court in *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532).

<sup>55</sup> See, for example *Thomas v Mowbray* (2007) 233 CLR 307 (anti-terrorist legislation); *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v State of New South Wales* (2011) 243 CLR 181; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 (anti-biker legislation).

<sup>56</sup> Section 7(3).

<sup>57</sup> Section 33.

<sup>58</sup> Section 36(4).

'residential facilities' and other locations who are subject to supervision orders<sup>59</sup>. These provisions in the *Sex Offenders Act* are to provide for a more strictly-controlled environment (or one capable of being strictly-controlled) than might actually be the case in practice. The consequence is that supervision may appear to provide a better means to ensure community safety than really exists.

The Victorian regime also gives less weight and importance to the assessments of prisoners by psychiatrists and appropriately qualified psychologists than other comparable regimes. An 'assessment report'<sup>60</sup> (which is the basis for applications for both supervision and detention orders) need not here be one prepared by a psychiatrist. There is no necessary requirement in Victoria, as there is in some other State regimes, that two or more of the assessment reports be from psychiatrists. The role of experienced forensic psychiatrists is a necessary part of other regimes.

I have looked briefly at some cases decided under the *Sex Offenders Act* and its predecessor 2005 Act.

[REDACTED]

[REDACTED]

[REDACTED] and cases like it, are to some extent unusual examples, because they are a legacy of the repeal of the 2005 Act and the fact that detention orders did not become available until 2010. No doubt detention applications under the present Act are being made in good time for them to be decided before the prisoner's release, thereby avoiding any need for interim supervision.

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<sup>59</sup>

Part 10.

<sup>60</sup>

A term defined in s 109. The report must be from 'medical expert', a term defined to include psychiatrists, and also psychologists and other prescribed health service providers. In other jurisdictions, special recognition is made of assessments by psychiatrists: *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 11, 13(4)(a); *Dangerous Sexual Offenders Act 2006* (WA) see, for example, ss 32, 37, 38.

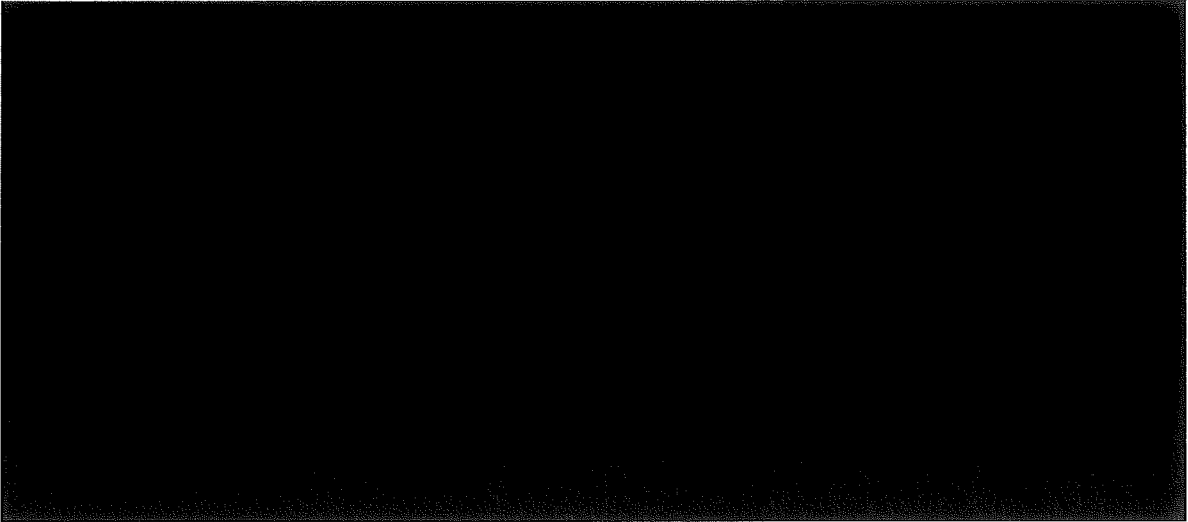
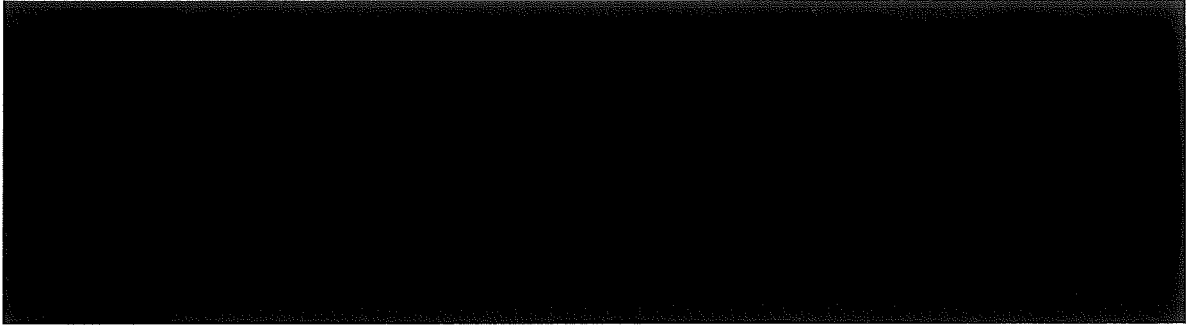
<sup>61</sup>

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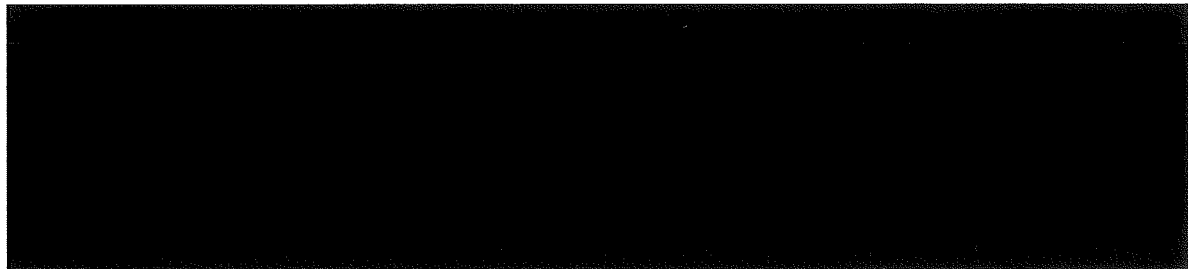
The 2005 Act, despite its repeal, continued to apply with respect to such orders.

<sup>63</sup>

As required by s 109(2).



The *Sex Offenders Act* in my view calls for more than an assessment, in determining whether supervision or detention is appropriate, as to whether a prisoner would be likely to abscond under supervision. The risk or danger to which that Act is directed is of harm to the community, in this case, by the commission of offences against children, and especially harmful ones. It is not entirely clear from the Judge's reasons in [REDACTED] what evidence was led on this topic, but it seems not to have focussed as clearly as it might, upon the risks to which I have referred.



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In *TSL*<sup>67</sup>, the Court of Appeal<sup>68</sup> considered the threshold for the making of orders under the 2005 Act. The Court concluded that the language of s 11 of that Act allowed the Court to make an extended supervision order only if satisfied to a high degree of probability that an offender is likely to commit a relevant offence, and that the word 'likely' requires there to be *a high degree of probability* that the offender will commit a relevant offence<sup>69</sup>.

The expressions 'likely to commit a relevant offence' and 'high degree of probability' are derived from *Chester's Case*<sup>70</sup>. The consequence is a higher threshold for the making of orders than may have been intended. Assessments of the degree of risk of recidivism can never be precise. Prediction of human conduct can never be entirely reliable (something to which Callaway AP expressly referred<sup>71</sup> in *TSL*). This and other considerations resulted in the revocation of the supervision order, because the Court of Appeal had no power to do other than revoke or confirm that order (when it is clear their Honours would have preferred merely to mitigate its effect).

In *Eames*, the Court of Appeal<sup>72</sup> corrected the 'error' of 'high probability' by revoking an extended supervision order which had been made below, on the basis that the primary judge had erred in concluding, on the evidence presented, that Eames was likely to commit a relevant offence<sup>73</sup>. The Court considered the term 'likely to commit' to mean 'more likely than not to commit'<sup>74</sup> (ie greater than a 50 per cent chance).

As I earlier suggested, the difficulties of reposing in the DPP standing to make applications for detention orders can imbue the cases with a criminal flavour. There is, for

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<sup>67</sup> A case decided under the 2005 Act: (2006) 14 VR 109.

<sup>68</sup> Callaway AP, With whom Buchanan JA and Coldrey AJA agreed.

<sup>69</sup> (2006) 14 VR 109 at [9].

<sup>70</sup> *Chester v R* (1988) 165 CLR 611.

<sup>71</sup> *TSL* (2006) 14 VR 109 at [41]-[42].

<sup>72</sup> Maxwell P and Weinberg JA; Nettle JA agreeing, but in separate reasons.

<sup>73</sup> At para [2].

<sup>74</sup> At para [21].



example, evidence in *TSL*<sup>75</sup> of the confusion between the criminal subject matter of an application and its determination in the civil jurisdiction.

To deny or restrict freedom to a person who has served his sentence is undeniably a large and serious matter, and one which should be done with great caution. But it is nonetheless something for which the legislature has made specific provision in the interests of the community at large, and of likely victims in particular.

The cases to which I have referred in this Chapter are not cases in respect of offences committed by parolees. But they, and the legislation applicable to them, have features in common with offences committed on parole. They recognise that there need to be regimes to deal with offenders whether randomly impulsively criminal or not, who present real and continuing risks to the community. They show that the Parliament, representing society at large, whilst accepting that criminals should not in general be detained after they have served their terms of imprisonment, has determined that there are some categories of offenders for whom special, if seemingly harsh arrangements, including of continued detention if necessary, must be made. This is not novel. In a sense, the regimes to which I have referred constitute a revival of the old system in some States that enabled judges to declare persistent serious offenders habitual criminals. In Victoria, that power existed under the *Indeterminate Sentences Act 1907* (where a Board was vested with that power) and continues to exist under s 18A of the *Sentencing Act 1991*.

Just as special provision must be made to detain dangerous offenders beyond their terms of imprisonment in some circumstances, similar categories of offender need to be identified and treated appropriately but clearly differently from other prisoners.

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<sup>75</sup> At para [18].

## Chapter 4

### Other Parole Systems

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#### **New South Wales**

The Chair and some of the members of the New South Wales Parole Authority met those assisting me at Parramatta on 22 May 2013.

That Authority is constituted by no fewer than four judicial members, one or more police officers, one or more Probation and Parole Service Officers and no fewer than ten community members. The judicial members are persons 'judicially qualified', meaning any Judge or retired Judge of a New South Wales court or the Federal Court, or any Magistrate or retired Magistrate, or any person qualified to be appointed as a Judge of a New South Wales court<sup>76</sup>.

Despite the definition permitting the appointment of a serving judge, in practice, a full-time serving judge or superior Court Judge has never, in recent times at least, been appointed. The judicial members are ordinarily retired Magistrates, who, in some cases, retain acting or limited inferior court appointments. These members are appointed by the Governor. They are not appointments which are made on the recommendation of the heads of the jurisdictions as they are in Victoria.

The police officer member remains as a sworn, serving member of the Police force. The Commissioner of Police makes that appointment. That officer, even as a member of the Authority, has access to such sources of information as do serving police officers. He or she introduces into meetings, and review hearings of the authority, information which has been obtained via these avenues. The information provided is obviously of relevance, and may in some cases, be essential for a determination in favour of, or against, parole.

Probation and Parole Service Officers are appointed by the Commissioner of Corrective Services. They have some knowledge of, and experience with, the practical aspects of managing and dealing with offenders who are on parole.

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<sup>76</sup> *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 meaning of 'judicially qualified'.

The Community Members are appointed by the Governor. Advertisements have been placed in the past, and some appointments made following them. Others are simply made on the recommendation of the Attorney-General.

The two principal differences between the composition of the institutions themselves in Victoria and New South Wales are the presence on the Board in Victoria of a serving superior court judge, and in New South Wales, of a police officer (not merely as a community member) and corrections officer, neither of whom is appointed by the Governor. The view has been taken in Victoria is that, although it might not be unlawful to appoint a sworn and serving police officer to the Adult Parole Board, to do so would be undesirable having regard to, among other things, the report of the Office of Police Integrity, *Crossing the Line*<sup>77</sup>, which expressed reservations about the compatibility of the duties of a police officer as such and membership of a parole authority. A question was also raised about the operation of the Appointment and Remuneration Guidelines for Victorian Government Boards, Statutory Bodies and Advisory Committees of the Department of Premier and Cabinet.

There is further difference in the underlying purpose which the New South Wales Authority seeks to achieve. Its members regard themselves very much as a law enforcement body, upholding and enforcing parole orders. It expressly disclaims any case management functions.

The New South Wales Authority operates in two modes: it meets privately to discuss and decide all matters. For those matters in which the Authority decides to revoke parole or to refuse the grant of it, a review hearing is convened. Such hearings are held in open session, in a purpose-built court room in the Parramatta Courthouse. Five members sit. A judicial member presides. Offenders are entitled to be represented. The Authority gives reasons for its decisions, including the cases in which it grants parole, which it provides to the offender. The review hearings which those assisting me observed were conducted expeditiously, the members having had the benefit of having read and considered the papers both before and during their private meeting.

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<sup>77</sup> M Strong, (2011) *Crossing the Line: Report of an investigation into the conduct of a member of Victoria Police undertaking secondary employment as a Ministerial Adviser and his relationship with a Deputy Commissioner of Victoria Police.*

Some decisions in matters which have attracted particular public interest are made available to the public and the media. Some appear on the Authority's website. By its public review hearings, the reasons it provides to offenders and those more limited number it makes available publicly, the Authority operates differently from the Victorian and other State Boards<sup>78</sup>.

There exists a statutory avenue of appeal from a review decision of the Authority to refuse parole. The limited ground of any such challenge is that the decision was made on the basis of false, misleading or irrelevant information<sup>79</sup>. The Attorney-General and the Director of Public Prosecutions may challenge any decision by the Authority to release a serious offender on parole on the same grounds<sup>80</sup>.

The Authority estimates that, in 2002, some 12 or so matters came before the Supreme Court by way of judicial review of the Authority's decision. One application was successful. It related to the killer of Dr Victor Chang, and was initiated by the Attorney-General, following a decision by the Authority to grant parole<sup>81</sup>. The Court (McClellan CJ at Common Law) concluded that the Authority had failed to proceed in accordance with the Act: the ground was a failure to follow statutory procedures rather than a miscarriage of a discretion. The matter was remitted to the Authority for reconsideration. The Authority subsequently released the offender on parole.

Few applications have been made this year for judicial review by the Supreme Court. The Authority would argue this to be because of the explanation given by way of its reasons, and, more generally, to its available and clearly reasoned decisions.

The Authority uses electronic records which greatly reduces the expense otherwise incurred in the making, storing and retrieving of hardcopies and the like. Offenders in most cases appear by video link, again saving the expense of transporting them to review hearings for what in most cases is a short appearance.

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<sup>78</sup> Victoria's Adult Parole Board regulates its own procedures, subject to what the Regulations may prescribe: *Corrections Act* 1986 (Vic) s 66(6). The only prescription in the Regulations is that the Board meet as often as is necessary for it to perform its functions: *Corrections Regulations* 2009 s 81.

The Board's current practice is not to have public hearings and to give prisoners brief oral reasons in some instances. Reasons are not published or otherwise made publicly available. The practice in Queensland is to give reasons, but the Board meetings are not open to the public.

<sup>79</sup> *Crimes (Administration of Sentences) Act* 1999 (NSW) s 155.

<sup>80</sup> Section 156.

<sup>81</sup> *Lim v State Parole Authority and the Attorney General for New South Wales* [2010] NSWSC 93.

The New South Wales legislation prescribes the factors which the Authority is to take into account in deciding whether to grant parole. Section 135 provides:

***General duty of Parole Authority***

- (1) *The Parole Authority must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest.*
- (2) *In deciding whether or not the release of an offender is appropriate in the public interest, the Parole Authority must have regard to the following matters:*
  - (a) *the need to protect the safety of the community,*
  - (b) *the need to maintain public confidence in the administration of justice,*
  - (c) *the nature and circumstances of the offence to which the offender's sentence relates,*
  - (d) *any relevant comments made by the sentencing court,*
  - (e) *the offender's criminal history,*
  - (f) *the likelihood of the offender being able to adapt to normal lawful community life,*
  - (g) *the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole,*
  - (h) *any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service, as referred to in section 135A,*
  - (i) *any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the State,*
  - (ia) *if the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D (1) (b) (vi) of the Drug Court Act 1998, the circumstances of that decision to decline to make the order,*
  - (j) *such guidelines as are in force under section 185A,*
  - (k) *such other matters as the Parole Authority considers relevant.*

...

These considerations are reinforced in 'Operating Guidelines' made under s 185A of the *Crimes (Administration of Sentences) Act 1999*. Those Guidelines state (section 1.1):

*When considering whether a prisoner should be released from custody on parole, the highest priority for the Parole Authority should be the **safety** of the community and the need to maintain public confidence in the administration of justice. (emphasis added)*

The Guidelines otherwise deal with the documents to be provided to the Authority, the circumstances in which there ought ordinarily be a grant of parole, and some practices and

procedures of review hearings. Section 6 of the Guidelines 'Revoking Parole' acknowledges that 'parolees are on conditional liberty' and sets out some of the considerations relevant to the exercise of the discretion whether or not to revoke parole.

The New South Wales system seeks to reinforce that parole is a dispensation. The formality of its review hearings, the separation of the case management function and the Authority's methodology and practices in my view all contribute to this. But that is certainly not to say that it is necessary to adopt a like system to New South Wales system. As I explain elsewhere, it is undesirable to cause prisoners to expect, or to confer the trappings of a judicial system upon the Executive function of punishment, and, if and when feasible, the reform of offenders.

The effectiveness of a parole system cannot, as I have explained, be assessed in isolation from the sentencing regime upon which it is, necessarily, predicated. In New South Wales, where a sentence is 3 years or less, the Court, in setting the non-parole period, also determines in a self-executing manner, the release of the prisoner to parole. The Authority, however, may revoke parole in such cases. It is only for sentences longer than 3 years, that the Parole Authority has a discretion whether to release a prisoner to parole. This is one reason why any comparison of the statistics for New South Wales and Victoria must be treated with caution. There are no automatic court-based orders in Victoria, and the threshold for matters within the Adult Parole Board's jurisdiction is lower than in New South Wales.

The parole system in New South Wales is, as with all such regimes, a product very much of its history and its sentencing regime and practices which have grown up around those. I think it desirable that any additional layer of consideration of parole matters by way of review is to be avoided. First, it is unnecessary. Secondly, it is expensive. Thirdly, it is to misunderstand the Executive function involved. Fourthly, a right of review tends to imply that the offender has rights in connexion with parole when it is, as I have said, properly to be regarded as a privilege or dispensation. Fifthly, our observations of the Adult Parole Board in session which I summarize later, are that a number of reviews are really exercises in futility.

## Queensland

The system of parole in Queensland is defined by the provisions in Chapter 5 of the *Corrective Services Act 2009* (Qld). Prisoners in that State must apply for parole<sup>82</sup>. Generally speaking, prisoners sentenced to a period of imprisonment of more than 2 years (if sentenced before the commencement of the Act) or 3 years (if sentenced after the commencement), are eligible for parole the day after the day on which the prisoner has served half the period of imprisonment to which the prisoner has been sentenced despite any grant of remission.

A number of Boards exist, including a Queensland Board, which deals with applications for parole by prisoners sentenced to a period of imprisonment of 8 years or more, or those prisoners who are in custody outside the area for which a regional parole board has been established<sup>83</sup>. The other Boards are regional ones: the Southern Queensland Regional Parole Board and the Central and Northern Queensland Regional Parole Board.

In 1997 a number of offences were declared to be 'serious violent offences', such as child sexual offences and violent offences<sup>84</sup>. An offender declared by the court to have committed a serious violent offence cannot apply for parole until he has served 80 per cent of the sentence, or 15 years in prison (whichever is less), unless the court has set a later parole eligibility date. Offenders sentenced to life imprisonment must serve 15 years in prison before being eligible to apply for parole. An exception applies to offenders who have been sentenced to life imprisonment for multiple counts of murder, or who have previously been convicted of murder. In these instances, an offender must serve 20 years in prison before being eligible to apply for parole. The Court may set a longer non-parole period.

Prisoners and their legal representatives may appear before the Board if granted leave<sup>85</sup>.

The Board is not bound by the recommendation of the sentencing court, or the parole eligibility date fixed by the court where the Board receives information about the prisoner that was not before the court at the time of sentencing, and, after considering that

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<sup>82</sup> *Corrective Services Act* s 180(1).

<sup>83</sup> *Corrective Services Act* s 187.

<sup>84</sup> Those offences are listed in Schedule 1 of the *Penalties and Sentences Act 1992* (Qld).

<sup>85</sup> *Corrective Services Act* ss 189, 190.

information, decides that the prisoner is not suitable for parole at the time recommended or fixed by the court<sup>86</sup>.

The times within which the Board must decide parole applications are prescribed<sup>87</sup>. Decisions to refuse parole are regularly the subject of judicial review by the Queensland Supreme Court. The Board is obliged to give reasons for a refusal. A prisoner who is refused parole three or more times by a regional board may seek a review of the last of those decisions by the Queensland Board<sup>88</sup>.

There are other aspects of the Queensland parole system of exceptional circumstances parole and Court-ordered parole with which it is unnecessary to deal.

The Queensland Board must include a president and deputy president, each of whom is to be either a retired judge or a lawyer who has practised for at least five years. The modern practice in Queensland has not been to appoint retired (or, indeed, serving) judges to the Board. There are five additional appointed members: one of them must be an Aboriginal or Torres Strait Islander, one a doctor or psychologist, and two or more must be women. One member is a nominated representative of Queensland Corrective Services.

The number of members on regional boards is decided by the Minister. But they must include the president of the Queensland Board, a deputy president and others members with similar qualifications to those on the Queensland Board.

The tests which the various parole boards in Queensland are required to apply are found in both legislation and in Guidelines given by the Minister.

The Guidelines are made under s 227 of the *Corrective Services Act* 'about the policy to be followed by the Queensland board when performing its functions'. The Minister has issued such guidelines<sup>89</sup>, which state, among other things, that the highest priority for the Board should always be the safety of the community in considering whether to grant parole.

Decisions of parole boards in Queensland are regularly subjected to judicial review by the Supreme Court, and a failure to take the guidelines into account is a ground for such a

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<sup>86</sup> *Corrective Services Act* s 192.

<sup>87</sup> *Corrective Services Act* s 193

<sup>88</sup> *Corrective Services Act* s 196.

<sup>89</sup> Made on 4 August 2011, see

[http://www.correctiveservices.qld.gov.au/About\\_Us/community\\_corrections\\_board/ministerial\\_guidelines\\_to\\_the\\_parole\\_board\\_aug2011.pdf](http://www.correctiveservices.qld.gov.au/About_Us/community_corrections_board/ministerial_guidelines_to_the_parole_board_aug2011.pdf)



challenge<sup>90</sup>. This direct involvement of the political Executive in the setting of the criteria by which parole decisions are to be made tends to imply the susceptibility of such decisions to judicial review, as a judicial check on guidelines which do not have the imprimatur of Parliament.

### **Other Australasian jurisdictions**

Corrections Victoria provided to us a table comparing some the major features of the parole systems which operate in each of the Australasian jurisdictions. This information included how each board is constituted, its 'jurisdiction', the documentary sources of the test which each applies, and the factors which each take into account in deciding whether to grant parole. We found that table to be a useful basis for comparing the Victorian system to those of other jurisdictions. Because of its utility to us, I append it as **Appendix 5**.

Most of the systems to which Victoria might be compared have prescribed in legislation the tests to be applied by the Board. Victoria and the Northern Territory are the only ones in which there is an element of internal prescription only, and therefore not fixed; Queensland however, operates on a combination of legislative provisions and Ministerial guidelines.

The legislation, however, says little of the tests parole boards should apply. Queensland is unique in having a regime of Ministerial guidelines. Their existence in a sense invites applications for judicial review by prisoners on grounds that relevant considerations have not been taken into account.

A victims' submission advocated the introduction of a provision requiring the Board to proceed according to the rules of natural justice, with a view, I think, to allowing standing to a victim or a victims' representative in proceedings either before the Board, or on review by a court. I am strongly in favour of regard being had to victims' and their representatives' voices and suggest measures for their being truly heard. As I observe elsewhere however, it is the role of the State to make provision for a justice system, to prosecute for crime, in the name of and on behalf of the community, and to implement the punishment ordered by the courts. This is inconsistent with personal standing as such in curial proceedings or the like. In practice, to introduce rules of nature justice is much more likely to provoke challenges by prisoners than to assist the important ends of victims and their representatives. This is, in

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<sup>90</sup> See, for example, *Butler v Queensland Community Corrections Board* [2001] QCA 323.

substance, what has happened in Queensland where judicial review instigated by prisoners is a frequent occurrence. It is also, as I wish to emphasise, inconsistent with the long history of the Executive function of clemency.

The creation of a parole board is not for the purpose of setting up a new and separate form of a constitutional arm or institution. The purposes are to separate political or prejudicial influence from a decision to grant or withhold parole, and to seek to ensure that the decision is made by a body having the expertise and experience to make it. At all times however, the Board remains an emanation of, and forms part of, the Executive exercising an executive discretion.

## Chapter 5

### Sentencing

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The parole system is one which is inseparable from the system of sentencing which precedes it. I deal in this Chapter with the circumstances leading up to present attitudes to grants of parole, and then move to some of the more important sentencing principles and rules which operate in Victoria.

#### Truth in sentencing

Reforms took place from the mid 1980s prompted by a desire to achieve greater transparency in sentencing decisions. One of the catalysts for those reforms was a decision of the Court of Criminal Appeal of Victoria in *Yates v R*<sup>91</sup>. Yates had been convicted of acts of paedophilia and sentenced to 10 years imprisonment with a non-parole period of 8 years. He appealed on the ground that, for a man of his age, such a sentence was 'crushing'. The Crown responded that, with remissions, Yates would serve a sentence of just 4 years.

Five Judges of the Court heard the appeal. A majority allowed the appeal and reduced the sentence to 7 years with a 5 year non-parole period holding that the sentencing court ought not have regard to the effect of administrative interventions in the sentence passed. It was the role, their Honours said, of the sentencing Court to pass a sentence which was appropriate having regard to the circumstances of the offence and character of the offender. The majority said<sup>92</sup>:

*The mere fact that there can be such a discrepancy between a sentence passed and the period of detention actually served is profoundly disturbing. The fact that there often is such a discrepancy has troubled sentencing judges for some considerable time. They have been troubled because the result of the combination of the labyrinthine provisions of the statutes and regulations relating to sentencing and the manner of their administration operates seriously to undermine the authority of the Court. On the one hand the sentencing judge's task is to fix the sentence which he considers appropriate in all the circumstances to the offence and to the offender. On the other hand, he knows that in all probability the person sentenced will not serve anything like even the minimum term imposed. An intelligent observer who was told about the sentence passed and the period of incarceration actually served would be likely to conclude either that the Court had no authority because little notice was taken of the sentence*

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<sup>91</sup> [1985] VR 41.

<sup>92</sup> [1985] VR 41 at 43-44.

*passed or that the Court was engaged in an elaborate charade designed to conceal from the public the real punishment being inflicted upon an offender. Such conclusions would be understandable unless the Court's role is seen as one of having to fix the scope of the appropriate sentence only without being concerned about the actual time which the prisoner may serve in custody, this being a matter more appropriate for the Parole Board and prison authorities who are able to assess the prisoner's progress during the course of the sentence.*

Following the decision, the Victorian Sentencing Committee was established to review sentencing policy and practice in Victoria. The *Penalties and Sentences Act 1985 (Vic)* was passed. It made provision for a range of new sentencing options (including suspended sentences and community based orders).

Later, in April 1988, the Victorian Sentencing Committee Report was published. It found that, although the *Penalties and Sentences Act 1985* had created an array of new sentencing options, there was little legislative guidance as to the circumstances in which those options might be utilised. Many of the recommendations which the report made were adopted in the *Sentencing Act 1991*. That Act, among other things: established a hierarchy of sentencing options; it abolished statutory remissions; and it provided for simplified sentencing procedures.

Amendments made to the *Sentencing Act* in 1993 had as their object greater consistency between sentencing law and practice, and community expectations. The focus of those amendments was serious sexual and serious violent offenders, and, in particular, offenders who had been sentenced to imprisonment for two or more sexual or violent offences of particular types. The amendments required the Court, when sentencing 'serious offenders', to have regard to community protection as the principal purpose for which the sentence be imposed. It became permissible for the Court, in doing so, to impose a custodial sentence 'longer than that which is proportionate to the gravity of the offence considered in the light of its objective circumstances'. These provisions were applied by the sentencing Judge (Nettle JA) in Bayley's case.

Those amendments also required that sentences be cumulative, unless there were exceptional circumstances. More recent amendments (in 1997) extended this to serious drug and serious arson offences.

Changes too were made so that offenders over the age of 21 convicted of certain serious offences might have indefinite sentences regardless of the prescribed maximum sentence. The threshold for doing so is the satisfaction of the court, to a high degree of probability, that the person is a '*serious danger to the community*', taking into account factors such as character, age and health, in addition to the exceptional nature and gravity of the serious offence and any special circumstances.

The 1991 Act was amended in 1994 to allow the sentencing court to receive a statement from the victims of criminal offending following a finding of guilt.

In 2003, the Sentencing Advisory Council was established, with functions that included the provision of statistical information on sentencing, conducting research and disseminating information to members of the judiciary and other interested persons on sentencing, the gauging of public opinion on sentencing, and consultation with government, interested parties and the public on sentencing matters.

A more recent sentencing reform was the abolition, in 2010, of suspended sentences for serious offences including murder, manslaughter, rape, intentionally causing serious injury, sexual penetration of a child under 16 and armed robbery.

I set out this brief account of changes in the sentencing laws to make the point that legislative mandates for the imposition of non-parole periods were not intended to give rise to any statutory presumption, or indeed even any implication that an offender should or must have an entitlement to parole on the expiry of a non-parole period. '*Truth in sentencing*' was the outcome of a perception that the sentence imposed by a Court could be, and often in practice was, quite different from and longer than the sentence that would actually be served.

### **Sentencing in Victoria**

When Victorian Courts sentence a convicted criminal, the Judge must set a non-parole period in those cases in which the sentence is to life, or two or more years, imprisonment<sup>93</sup>. When the sentence imposed is less than 2 years imprisonment, but not less than 1 year the Judge *may* do so<sup>94</sup>. The non-parole period must be no fewer than 6 months less than the term

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<sup>93</sup> *Sentencing Act* 1991 (Vic) s 11(1).

<sup>94</sup> *Sentencing Act* 1991 (Vic) s 11(2).

of the sentence<sup>95</sup>. Beyond that legislative direction, there is no requirement at law for a set ratio between the head sentence and the non-parole period<sup>96</sup>.

The Court of Appeal of Victoria has rejected the notion that there might be any 'usual' non-parole period. As Nettle JA said in *DPP v Kumova*<sup>97</sup>:

*... the idea of a 'usual non-parole period' can be problematic. Taken literally, it tends to imply the existence of a starting point in a two part sentencing process. A two part sentencing process is forbidden: Markarian v The Queen (2005) 228 CLR 357 at [39] and [51].*

I respectfully agree, and think that his Honour's reasoning is relevant to the current, in my view, not appropriately balanced approach of the Adult Parole Board. The Courts strive for consistency by looking to comparable sentences. Making an empirical observation about such instances does not displace the sentencing judge's obligation to consider the minimum time which the offender ought spend in custody before becoming eligible for release. As Nettle JA also said in *Kumova* (at 6):

*To a considerable extent, what is usual or normal is what a sentencing judge considers to be usual or normal for the nature and gravity of the offence in question in all the circumstances of the case, and what is less than normal will accord to that conception.*

This approach is one which follows the reasoning of the High Court in *Power v The Queen*<sup>98</sup> to which Nettle JA referred and applied in *Kumova*, and to which the Court of Appeal of Victoria also has recently referred in like cases<sup>99</sup>.

Before leaving this topic, I note and respectfully adopt the characterisation of the Court of Appeal in *Yates* of the carrying out of punishment and the partial exemption from it, as an administrative act, thereby making a clear distinction between the judicial function of trial and sentencing, and the actual imprisoning and releasing of offenders.

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<sup>95</sup> *Sentencing Act* 1991 (Vic) s 11(3).

<sup>96</sup> *R v Tran and Tran* [2006] VSCA 222 at [27]-[28] per Redlich JA, with whom the other members of the Court agreed.

<sup>97</sup> [2012] VSCA 212 at 3.

<sup>98</sup> (1974) 131 CLR 623.

<sup>99</sup> See, for example, *R v Merritt* [2008] VSCA 238 at [17], n 4.

## Chapter 6

### Other Reviews, Assessments and Results of Consultation

In preparing this Report, I have been much assisted by the various reviews which have been conducted in recent times of the Parole Board and issues related to it<sup>100</sup>. Of particular assistance were the Departmental summary of the Reviews and the Review conducted by Professor James Ogloff and guided by the Office of Correctional Services Review (OCSR). It is to the first of those that I now turn.

#### **Professor Ogloff's Review**

Professor Ogloff reviewed nine relatively recent cases in which offenders under supervision either committed or are alleged to have committed murder<sup>101</sup>. They are of particular relevance and, it seems to me, expose deficiencies in the Victorian parole system.

I need to say something about those cases because it is no exaggeration to describe them as shocking cases, a proposition which I put to Professor Ogloff and with which he agreed. The fact that those persons may have re-offended in the circumstances in which they did is not a matter which can be treated with other than the greatest of concern and calls for explanations as to why it happened.

Because Professor Ogloff has dealt in detail with the cases, it is unnecessary for me here however to do more here than to refer to some of them.

Offender ■ whilst on parole and a subject of police interest, was charged with the murder of a person ■

■ He has now been convicted and sentenced to life imprisonment. ■

■ He had served a term of imprisonment for murder from ■ He was then on parole for ■ before being convicted for a further murder which had been committed some ■

■ It is a little difficult to understand how, in those circumstances, he was sentenced only to 15 years imprisonment with a non-parole period of 11 years.

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<sup>100</sup> Sentencing Advisory Council, March 2012, *Review of the Victorian Adult Parole System*.

<sup>101</sup> In addition to two others: see note 1 above.

The last murder for which Offender ■ was convicted was, as I have said, committed in about ■■■■■. The relevant parole conditions to which he was subjected included participation in various programmes and that he have no contact with the family of his victims. It appears to me that the parole conditions were formulaic. There must be a very serious question whether a person who has already been convicted twice for murder should be allowed parole under any circumstance. Certainly such a person should not in my opinion be allowed parole unless the highest level of intensive supervision were practicable, which plainly it was not.

Enlightened society may well take the view that no case should be regarded as hopeless, but the truth is, as Offender ■ incurable violence demonstrates, that society cannot be expected, and should not be obliged, to assume the risk that release on parole involves.

Professor Ogloff has provided a full history of Offender ■ criminal conduct other than murder, as well as the repeated attempts, by imposition of educational programmes, to reform him. The latter always failed, and, with the benefit of hindsight, can be seen to have been inevitable failures. It is impossible not to be sceptical of the progress reports before Offender ■ last apprehension which record satisfactory conduct by him.

I refer next to the case of Offender ■ This man was charged with murder in ■■■■■

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Offender ■ is now ■■■■■. His prison record includes imprisonment for criminal damage, false imprisonment, attempted breaking, burglary, breach of a suspended sentence, stealing, wilful damage to property and larceny ■■■■■

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Offender ■ has ■■■■■ and is reported as, on occasions, complying with conditions of parole.

Among other things, Professor Ogloff noted that there had not been sufficient attention paid before ■■■■■ release on parole to the arrangements that he might make for



accommodation, or as to his mental health. This, with respect, seems to be something of an understatement. The odds, it seems to me, clearly favoured the proposition that further criminal conduct by him was a certainty.

It was equally inevitable that Professor Ogloff and I would discuss the notorious case of Bayley. Bayley was not considered by Professor Ogloff in his report. [REDACTED]

[REDACTED]

The facts of Bayley's case and his history of offending were considered by Nettle JA in his remarks when sentencing him on 19 June 2013 for that rape and murder<sup>102</sup>.

On 21 September 2012, Bayley was drinking with his partner at a Melbourne city nightclub. His partner left after an argument between them. He later came into contact with Ms Meagher. She was then a young married woman of 29 years of age. On the night, she had attended a birthday party for one of her colleagues. She left the party and, at about 1.30am, having declined the offer of a lift home from a colleague, began walking home. Bayley soon sighted her and spoke to her. He attacked her, raped her, and then strangled her. He drove her to a remote place, buried her body in a shallow grave, and thoroughly cleaned his car to remove any trace of evidence.

CCTV footage showed Bayley to have been in the vicinity of the crime scene. Witness statements supported this. He was arrested on 27 September. He initially denied any involvement in an interview, but confessed as the strength of the police case was made known to him.

At the time Bayley was on parole, and on bail, as I summarize later. He had a history of violent sexual offending. He married in 1990, and fathered two children. After he was married, but when he was just 18, Bayley detained a woman (not his wife) against her will, attempted to rape her, and then did rape her, in the bedroom of his home. He was charged and released on bail pending trial.

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<sup>102</sup> [2013] VSC 313.

While then on bail, Bayley again attacked a 17 year old girl. He poked her in the eyes, ripped off her clothes, and touched her on her breasts and vagina. He threatened to kill her.

Later, in 1990, he then detained and attacked a 16 year old girl who was hitch-hiking and whom he had picked up, but who was able to escape.

Bayley, after being confronted with allegations of these three attacks, ultimately admitted having perpetrated them. He was sentenced on 7 June 1991 for those offences to a total effective sentence of five years' imprisonment with a non-parole period of three years. In the course of his sentencing remarks, the County Court judge expressed grave reservations about the genuineness of his expressions of remorse.

At this time, Bayley was known as Edwards. He changed his name by deed poll. Bayley separated from his wife. He commenced a relationship with another woman, with whom he fathered two children.

On 17 April 2001, he was again arrested, and charged with 16 counts of rape against five complainants committed between 1 September 2000 and 31 March 2001. He admitted sexual activity with each, but denied the use of force or any other wrongdoing. He later admitted guilt and claimed to be remorseful for what he had done. He was sentenced to 11 years' imprisonment with a non-parole period of eight years. The County Court judge who sentenced Bayley on this occasion noted that the five complainants were prostitutes and whom Bayley saw to be easy victims, unlikely to complain to police<sup>103</sup>. He had used threats and violence to force those women to engage in a series of sexual acts which caused horrifying distress and brutal injury. His acts were intended to humiliate and injure.

Bayley was again released on parole, on 17 March 2010. He re-offended almost immediately (18 months later). He was sentenced on 27 February 2012 to three months' imprisonment on one charge of recklessly causing serious injury committed on 20 August 2011, to be served cumulatively with the sentences earlier imposed. On appeal against that sentence he was granted bail. It is not easy to understand why Bayley was not imprisoned when he was sentenced on 27 February 2012. It is no answer to say that he had an appeal pending. It was an appeal against sentence only. Bayley was therefore both on parole, and on bail when he

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<sup>103</sup> Transcript of Proceedings, 9 May 2002, Judge Duckett, R v Bayley No 73704.

raped and murdered Ms Meagher. He ought to have been known by then to be a recidivist serious, violent, sexual offender, with a history of being so from a young age and with an established pattern of doing so.

Nettle JA, in sentencing Bayley, referred to the need for community protection in light of his '*extraordinary range of ... previous offending*'. Having considered also victim impact statements, psychological considerations and his plea of guilty, his Honour considered Bayley's prospects of rehabilitation. His Honour assessed those prospects as poor. In setting the non-parole period, his Honour referred to the desirability that Bayley have an incentive to try to strive for rehabilitation. [REDACTED]

Bayley was declared to be a serious violent and dangerous offender, the effect of which was that protection of the community became the principal purpose for which the sentence was to be imposed. Accordingly, and by reason of the statutory provisions to which I have already referred, the Judge was entitled to impose a sentence longer than might be proportionate to the gravity of the offence to achieve that purpose<sup>104</sup>.

Bayley's sentence was life imprisonment for murder, and 15 years imprisonment for rape (to be served cumulatively with the sentence on the murder charge), producing a total effective sentence of life imprisonment, with a non-parole period of 35 years. [REDACTED]

Unfortunate as it might be, there do exist incorrigible offenders who, despite the best efforts for their rehabilitation, must nevertheless properly be classed as habitual serious offenders.

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<sup>104</sup> *Sentencing Act 1991 (Vic) s 6D(a).*

Veen, who was convicted of murder, only to do so again, is a case in point. There, the High Court observed<sup>105</sup>:

*... antecedent criminal history is relevant ... to show whether the instant offence is an uncharacteristic aberration or whether the offender has manifested in his commission of the instant offence a continuing attitude of disobedience of the law. In the latter case, retribution, deterrence and protection of society may all indicate that a more severe penalty is warranted. It is legitimate to take account of the antecedent criminal history when it illuminates the moral culpability of the offender in the instant case, or shows his dangerous propensity or shows a need to impose condign punishment to deter the offender and other offenders from committing further offences of a like kind.*

Until Bayley's remand for sentencing for murder and rape, there was some reticence on the part of some people with whom we were speaking to discuss the case. I was uncertain whether all of that reticence stemmed from a concern for the integrity of the judicial system, or out of a sense of failure on the part of the parole system. We asked for, and were provided with, the Bayley file which did not disclose the names of the members of the panel that granted parole to Bayley. I regard that as a deficiency. The file was itself ill-organised and contained a deal of repetitive material including cuttings manifesting the entirely understandable public reaction to, and criticism of, the Board in this case. There was no single document containing a straightforward complete chronology of his criminal history or analytical material relating to it on the files.

[REDACTED]

[REDACTED] On release he worked as a pastry cook.

[REDACTED]

[REDACTED]

[REDACTED] Even so, he was released on parole. [REDACTED]

[REDACTED]

[REDACTED] He was next alleged to have made an unprovoked attack in Geelong. He claimed that he had been drunk at the time, and had no recollection of the assault. The Parole Board decided to 'await the result' of the charge against him. [REDACTED]

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<sup>105</sup> *Veen v The Queen [No 2]* (1988) 164 CLR 465 at 477.

Still the Parole Board temporized notwithstanding that a report made to it that the Board 'reiterate the expectations of him under parole'. But Corrections Victoria too produced a report suggesting the Board await the outcome of Bayley's appeal against the sentence (of 3 months) for the assault at Geelong.

I have not set out all the details of Bayley's criminal history and parole. It can however be said I think, that the Parole Board had both cause and opportunity to cancel Bayley's parole. Partial compliance with conditions of parole is not good enough. Offending in a violent way when on parole should not have been countenanced as effectively it was by awaiting the outcome of the appeal.

Professor Ogloff made several recommendations in his report. There is not one of his recommendations with which I would not agree. I would, however, draw specific attention to, and expand upon some of them. Professor Ogloff says that higher priority cases should receive greater attention, more intensive supervision and be better assessed than they are now. I would reinforce that, by prescribing a particular category of cases, which should attract that sort of attention, and a system of review to deal with them when their parole is under consideration. A category suggested by the Chief Commissioner of Police would be one that includes murder, rape, armed robbery and abduction.

Professor Ogloff both in his report and in my discussions with him, expressed reservations about the utility and validity of the Victorian Intervention Screening Assessment Tool known as 'VISAT'<sup>106</sup>

A different test should be used. There are other actuarial tools which are regularly employed to assist in the assessment of the risk of recidivism. I say something of them below, and express the view that the VISAT test does not command the confidence or empirical validity which other, more established, tested, and widely used tests do. I recommend that a test or tests different from VISAT be employed, the final form of which should be discussed with, and approved by, Professor Ogloff and be kept

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<sup>106</sup> VISAT is a risk assessment which Corrections Victoria relatively recently instituted. It is said to ascertain an individual's general risk of re-offending as well as identifying the dynamic and static risk factors that contribute to that offending.

under review by him or a qualified person nominated by him to ensure that the tests used are the best internationally available.

It is well known, and Professor Ogloff did confirm to us, that some prisoners, indeed high risk prisoners, can be very manipulative and become skilled in appearing to comply with programmes and assessments. This is not only a matter of common knowledge but is also well borne out by the cases which Professor Ogloff analysed in his review. Many of those offenders do appear to have satisfactorily completed in-prison programmes and must have persuaded assessors of their good intentions and capacity, to comply with parole, when in fact, at least with hindsight, they were probable reoffenders.

Professor Ogloff is rightly very concerned with the extent to which the Parole Board is informed and able to marshal all of the relevant information relating to a prisoner eligible for parole. I make suggestions to meet this concern in the final Chapter of this Report.

### **Parole Board operations**

Before our attendance at cancellation hearings of the Adult Parole Board, we had been made aware of, and saw for ourselves the obvious and inefficient antiquity of the filing system of the Board which required the preparation of a master and three hardcopy versions of each file on an offender. We were told that the Board has a plan for the electronic transcription of these files which could be completed fairly quickly for a relatively small amount, and would promote efficiency in the work of the Board. I accept that, and recommend it, but do not think that it would by any means resolve what I think are some fairly obvious problems about the performance of the Board. On each sitting day of a panel of the Board some 20-30, even more, cases may be considered. The files, in a great many of the cases, are voluminous and suffer from the same deficiencies as were apparent from the Bayley file. It would simply be impossible for any member of the panel to have read and given full consideration to the cases contained in them, or to the range of issues required by the Members' Manual to be considered in each case. No doubt it is true that experienced and astute people can selectively read and gain some understanding of particular cases. But the cases are not organised in any order of importance. Until a file is opened, subject only to a recently introduced rudimentary external labelling system, it is difficult to know how serious the conduct of any particular offender had been. Sentencing remarks are not, as I think they should be, prominent in any file and nor are the police facts, or reports of the very often numerous parole breaches and reoffending. Ms Carmel Arthur, a Parole Board member,

made a persuasive submission to us, recommending categorisation and batching of various cases for the more efficient disposition of like matters. I agree with that.

On the day on which we attended, the panel very ably presided over by a Judge of the County Court, was dealing with offenders whose parole had been cancelled. I was surprised to learn these facts. Offenders do not apply for parole. The Board opens and maintains a file on every offender, which means a very large number of offenders, who have been sentenced to a non-parole period of imprisonment. The Board automatically considers the question of parole in respect of each prisoner immediately before (usually), or more rarely, upon the expiry of their non-parole periods. The Board does not merely cancel the offender's parole when there has been a *relevant*, in the Board's mind, breach of parole, whether by the commission of an offence or otherwise, but then reviews the cancellation by review on the papers. Not content with that, the Board then actually conducts a form of hearing at which the offender is present by video link (or even personally) and reviews its earlier paper review, as well as the initial cancellation. During the course of what is effectively a review of a review, the Board, it seemed to me, with the best of intentions, urged and sought to coax offenders to undertake in-prison programmes, and to obtain some insight into their conduct. The emphasis it seemed to me was more on forms of rehabilitation than other relevant matters such as the possibility of reoffending, and the offender's attitude to, and breach of, parole.

This I think is to lose sight to some extent of elementary and important matters. One important purpose of imprisonment is punishment. Another is of deterrence. It may be accepted that these may reasonably be compromised to some extent in the interests of reform and rehabilitation, and in consequence the interests of enlightened society generally, but not to the extent that punishment and deterrence are greatly diluted in purpose.

Also, I could not help observing that the three cases at the hearing at which I was present, and which I had no reason to assume were other than fairly representative, were hopeless cases, as well as providing an unproductive third, quite unnecessary and undeserved opportunity to the offenders to have their repetitive misconduct treated, in effect, as if it had not occurred or was excusable. The time taken up with these cases should not be occupied as it was. The focus of attention of any kind upon this third opportunity had a further, and perhaps even more serious disadvantage. It had the capacity to operate as a serious distraction from a full and adequate consideration of important cases, and a well-calibrated

calculation of the risk to the community posed by the release of likely dangerous re-offenders.

What occurred at the hearing was very much confirmatory of my initial impression of a distortion of the balance, and the inefficiency of the processes of the Board. The latter I emphasize is greatly aggravated by the large, impossibly large, number of cases with which the Parole Board deals.

It seems to me that it is in the interests of society that special provision in respect of parole be made for violent offenders and serious sexual offenders including paedophiles. I have formed the view that they need special and more careful consideration *before* they are released on parole than other offenders. On any view they constitute an obvious and greater threat to society than most other offenders. I do not discount the factors that have been drawn to our attention: of the marginalised nature of some unfortunate people whose early circumstances have led them to a life of crime; of the economic cost of incarceration, and its relativity to the much lower cost of supervision in the community; of a civilised and democratic society's ethical aspiration for rehabilitation and redemption of criminals; or indeed of what Corrections Victoria regards as a good result, that is, that about 60 per cent of those on parole do comply with the conditions of parole, a statistic which compares well with the performance of other States. Even so, 40 per cent is a high rate of non-compliance in absolute terms. There is also a question (which I consider elsewhere) whether parole is quite as good a prophylactic against subsequent crime as dedicated Parole Board members and Corrections Victoria officials think. [REDACTED]

[REDACTED] As I take up later, there needs to be much more consultation by the Board with the Police, both generally and on specific matters.

I emphasise again that people who are sentenced to a term of imprisonment with a non-parole period do not have a right to parole after its expiration. They are *eligible* for parole. I have formed the opinion that there is a mode of thinking, an assumption, perhaps almost a *presumption*, that after a non-parole period has expired, a prisoner has a right to parole. Even if that presumption were one to be treated as rebuttable, such a way of thinking can lead to, and I fear may have led in this State, to less rigorous attention than the true situation requires. Once thinking of that kind becomes the mode, there is in the nature of a reverse onus. The onus should be upon a prisoner to demonstrate that he or she *deserves*



parole. A prisoner should be required to demonstrate that he or she has a very genuine intention, and a real capacity to rehabilitate himself or herself by complying with conditions of parole and genuinely attempting to re-join the community in a harmless way, before being granted parole.

The point was made to us that few prisoners will remain in prison for life and that whether a full term of imprisonment is served or not, the offender will be released into the community anyway. That is undoubtedly so, for almost all prisoners, but it does not mean that an offender who does not deserve release on parole, should be allowed to re-enter the community and offend again any earlier than necessary. To assume a *right* to parole is not in my view to give full effect to three important purposes of imprisonment: deterrence, punishment and prevention (or negative protection, as it is sometimes known). An offender who has been sentenced to a term of, say, 14 years, with a non-parole period of 11 years, if he were to serve for those years between full sentence and the non-parole period, he will at least not be able to offend against the community during those three years.

The Chief Commissioner of Police made some telling observations. He and other experienced officers can easily see that the Parole Board is under resourced. Most cases are before it for only a few minutes. [REDACTED]

[REDACTED] I can understand why the Police, seeing as they have so much recidivist conduct by offenders, and being called upon to clean up the mess as it were, might take this view. I do not however think that this should become law for two reasons. One is the introduction of the law enabling detention after service for a term in appropriate cases. The other is the experience of mandatory sentencing which is that it can entrap the wrong offenders and can lead to unjust results<sup>107</sup>.

In his submission the Chief Commissioner expresses his reservations about some reforms to deal with violent offenders:


*On a broader level, Victoria Police is concerned that current attempts to improve community safety through parolee reform will have limited net benefit. It is likely that rather than reduce community risk, the current reforms merely transfer that risk from the APB and CV to Victoria Police. It is anticipated that to manage this increased risk Victoria Police will be required to eventually establish a duplication of the current Sex Offender Register (SOR), requiring a constant monitoring of parolees in*

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<sup>107</sup> *Ostrowski v Palmer* (2004) 218 CLR 493 at [84] and [85].

*the community, given the levels of breaching currently occurring and the often serious and violent nature of that recidivist offending. It is believed that such a monitoring scheme will be more problematic than the SOR because it will not be supported by legislation and will involve more dangerous and violent offenders than currently populate the SOR.*

The Chief Commissioner is concerned about other current issues. He said that there are a number of other frustrations with the current system that Victoria Police would bring to my attention:

1. *Currently the APB do not allow Victoria Police to copy any part of a parolee file even after a parole has been cancelled. This is an important tool required by police to investigate the whereabouts of parolees and reduces police effectiveness.*
2. *Victoria Police currently do not have a means through which we can make submissions to the Parole Board and be heard on individual cases. Important Victoria Police intelligence not kept on the Victoria Police LEAP system is not seen by the board when evaluating parolee re-offending risk.*
3. 
4. *Currently Victoria Police would like to see more parole cancellations for failing mandatory drug and alcohol testing than is currently the case. The reason for this is that the consumption of drugs and alcohol increases the risk of offending amongst this recidivist population.*

If item 1 is correct, the procedures should be changed. Victoria Police should be allowed to see, and as necessary copy files, except perhaps for sensitive details about victims and informants, and information which the provider requires be kept confidential from the Police. Both the Board, and the Police, as effectively arms of the Executive, have a common interest in the observance of conditions of parole, and the prevention of reoffending, in short, in the safety of the community. Police views in relation to parole should be received and considered.

### **Sentencing Advisory Council's 2012 Review**

Mr Cornall and I were also assisted by the report made following the review of the Victorian Adult Parole System in March 2012 by the Sentencing Advisory Council.

I certainly agree with the proposition stated in the report that there may be a lack of awareness that parole represents only conditional release and that a parolee remains under sentence while on parole. Not only is there a lack of public awareness about this, but also there is, I think, far too ready an assumption on the part of some involved in the administration of the parole system, that on the expiration of the non-parole portion of a sentence, there is at least a prima facie entitlement to parole. That assumption needs to be dislodged just as much as there needs to be a clear understanding in the public mind of the nature of parole. If in fact administrators at any level do make the assumption to which I have referred, it would not be surprising if the public were to become sceptical about the reliability of the system. That scepticism is bound to be increased, if not transformed into a deep mistrust, if very serious violent offences, including murder and rape, are committed by persons previously convicted of offences of violence on parole.

It is all very well to articulate the purposes of parole, but it is far more important to understand its true nature and the intention of it. No one would disagree that one purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, so long as there is a true appreciation of the risk, and I think a strongly risk-averse policy and practice on the part of those both granting parole and administering it.

I do not agree with the recommendation of the Council that there should be no statement in legislation of criteria for the grant or withholding of parole. I think that one should be wary of the reliance, that the Sentencing Advisory Council appears to place, on the proposition that potential advantages of statutory criteria may be outweighed by potential unintended consequences. I do not know to what consequences, reference is made. In any event, in my opinion, on a weighing up of any consequences that can be foreseen against all of the advantages, of clarity, mandated requirements, and increased objectivity in decision making as a result thereof, the balance falls fairly and squarely on the side of statutory prescription. Included in, and right at the forefront of any statutory, indeed prescription of any kind, should be the safety of the public. Elsewhere in this Report I state some measures

by which paramountcy of public safety might be stated, and I hope, improved. My attention has been drawn to the possibility of Ministerial directives to the Board by which tests could be prescribed and changed from time to time. It is an option that could be considered, but I incline against it. Directives are a very subordinate form of subordinate legislation. Even if published they are unlikely to be debated in Parliament to the same extent as Bills will be. There would be need in any event for legislative provision for the giving of them.

The Sentencing Advisory Council refers in its report to the use by the Parole Board of the VISAT test. It said that the capacity of the Board to interpret such a test is critical, and that the Manual should provide guidance for its interpretation and use. Our inquiries, reading and research, and in particular our discussions with Professor Ogloff have satisfied us that there are much superior tests to VISAT. Again, elsewhere in this Report we discuss options for the formulation of other tests. A different and superior test (or combination of them) would have the further advantage of easier application by the Parole Board.

I do not doubt that there should remain with Corrections Victoria, a discretion in relation to the reporting of breaches of parole to the Board. But I think that the discretion should be a much narrower one than in practice seems to be being exercised. Failure to comply with conditions of parole will very often provide an early indication of a likelihood of further offending. Compliance with what on the whole are usually very easily understood conditions, and ones not difficult to satisfy, must form part of the process of rehabilitation and self-discipline that a parolee must have. If he or she fail to comply, then there is reason to believe that parole will not be taken seriously as a privilege and a discipline, and moreover, will, in many cases be a sign that the parolee is likely to reoffend. In this Report I suggest options as to the nature of the discretions which should be exercised and the need for clear prescription. I lean towards the view that except in very special circumstances, a parolee should be returned to prison if he or she is in breach of any substantial condition of parole.

The Council refers to the doctrine of legitimate expectations in relation to administrative decisions affecting a person's rights or interests. The high water mark of the application of the doctrine in Australia is *Minister of State for Immigration & Ethnic Affairs v Teoh*<sup>108</sup>. A somewhat different and much more cautious view of the reach and application of the doctrine was taken by the High Court in the case of *Re Minister for Immigration and*

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<sup>108</sup> (1995) 183 CLR 273.

*Multicultural Affairs; Ex parte Lam*<sup>109</sup>. A grant of parole is not a right. Convicted criminals are intentionally denied rights. It is an important object of the justice system that they are so denied. To refer to 'legitimate expectations' in this context misses the point.

The Sentencing Advisory Council stated that it considered that the rules of procedural fairness were vital even if they were not necessarily legally applicable because the decisions of the Parole Board affected a person's liberty, and the safety of the community: the rules of procedural fairness promote '*high quality decisions and ensure fairness*'. These are fine but ultimately aspirational statements. They need to be properly understood in the context in which they are made, that is, of decision making in respect of people who, as a matter of Executive indulgence, may be given a very special chance to re-enter the community before the expiration of their sentences. Parole decisions should in practice be informed by Police intelligence and informants' reports and claims. This will usually be sensitive material and not such as ought to be disclosed to an offender. On occasions international instruments are ought to be invoked to justify the rules of natural justice and an appeal<sup>110</sup>. It is sometimes overlooked that the authors of, and subscribers to these, are from jurisdictions which do not insist upon conviction by a unanimous jury<sup>111</sup> on the discharge by the Prosecution of an onus of proof beyond reasonable doubt. Indeed there is a deal to be said for the symmetry of conviction on such a basis, with a correspondingly high onus upon a convicted prisoner seeking to justify release on parole. The Correctional Management Standards for Men's Prisons in Victoria (2011) and the Standards for the Management of Women Prisoners in Victoria (2009) set out with precision the minimum entitlements of prisoners. To expand those intentionally very limited rights whilst in prison, to rights anything like rights of general expectation at common law, is I think to misunderstand the purposes of incarceration and the privileged and conditional abbreviation of time spent in it. These people are people who have committed serious crimes and have been sent to prison effectively as a last resort. That has occurred as a result of the discharge of the heavy onus on the Crown to which I have referred. The result of that, or conviction on a defender's own plea, has been a term of imprisonment deliberately intended to deny the offender for a period, access to many basic human rights, in particular, freedom. I do not suggest that the Parole Board should in any way be encouraged or licenced to abuse the rules of natural justice. I would expect that it

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<sup>109</sup> (2003) 214 CLR 1.

<sup>110</sup> B Naylor and J Schmidt, 'Do Prisoners have a Right to Fairness before the Parole Board' (2010) 32 *Sydney Law Review* 437.

<sup>111</sup> And, in limited circumstances, by majority verdict: *Juries Act 2000* (Vic) s 46.

will act appropriately and proportionately in the circumstances of each case. Appropriateness, proportionality and the right balance should be the duties which the Board should impose on itself in making its decisions, and no more. Parole is, and should remain an Executive function. It is not part of the judicial system. The Board exercises discretionary functions. It has access, and is entitled to, and should have regard, in a risk averse way, in appropriate cases, to material not admissible in a Court of law. All of these factors argue against any imposition of any kind of rules of natural justice upon the Parole Board, as well as any subjection of it, or its decisions, to the Victorian Charter of Human Rights and Responsibilities. I think that the current exemption should remain, and continue indefinitely. I disagree for these reasons with the Council's opinion that the Board should not be exempt from the rules of procedural fairness.

I entirely agree however with the Council's recommendations with respect to the sharing of information between all interested parties. There is reason to believe that the Parole Board has not had before it all of the information that it should have when it considers applications for parole or cancellation of it. At the very least, the Board should have, and of course be able to read and consider, the fullest possible account of an offender's criminal history, his or her other antecedents, the sentencing remarks in respect of the most serious offenders offences, parole supervisors' reports, all psychiatric or psychological reports on the offender, and any recommendations from Corrective Services. In addition, the Board should continue to receive and consider the views of victims and their families. I raised with the Chief Commissioner of Police the possibility of Police membership of the Parole Board as in New South Wales. His preference is for a section of the Police Fugitive Taskforce working closely with the Prison Intelligence Unit to be based at the Parole Board, and to be consulted before parole is granted. I agree with this. Any suggestion of conflicts is misguided. The Parole Board and the Police are essentially partners in the enforcement of the law. They are both performing an Executive function. Almost everyone we spoke to deplored the absence of relevant information, and the non-correlation of so much of it as was available to the Parole Board. The installation of the relevant Police section at the Parole Board should go a long way to meeting this deficiency. Finally, I think that in the cases of any serious offenders at least, the Police should be asked their views on parole.

It does need to be re-emphasised that, simply because there is a Parole Board which exercises the function of granting, withholding or cancelling parole, does not mean that the

Board is performing any kind of judicial or quasi-judicial function. Traditionally and rightly, early release of any kind from prison, as with, in past times the commutation of the sentence of death has been an Executive function. The Parole Board is in effect the delegate or proxy of the Executive in doing its work. I do not think that modern conditions and understandings compel any different view. Imprisonment and its abbreviation are, like apprehension, essentially the functions of Executive government. What happens in between, trial and verdict, are, on the other hand, and should continue to remain, distinct judicial functions.

Among the recommendations by the Sentencing Council are, that the Manual used by the Board include guidance for members on the interpretation and use of formal risk assessments, and that the Board should expressly adopt a general principle that community safety be the paramount consideration, and that parole be cancelled if the offender pose an unacceptable risk to community safety by remaining on parole. I take up and express my views on these matters later in this Report.

The Council recommended that four matters (inter alia) be considered by the Board when breaches of parole occur:

- a. time spent on parole;
- b. time left before parole expires;
- c. compliance with conditions; and,
- d. the impact of the offender's behaviour on the community.

Each of these considerations is of course relevant, but I do not think that they are equally important, or that their order of importance is properly reflected by the way in which the Sentencing Council states them. I would put at the forefront of all of the considerations, the fact and nature of the breach of the conditions of parole. Time spent on parole and the unexpired time of parole, are in my view of much lesser importance except perhaps in those cases in which only a very short time of sentence is left to expire. (The relatively short time of unexpired parole period was an influential factor in the non-cancellation of Bayley's parole.) I see no reason why these factors should not be a matter of statutory prescription.

Unless language is binding, clear and prescriptive, there will always be a greater possibility of departure from principle. So too, when a particular mode of behaviour or approach has become routine, and the need arises to change direction, experience tells that the language itself needs to change.

I do agree that prisoners released on parole should be made aware of the support that will be available to them on their release, but it is important I think that there be no assumptions made about the capacity of Corrections Victoria, and the other agencies of support, to ensure that the support is given, and that conditions of parole will necessarily be satisfied.

I obviously endorse the Council's recommendation that the nature of parole is a privileged one, and the risk that any failure to comply with conditions or reoffending will lead to cancellation, be explained as fully as possible to applicants. But too much time and effort should not be devoted to this. It is a self-evident proposition. If it is not clear to any particular offender, then it is impossible not to be pessimistic about his chances of compliance.

In Recommendation 12, the Sentencing Council is concerned with review applications. This is the subject of separate consideration by me elsewhere in this Report.

Recommendation 13 urges that there be a review of the operation of s 464B of the *Crimes Act 1958* (Vic), a provision which governs the questioning or investigation of a person already held for another matter. It is often engaged when parolees breach parole because they will often be wanted for other offences. I need not express a view about this recommendation.

Subject to what I would say in this chapter and other parts of the Report, I agree generally with Recommendations 14, 15, 16, 17, 18 and 19 in the Sentencing Advisory Council's report. There also seems to be a clear case for the adoption of Recommendation 20. That recommendation includes a reference to the educative functions of the Board. In other places of Westminster Executive government I have noted a misapplication of resources on internal educative functions, which might be better and more profitably spent elsewhere. I do not understand precisely what, in practice, the Parole Board can and does do to educate prisoners about non-offending. In practical terms, unless a great deal more staff and money



were provided to it, I doubt that there is very much it can do except to stress to potential parolees their responsibilities and obligations, and the risks that they run of reoffending.

I do not wish to be taken as suggesting that the recommendations for inclusion of matters in the Manual, is one that should not have been adopted. My concern is that necessary change is more likely to occur with clear statutory prescription. That does not mean that the Board will not be, in practical terms exercising its discretion. It may mean that the ambit of the discretion will however be narrower, having regard to the very serious offences which have been committed by offenders on parole, particularly those of the kind reviewed by Professor Ogloff and the Bayley case. This is a desirable change. Nor does it mean that there should not be a Manual to give guidance to the members. Any manual should explain as fully as possible the governing legislation and considerations appropriate for a grant of parole.

#### **Other views**

We were also assisted by other informed views.

It has been suggested that the Chair of the Board be a full-time position. I can see the force in that. The administrative functions of the Board should be performed by administrators, and the Chair left to the important role of overseeing the work of the panels, presiding on cases that may be difficult or controversial, and performing a review function in some cases of violent offenders. I formed the view that it is very important that the Chair of the Board be either a Supreme Court Judge or a retired Supreme Court Judge. The role is a very important one. It is essential that the Board enjoy public confidence. Judges are best equipped to decide difficult questions of fact and have the most and best experience of criminal behaviour and its punishment. Justice Whelan, the retiring Chair of the Board, rightly pointed out that the case load is almost overwhelming: the Chair has a leadership function that requires constant attendance at the Board; the Chair needs to be accessible at almost all times for consultations. A full-time Chair would be able the better to promote consistency of thinking.

A strong and repeated expression of concern is as to the availability of all relevant information to the Board. It should be heeded. The Board should, in my respectful option, decline to deal with any application unless all the relevant material including Police intelligence is available to it. Such a view is not inconsistent with the basic proposition that

parole is a privilege, and that accordingly, its postponement in the public interest pending receipt of all relevant information, is well justifiable until such time as the Board believes it can confidently act in an informed way. I do not think that the Board should publish its reasons in any cases. Every release on parole or withholding of parole, is a matter of public interest. A release on parole which turns out to be unfortunate in the sense that a serious offence is committed during parole, is simply a matter of greater public interest than others. My judicial experience, particularly in relation to cases in which special leave had to be refused on the papers, tells me that a requirement to give reasons increases the workload. The workload for the Board is already too heavy. Furthermore, stated reasons may invite review. Elsewhere in Australia, except for New South Wales, reasons are not given.

I do think that research needs to continue to be done and enhanced as suggested to us by the retiring Chair.

### **Risk assessment tools**

It remains to say something of the current practices of which I am aware, for the assessment of the risk of recidivism for violent and sexual offenders, the tools which are employed in doing so, and some observations I made of the VISAT test presently used in Victoria.

The efficiency and validity of any system of parole requires the best possible tests of the prospect of an offender's re-offending. Judges have, on occasion, pointed to the difficulties of predictive assessments, and their reliability<sup>112</sup>.

Risk assessments were once undertaken by the exercise of what is now referred to as unstructured clinical judgment. Reservations however, have been expressed: reservations about the susceptibility of that method to false positives. The clinician himself or herself would tend to base such assessments on his or her own experience in seeing offenders and observing their recidivism over time. That method, it is now accepted, produced high rates of error, in ascertaining the likelihood of a serious assaultive act by dangerous sex offenders. Research<sup>113</sup> gave grounds for scepticism about psychiatrists' ability to predict violent behaviour. Even though those early studies have themselves been questioned to some extent,

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<sup>112</sup> See, for example, Kirby J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 at 623.

<sup>113</sup> J Monahan, (1981) *Predicting Violent Behaviour: An Assessment of Clinical Techniques*.

more recent studies suggested that the accuracy of prediction of sexual violence can never exceed 50 per cent.

Scientific knowledge has expanded and been improved, as has access to data which links characteristics of offenders to actual rates of recidivism. The response has been for clinicians to employ tests which structure their clinical assessment, as well as those which are more actuarial in nature. Each of these types of tests has as its base, empirical research, and the identification of those groups of persons who are of a sufficiently high risk of recidivism. Over time, better statistics have become available as to the actual re-offending rates of the various categories of offenders.

The actuarial tools which assist in the assessment of the probability of reoffending offer guidelines from a statistical point of view as to the likelihood of reoffending. By reference to certain factors, they call for a score to be given. The factors are allocated a weighting of importance by the test itself. The tests which are used as part of a structured clinical assessment give to the clinician greater flexibility in the weighting to be attached to particular scores.

Static 99 seeks to predict sexual and violent recidivism for sexual offenders. It was developed by Hanson and Thornton in 1999. Its study base was 1,031 sex offenders from Canada and the United Kingdom. It calls for the assessment of ten items, which are then used to estimate future risk based upon the offender's *historical factors*. Those factors include prior sexual offences, commission of a current non-sexual violent offence, a history of non-sexual violence, a number of previous sentencing dates, age, whether the victims were male, having never lived with a lover longer than two years, having a history of non-contact sex offences, harming unrelated victims, and having stranger victims.

The recidivism estimates which this test produces are based upon reconvictions of persons possessing these characteristics. They do not, like all actuarial tools, directly correlate to the risk of an individual offender. A particular offender's risk may be higher or lower than the probabilities estimated, depending upon other factors not measured by the instrument. Hanson, in 2005, said, for example, that older offenders tend to have lower

sexual recidivism rates than the Static 99 categories would suggest<sup>114</sup>.

The Stable 2000 was the result of research by Andrew Harris and R Karl Hanson in 2004. It is a 'companion' measure for Static 99. It evaluates *dynamic* change (as distinct from the historical factors with which Static 99 concerns itself) in risk factors among sex offenders. It evaluates social influences, defects in intimacy, sexual self-regulation, attitudes supportive of sexual assault, breaches of supervision and general self-regulation. The manual which accompanies the test includes guidelines for scoring, a score sheet and interpretive ranges of low, moderate and high risks. Scores on Static 99 and Stable 2000 are often combined to provide an overall risk assessment of high, moderate or low.

The risk for sexual violence protocol (RSVP) has an evidence base which informs an assessment of recidivism for various aspects of sexual reoffending. The 22 risk factors to which it is directed are derived from research. The assessors, in using the test, identify the most plausible scenarios of future sexual violence.

Other instruments include the Hare Psychopathy Checklist Revised (PCLR). It was developed in Canada and receives deference in other tests, especially the VRAG and SORAG (mentioned below). It provides a structured clinical judgment as well as ascriptions and scoring systems. The total possible score is 40 and a score of 30 out of 40 regarded as a cut-off point for a diagnosing psychopathy. The test aims to identify those who are relatively impulsive, deceitful, remorseless and have perhaps, superficial charm.

The Violence Risk Appraisal Guide (VRAG) was developed in Canada. It aims to predict future violence by those offenders who have been institutionalised for the commission of a serious act of violence. The file information from 600 violent inmates was relied upon and related to those inmates' criminal convictions seven and ten years later. An expanded version of this test, which has been designed especially for sex offenders, is the SORAG.

Another test is the VASOR, the Vermont Assessment of Sexual Offender Risk Manual. It is for use with adult male sex offenders. Views differ whether this has a predictive validity equivalent to Static 99 and better than SORAG and VRAG, or whether it is an experimental scale with capacity to aid decision making but little more.

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<sup>114</sup> R Karl Hanson, (2005), *The Validity of Static-99 With Older Sexual Offenders 2005-01*  
<http://www.publicsafety.gc.ca/res/cor/rep/fl/2005-01-val-stic-eng.pdf> accessed 2 July 2013.

It offers some comfort to know that these tests do have a statistical base. Statistics can only ever be, however, aggregates and generalisations. Clinical judgment about a particular offender, and experience in treating and assessing offenders, must always be employed.

Most of the statistical data upon which the actuarial terms are based are taken from North America, and to a lesser extent, the United Kingdom. Necessarily, application of those tests to Australian offenders assumed similarity between conditions and personality types of these countries. For indigenous offenders, circumstances might be very different, and call for more caution when the tools to which I have referred come to be applied. Tools of this kind do not, therefore, displace clinical approaches. The present practice is to combine clinical judgment (structured and unstructured) with actuarial approaches, and thereby to combine the benefit of both reliable actual predictions (inflexible as they tend to be), with tailored and more intuitive clinical assessment, including how an offender has responded to therapy. Indeed reliance upon any test alone is dangerous.

Absent from this analysis is any reference to VISAT. It, as I have mentioned, does not command the respect of Professor Ogloff either. Unlike the other tools to which I have referred, VISAT has never been empirically validated<sup>115</sup>. I was told that VISAT is in the course of being evaluated and validated by Dr Stuart Ross of Melbourne University. It is not, so far as I am aware, employed outside Victoria. It is also relatively new. It has been used in prisons in Victoria only since 2008. It replaced the Level of Service Inventory-Revised 'LSI-R' test previously used by Corrections Victoria. The LSI-R was shown to be reliable and had been empirically validated. The impetus for his change was a desire of Corrections Victoria to have a locally designed instrument which emphasized areas believed to have greater significance for Victorian offenders<sup>116</sup>. Whether it was a wise decision to abandon a test which had been empirically validated and proven, in favour of one that had not, is very much open to challenge.

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<sup>115</sup> See, for example, C Thompson, *An evaluation of the efficacy of Corrections Victoria's assessment process*, PhD Thesis, RMIT University, March 2013 at 120. URL: <http://researchbank.rmit.edu.au/eserv/rmit:160372/Thompson.pdf> accessed 21 July 2013.

<sup>116</sup> And even though there is research which indicated LSI-R had an acceptable level of practical utility for offenders of Caucasian origin in New South Wales: see, for example, C Hsu, P Caputi, M K Byrne, 'The Level of Service Inventory-Revised (Lsi-R) and Australian offenders: Factor structure, sensitivity, and specificity' (2011) 38 *Criminal Justice and Behavior* 600 at 618.

Of further concern is that recent research (by Carolyn Thompson at RMIT University) has shown that VISAT tends to attribute a markedly reduced level of risk to offenders compared to the LSI-R. Her study showed<sup>117</sup>, for example, 51.4 per cent of men who had been assessed as having a medium risk of re-offending under the LSI-R were later assessed as being within VISAT's low risk category. Even more pronounced results occurred for female offenders.

Ms Thompson warns against strains on organisational resources causing VISAT to be pushed beyond its limitations<sup>118</sup>.

We saw a VISAT test in one of the Parole Board files with which we were provided when we attended a hearing of a Board panel. It appeared to us to be more a list of questions to be asked of an offender than to constitute a formal actuarial assessment. We were not even sure on reading it, whether the offender had filled it (the VISAT questionnaire) in himself, as what is known as a 'self-report'.

One suggestion which was made to us was that members of the Board, or those assisting it, might be trained in the administration of the test. That, to us, seems dangerous. Not only ought there to be a separation between the clinical risk assessors and the deliberations of the Parole Board, but also the tests should be made and provided by trained clinicians. The whole purpose of an actuarial test would be circumvented if administered by persons who, albeit trained in relation to it, have no wider experience or training. They would, for example, be incapable of applying clinical judgment. It would seem to us that administration of any actuarial predictive assessment tool ought be limited to trained psychologists and psychiatrists capable of making the kind of distinctions to which we have referred, and understanding the need for judgments to be made based upon clinical assessments and individual circumstances and traits.

I defer to Professor Ogloff's views about the VISAT test. It appears to me to be far inferior to more established tests which have been proved overseas, and which are regularly used by professionals in Victoria and elsewhere in Australia. The authors of VISAT test disclaim its utility as a 'decision maker', and regard it only as a 'decision aid'<sup>119</sup>. VISAT,

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<sup>117</sup> Ibid at 131. See also at 207 for factors to be taken into account in assessing the significance of these comparisons.

<sup>118</sup> Ibid at 249.

<sup>119</sup> Ibid at 94.

unlike other assessment tools, does not purport to provide offence specific risk scores in the areas of violence and sexual offending<sup>120</sup>. It is, at most, a tool to be used together with existing, empirically proven, assessment systems<sup>121</sup>.

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<sup>120</sup> Ibid at 110.

<sup>121</sup> Ibid at 94.

## Chapter 7

# The Victims' Perspective

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I have no doubt that the many of the victims of serious violent and sexual crimes do not believe that their concerns are fully taken into account by the 'authorities' of which the Parole Board is one. There are some victims who have been fortunate enough to be able to distance themselves, both geographically and emotionally from the crimes committed upon them, and do not wish to hear, or be involved in anything further in relation to offenders. Understandably however, there are many people who have been so badly injured, or who do not have the great resilience and means required, to do this. The consequences of the crimes committed on them, or their relatives haunt them for the rest of their lives, and a fear of repetition remains with them. Some of these people place their names on a Victims' Register.

Registration is intended to enable notification to a victim of the prisoner's sentence, and earliest possible release date. Registrants may also make a submission in writing to the Parole Board about the potential release of the offender. They are entitled to be notified when the prisoner is granted release on parole, and of any special conditions of the parole which might affect them. So too they should be notified if an offender becomes subject to a supervision or detention order.

Representatives of victims contend that assessment processes and guidelines of the Board are deficient. Rightly, they are concerned about an insufficiency of risk aversion on the part of the Board. They have referred to 13 deaths caused by parolees or other serious offenders. In substance, there have been too many of these and the numbers speak for themselves. They regard the current parole system as having failed. They make the same point as I have made earlier, that some offenders who have shown contempt for women should not and cannot be appropriately supervised by other than a male. They are aware that many offenders are manipulative and intimidating. I quote from one of the submissions that I have received:

*Professor Arie Frieberg, the Chair of the Sentencing Advisory Council, has been quoted in the Melbourne print media as saying that of more than 10,000 deliberations in 2012 the APB denied only 296 applicants parole, and that more than half of the parole approvals were 'successful'. Yet the Victorian Auditor-General*



*reported that the Victorian prison population at 30 September 2012 was 5,024. (See – ‘Prison Capacity Planning’ Victorian Auditor-General, PP No 201, session 2010-12, page ix).*

*How can these two totals be reconciled? It cannot be that every prisoner in Victoria made two or more parole applications in one year, so it must be that one of the two agencies is under or over-quoting the statistics. Yet if either these possibilities is true, how can the public of Victoria retain any confidence in the current system?*

Others who represent victims, both within Corrections Victoria and outside it, had a number of complaints about the system generally.

The first was that they felt that the Parole Board did not take sufficient account of their concerns when a prisoner is about to be released upon parole. It is difficult to deal fully with this complaint as I have not had the opportunity of looking at the specific cases, but I do not doubt that there is validity in it. This is not to suggest that an understandable wish on the part of a victim for revenge or the like, should be substituted for prosecution by the State, and implementation of penalties by it upon offenders. But something does need to be done to ensure that victims’ voices are heard and taken into account. As I point out elsewhere, the fact that they may not have been given due consideration is contributed to by the overwhelming burden of material and number of cases with which the Parole Board has to deal.

Provision does need to be made to ensure that no seriously violent or serious sexual offender is released on parole unless and until a proper opportunity has been given to a victim to make a submission, and that submission has been properly considered by the Board. As I point out elsewhere the so-called EED should not be the imperative which I think it has become. The Board tends to function as if it has in some way failed in its duty if it has not considered the parole of an offender in time to enable the offender, if he or she is to be granted parole, to begin that parole on the EED. I have no hesitation in saying that in the cases of serious violent or sexual offenders, it does not matter if their imprisonment does extend beyond the expiration of the non-parole period, even if they are suitable for parole, in order to enable proper and full consideration to be given to victims’ submissions as well as all other relevant material.

The second theme which was consistently repeated was that victims were not given notice, either at all or in a timely way, of the release of a serious violent or serious sexual offender on parole. It was often the case that they first learnt of it from media reports.

A prisoner in the categories to which I have referred simply should not be released whether the non-parole period has expired or not, and whether his or her release will be postponed as a result thereof, unless and until a victim has been given no fewer than 14 days' notice of it. Such notice is required as a minimum, not only to enable a victim to attempt to make such emotional adjustment as may be possible, but also for the practical reason that a victim may wish to change address, or to take other steps to insulate or distance himself or herself from the released parolee.

Shine Lawyers represent five families of people who have been murdered by parolees in Victoria. The Social Justice Law Practice of the firm also represents victims in other States and accordingly has some acquaintance with parole systems in general.

In their submission, murders and other serious offences committed by parolees represent the most catastrophic and cumulative failures of the parole and criminal justice system in Victoria. According to the firm, no fewer than 15 murders have been committed by parolees in Victoria since 2006, circumstances they maintain which should have led to a public inquiry into the systemic faults of the parole system in the State. It is not for me to say whether such an inquiry should be held but I do hope that I have identified what I agree are systemic failures in the parole system and have sought to mould Measures to deal with these. It is not within my terms of reference to explore in detail, all of the relevant cases, although naturally it was necessary for me to consider some of them in some depth in order to form views about how the system had failed in practice.

That having been said, I do understand that victims' families regard themselves as entitled to explanations and no doubt apologies, from those who may have contributed to the failures that have occurred. At the very least, they think that there should have been open coronial proceedings which, if undertaken earlier, might have exposed the deficiencies in the system and have led to some repairs to it. The families of the victims' question why there has been no publication of the reports which came into existence after reviews were undertaken. Specific reference is made to Professor Ogloff and internal reviews or audits of Correctional Services. They express a sense of bewilderment as to why public release has not occurred and condemn what they consider to be quite unnecessary secrecy. Why, they ask, has there been such opaqueness? I set out questions which the submission validly raises:

- A. *What risk assessments (if any) pertaining to release on parole decisions were undertaken?*
- B. *What risk assessments and home visits were undertaken by Corrections Victoria and/or the Board in relation to the residency conditions and addresses attaching to release decisions to determine:*
  - I. *Whether any residency details given were accurate;*
  - II. *The extent of any vulnerability of the persons with whom the parolee was to reside; and*
  - III. *Whether resident was made aware of the history and risk of violence of the parolee?*
- C. *Where murders have occurred in a family violence/familial/domestic relationship context:*
  - I. *Did and do Corrections Victoria, the Board and Victoria Police undertake family and resident assault risk assessments; and*
  - II. *Is there any consideration of the previous histories of vulnerability and exposure to family violence?*
- D. *In relation to compliance with parole conditions and the monitoring, reporting and actioning of breaches of parole conditions, against a background of serious and repetitive breaches of parole conditions, all with acute implications for community and individual safety:*
  - I. *How did the Board maintain the parole of perpetrators in the face of evidence of clear and serious breaches of parole conditions that left perpetrators able to continue down their pathways to murder; and*
  - II. *What was the role of Corrections Victoria and Victoria Police in not notifying or pursuing breaches of parole conditions, remand decisions and/or other use of the corrections and/or criminal law?*
- E. *In relation to the staffing, dedicated expertise and resourcing of parole functions:*
  - I. *Given the volume and rapidity of the Board hearings and reviews, what, if any, serious risk assessment and cross referencing and testing of evidence and representations have and do occur; and*
  - II. *What capacity does the Board have for identifying and managing high risk and recidivist offenders and parole violators for higher levels of risk assessment, monitoring and compliance actions?*

All of the questions asked are ones that should be asked by the Parole Board before it releases a serious violent offender on parole. Take D(I) for example: I agree that sufficient regard has not infrequently failed to have been paid by the Board to escalating misconduct

both by way of breaches of parole and commission of offences by parolees. And it is right as the submission states, that Corrections Victoria and the Parole Board too often temporised in dealing with recalcitrant parolees.

The submission is critical of Victoria Police. The consultations that I have had and the material that I have seen, leads me to believe that this criticism is not well made. The Police are very stretched and would agree that a number of serious offenders who are being released on parole, should not have been released, and that a great deal of Police time is spent in finding and arresting offending parolees. The Police themselves rightly complain that they have not been consulted in many instances in which they should have been consulted, before parole be granted.

There are two particular submissions of Shine Lawyers which require separate consideration. The first is submission D:

*D. In order to enhance its transparency and accountability the Board should make its Members Manual, Secretariat Operations Manual and all relevant Corrections Victoria Director's Instructions and Victoria Police Manuals relevant to parolee management publicly available. Additionally the Board should become an agency and subject to the Freedom of Information Act as well as making publicly accessible in some form the reasons and conditions underpinning their granting/denial of parole, release, monitoring and cancellation/revocation decisions in relation to high risk sexual and violent offenders and in other cases of high public interest.*

I would accept the first part of this submission. For reasons which I have stated elsewhere, I do not think that the Board should be required to give reasons for its decision. I have carefully considered the submission and the Board should become subject to the *Freedom of Information Act*, but on balance am opposed to that. If the measures which I propose are adopted, the Board will in future in the case of serious offenders, have access to and use Police information and intelligence as well as information from victims and informants. It would be too time consuming and I think difficult, if not dangerous in some cases, to attempt to dissect this highly confidential information from other information which could without problems be publicly exposed. Exposure however of only some of the relevant information upon which the Board acted would give a false picture of its approach and the basis for its decisions.

Submission E is as follows:

*E. The Board to report publicly on all homicides and other serious offences committed by parolees.*

I agree with that submission.

I did consider submission G at some length, that homicides committed by parolees be the subject of mandatory coronial inquests. Homicides of this kind, as well as all homicides involving culpability on the part of those responsible for them, will be the subject of criminal proceedings. Coronial proceedings whether in tandem or not with criminal prosecutions, would inevitably involve a degree of duplication and could lead to problems in the conduct of the trials.

We were assisted very much in our work by Dr Kerry Jones. She supports any legislative changes that would help to restore community safety as the paramount factor in determining whether parole should be granted. She is also very much in favour of a categorisation of the type that I propose, of serious violent or serious sexual offenders. She draws attention, and correctly so in my opinion, to a tendency on occasions for an ideal of reform and rehabilitation to mask the reality of the incorrigibility of some offenders. In her opinion, serial rapists and murderers should not have parole, but should be subjected to either intensive supervision or continuing detention. Recent legislative changes may have this practical effect in some instances.

Dr Jones's experience suggests that all serious violent and serious sexual offenders should be provided with a programme as early as possible in their offending history. That, she thinks, offers a better chance of the prevention of reoffending than parole.

Dr Jones's submissions leave me in little doubt that sometimes too much faith is however placed in programmes, particularly those provided late in an offender's pattern of offending by Corrections Victoria and the Parole Board. That does not mean that programmes should not be made available and be required to be undertaken by prisoners: just be careful about how much weight is placed upon them.

It is also Dr Jones's informed observation that the Parole Board has been too susceptible to excuses offered by parolees that their failures to observe conditions of parole are due to a lack of housing. Very often parolees who give as a reason for their breaches a shortage of housing, are unhoused because of drug use, or offensive behaviour in a residence.

She has a different perspective from some members of the Parole Board which is based upon her practice outside the forensic area. She knows of many people with housing problems, poor mental health, and cognitive impairment who do not offend.

Dr Jones emphasises that a system of parole needs to place the onus of responsibility on offenders to make the most of their parole opportunity: they need to be more compliant and to participate genuinely in proposals for the way in which they will live on parole. My own observations and discussions with others lead me to believe that Dr Jones's views on these matters should be heeded.

## **Chapter 8**

### **Summary and Conclusions**

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I have, I believe, foreshadowed in preceding chapters the conclusions that I have reached. To the extent that I think necessary, I summarise those conclusions and expand upon the Measures or options which I think should be considered by the Executive government, and the reasons for them.

The volume of work sought to be done by the Board is intolerably heavy. The Board's 2011-12 Annual Report shows that the Board considered 10,205 cases in that period, and that this was a 13.9 per cent increase on the number considered the year before. The Board interviewed, the Annual Report states, 1,665 offenders in prison, made 1,843 parole orders and denied 296 applications. When cases come before the Board, the issues requiring consideration are not, as far as I could observe, clearly identified. To try to deal with 20-30 cases or more daily and to consider all of the matters listed in the Manual in respect of each of them, as the Board does, is impossible. The sharpest, most experienced and intelligent of people simply could not give the attention to each matter that is required.

Some of the burden is self-imposed. I have already mentioned that there are two reviews of cancellations of parole. The Board has effectively imposed upon itself an imperative of consideration of each potential parolee's case before the dates of expiration of parole. That date has become an unnecessary and unreasonable imperative in itself. Applications for parole are not made by prisoners: the consideration by the Board is undertaken entirely on its own initiative as it is in the case of at least the first review of a cancellation. The weight of the work is greatly increased by the antiquity, in the electronic age, of the Board's filing systems and access to information, all of which is contained in hardcopy only, and requires the production of an original and three copy files for each prisoner for consideration by each panel. The Board does not have a sophisticated system of case management.

The Measures which I propose, if adopted, should do something to reduce this workload. It will not eliminate it. Indeed, the reduction may not be a very great one, but I have no doubt that the quality of decisions will improve if they can be implemented.

The Board's management of its workload would benefit from moving to electronic files and introducing an effective case management system. This will enable, among things, information to be accessed quickly which is of particular interest to the members.

**Measure 1**

*A new and comprehensive electronic database and case management system which is accessible to all members of the Board and its staff needs to be established as quickly as possible. The database and case management system should be designed to include appropriate Police intelligence and to allow secure remote access by Board members.*

If an electronic system were to do nothing more than move the Board's current processes on to computer, an opportunity for improvement in the efficiency and effectiveness of its administration will be lost. The introduction of the case management system and supporting database ought to be implemented in conjunction with improvements to the Board's workflow and its structure, staffing and procedures, which are the subject of Measure 4 below.

I do not think that there is any necessity for the Board to *initiate* consideration for parole of serious offenders who, for the purposes of this Measure, I would regard as persons sentenced to imprisonment for three or more years. By undertaking that initiating consideration, the Board is performing a task that in a number of cases need not be performed. There will be prisoners who know that they are unlikely to be granted parole and accordingly not to seek it, or not to seek it yet. A requirement of parole only by application for these should have the further effect of bringing home to prisoners that parole is not automatic, is not even a matter of expectation, but is something which must be earned. It places the onus fairly and squarely on the prisoner. It should cause the prisoner to turn his or her mind to his or her capacity and intention to satisfy what will surely be the conditions of parole. The selection of three years seems to me to be reasonable as a cut-off period, but there may be other credible reasons for a selection of a different period. It is no answer to what I suggest that some prisoners may be illiterate or unaware of eligibility of parole. Anyone imprisoned for more than three years would almost surely learn from other prisoners or prison staff about eligibility and the need for an application.



**Measure 2**

*The Board should cease to initiate consideration of parole of its own motion for offenders sentenced to terms of imprisonment of three or more years. Such prisoners should be required to make application for parole.*

There should not be automatic review initiated by the Board, whether on the papers or otherwise, of a cancellation of parole. The best way of bringing home to prisoners the necessity of compliance with conditions of parole is to visit non-compliance with serious and automatic consequences. I support the recent legislative changes which make breach of parole an offence, and make provision for automatic reimprisonment on offending. But I question whether they go far enough. Be that as it may, the Board should not be giving the repeated consideration by way of review that it does, to cancellation of parole, because its time would be better occupied by giving more careful and extensive consideration to serious cases.

**Measure 3**

*On cancellation of parole and reimprisonment, an offender should not be entitled to have cancellation of his or her parole reconsidered until half of the unexpired time of parole has elapsed or unless the offender has a prima facie case that he or she was unable to comply with a substantial condition of parole by reason of matters beyond the control of the offender, or that the breach should be excused for other truly exceptional reason.*

In addition to the case management system and supporting database, administrative reforms to improve the management of the Board's workload need to be introduced urgently. I do not have the experience or qualifications to do this but I think that it should be done by a person of relevant qualifications and experience external to the Board in consultation with the Chair of the Board and its current senior administrative staff.

Reforms along the lines set out in **Appendix 6** should be effected.

**Measure 4**

*A sufficiently qualified person or a panel of persons experienced in public and/or commercial administration and organisational management should be appointed to oversee and assist in the administrative reform of the Board's structure, staffing and procedures, including the introduction of the case management system and supporting database, and the implementation of the other relevant Measures set out in this Report.*

In practice it has proved to be too easy for serious violent and sexual offenders to obtain and to remain on parole. There needs to be a clear categorisation of offenders on their conviction, and special consideration given to serious violent and sexual offenders.

**Measure 5**

*All offenders should be categorised on conviction and sentencing for a non-parole term of imprisonment according to the nature and severity of the offence. It should then follow that consideration for parole can be given by the Board according to the gravity of the offence. One category should be of offenders who have committed intentional crimes of violence which could result in personal injury requiring treatment, or serious sexual crimes. I would also include in that category offenders who have broken and entered residential premises for the purposes of committing a crime. (Historically, the law has always regarded, and should continue to do so, crimes of breaking and entering in these circumstances as having a special tendency to lead to violence by reason of the alarmed response to an intruder by a householder). Their applications for parole should be considered in the first instance by a panel of which a judge or retired judge of the Supreme or County Court is the chair and a psychiatrist and a community member are the others. Parole should only be granted to these offenders by the unanimous decision of that panel which should however, in turn, if parole may be granted, be confirmed, varied or overturned by a review panel of which the Chair is a member. The decision of the review panel will be final. No review will be necessary or should be undertaken if the first panel decides not to grant parole.*

History, the experience in other States, the common experience elsewhere, and in Victoria, the serious cases reviewed by Professor Ogloff, Bayley's case, the understandable public disquiet about these, the irrefutable statistics and observations that Mr Cornall, Mr Horton and I made, the written material provided to prisoners by the Adult Parole Board, the mindset in Corrections Victoria and to some extent of the Parole Board, well intentioned as it is in favour of parole as a matter of entitlement, compel a different formulation of the tests to be applied by the Board in deciding whether to grant parole or not to the offenders referred to in the preceding measure whom I shall hereafter refer to as PDPs (Potentially Dangerous Parolees). It seems to me that, in practice, the paramountcy of the safety of the public has not been given the prominence that it should have. I am also concerned about the strength of the test of unacceptable risk. The latter is too subjective. There will inevitably be an element of subjectivity in the application of any test, but I think, negligibility of risk of reoffending, for PDPs is a better test and less likely to be subjective in application. In any event, experience tells that, if change is to be effected, the language must change.

**Measure 6**

*Henceforth, PDPs should only be granted parole on application by them if they can satisfy the Parole Board, taking as paramount the safety and protection of the community, to a very high degree of probability that the risk of reoffending is negligible, and that they are highly likely to satisfy the conditions of parole to which they are likely to be made subject.*

I have noted the provisions of section 72(1)(ba) of the *Corrections Act* which require the Parole Board to set out in its Annual Report *the purposes of parole and the general principles and factors taken into account by the Board when making decisions in relation to parole.*

Nonetheless, I lean in favour of legislative prescription. No one has attempted to imagine for me the so-called 'unintended consequences' which the Sentencing Advisory Council thought argued against legislative prescription. On the other hand, it is easy to imagine the consequences that flow from mere statement of objective and tests rather than the obligations flowing from and reinforced by statutory language. Ministerial directive of tests from time to time is an alternative to be considered. Earlier however I expressed, and continue to hold, reservations about that.

**Measure 7**

*I favour legislation to give effect to Measures 5 and 6. The legislation should also specify the paramountcy of the safety and protection of the community in all considerations for parole or at least in consideration of parole for PDPs.*

Earlier, I have explained my reasons why I do not think the rules of natural justice should be applied to the proceedings of the Board which is, and should clearly be seen to be an arm of the Executive, albeit that it has some independence in decision making. The same reasons compel my conclusion that the Board and its processes should remain indefinitely exempt from the Charter of Human Rights and Responsibilities.

**Measure 8**

*The rules of natural justice do not apply, and should not be required to be applied to the processes of the Board and its decisions. The Board should also remain exempt from the Charter of Human Rights and Responsibilities indefinitely.*

I do favour the current arrangements which involve the participation of each of the three levels of the judiciary in the proceedings of the Board. The Chair does not however need to be a sitting Supreme Court Judge. Subject to legislative changes<sup>122</sup>, the Chair could well be a retired Supreme Court Judge. The presence of a Judge of a superior jurisdiction should provide rigour and help to ensure public confidence in the role of the Board. Participation by judicial officers of the other jurisdictions is also important by reason of their knowledge of the criminal justice system and their observation of, and almost daily participation in it. The Chair of the Board should not have to involve himself or herself in any daily or routine administrative matters. The Chair of the Board should have a special role in a process of internal reform of the kind which I have discussed. So too I think that there should be no fewer than two very well qualified and experienced psychiatrists, and a similarly qualified psychologist on the Board, one of the former of whom should be available to participate in the reforms to which I refer later. Other members of the Board should be, so far as possible, representative of the community or able otherwise to bring special skills or knowledge to the Board. The Executive, the Governor-in-Council should continue to appoint all members of the Parole Board and the Minister should take a close interest and active role in seeking appropriate candidates for appointment. The appointment of the judicial members should be made on the recommendation of the heads of jurisdiction.

In principle, there is no reason why the head of jurisdiction should not nominate a retired member of it, although legislative changes which I favour would need to be made for such a properly remunerated appointment to be made. The involvement of the Chief Justice and the heads of other jurisdictions is necessary to ensure that the person to be appointed is prepared to accept the appointment. With respect to the appointment of a retired Judge, it is important to keep in mind that the resources of the Supreme Court are already stretched and that it may be difficult in the future to spare, or indeed even to persuade a sitting Judge to accept appointment as Chair of the Parole Board.

Whether the Chair should be a full-time appointment is a question that has greatly concerned me. I was worried that if the Chair were to be a full-time position, there might be a risk that he or she might become mired in a mass of detail and administration. I did have a valuable discussion with the Honourable Frank Vincent AO who was, whilst a Supreme

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<sup>122</sup> *Supreme Court Act 1996 (Vic)* s 104A(7) and (8). The right of a retired Supreme Court judge to a pension is suspended while he or she holds an office of profit under the Crown unless the Governor in Council by Order otherwise determines.

Court Justice, Chair of the Parole Board for many years and involved himself in the deliberative work of the Board to a remarkable extent given the onerous judicial duties which he contemporaneously performed. He made a practice of seeing serious offenders who might be candidates for parole at least once, sometimes twice a year. He, as did others, thought it important actually to interview some potential parolees. This sort of personal attention to particular cases is not possible in current circumstances. That does not mean however that the frequent personal attention of a Chair is not important. Practically every informed person to whom I have spoken thinks that the Chair should be a full-time appointment. Because of what I have been told by these people, [REDACTED] and the fact that, if the changes that I have recommended are to be implemented, requiring a close leadership role on the part of a Chair, I am now persuaded that the Chair, certainly for the period of the implementation of changes at least, should be a full-time position.

**Measure 9**

*Consideration should be given to the appointment of a recently retired judge of the Supreme Court to chair the Parole Board, and for other retired judges to sit on it on a suitably remunerated basis. There has been almost overwhelming support for the appointment of a full-time Chair: the necessary process of change and the need for a leadership role by a full-time Chair have persuaded me that such an appointment should be made.*

I do not think that the numbers of the Board need to be increased unless the measures which I have suggested cannot be implemented, or unless they are not effective to make a substantial reduction in workload.

Consideration should I think be given to the specification of a maximum number of the years for which a member of the Board should serve. There is always a danger of institutionalisation. As a result of some of my discussions, I became concerned that there are those involved in the work of the Board who might find it difficult to accept that there were other or better ways of doing things than they had been done over decades. All institutions benefit from change, fresh thought and invigoration.

**Measure 10**

*It would be better I think if no member of the Board were to serve for more than six, or nine years at most. I would not suggest that any present member of the Board have his or her appointment revoked or cancelled on this account, but if this measure were to be adopted, on the effluxion of a current member's term, such a long-term member should not be reappointed.*

The Board does not receive and collate all of the relevant information that it has and should have in order to give proper and full consideration to a grant of parole. As I have already pointed out, it treats the Earliest Eligibility Date as an imperative in a way in which it should not. I did consider the possibility of the appointment of a serving police officer to the Board as is the case in New South Wales. But on reflection, I prefer the proposal of the Chief Commissioner. It is that a section of the Fugitive Taskforce be installed at the Board. The Police have resources which the Board does not, and have access to valuable intelligence relevant to offenders. It is unthinkable that the Board should not have access to this information. Indeed it should be prescribed that no grant of parole be made to PDPs without prior reference to police opinion about it.

**Measure 11**

*There should be installed at the Board a section of the relevant Police unit possessing intelligence about PDPs who should be consulted about any PDP before he or she is released on parole. The Police should also have access to, and be permitted to copy parole files (except to the extent that victims or other informants do not wish that to occur).*

The attitude that the grant of parole is an entitlement has, in my opinion, clouded the participation of victims in the parole process. There ought to be greater attention given to the views and interests of victims.

**Measure 12**

*For reasons which I have earlier explained, victims' voices need to be heard and their views considered before any PDPs are released. Persons on the Victims' Register should be given timely notice of an offender's sentence, the possibility of an offender's parole and any likely conditions of it in order to enable victims to make submissions and such arrangements as they wish to make if parole were to be granted. Victims should also be informed no fewer than 14 days before the release of an offender on parole.*

I was struck when I attended a session of the Board by the repeated attempts by the Board to explain to prisoners that they needed to undertake various programmes before the cancellation of their parole should be revoked. To do that was, I thought, to state the blindingly obvious. If the programmes are not available, a prisoner may have to await their availability. There may persons who are not PDPs who nonetheless need some education or re-education before returning to the community. At the very least, all persons hoping for parole should behave well in prison to qualify for it. No Department of Government has unlimited resources.

**Measure 13**

*No person, whether a PDP or otherwise, should be granted parole who has not undertaken programmes which either the Court, or Corrective Services has ordered or directed or believes should be taken even if the prisoner has to await their availability. Similarly, no person, whether a PDP or not, should be granted parole who has not behaved satisfactorily for at least the second half of that person's time in prison. Failure to meet these requirements should be clear disqualifications for parole.*

The grant of parole requires a careful and thorough assessment of the risk to the community involved in the prisoner's release from gaol. The Board at present uses, among others, the VISAT test. That test is quite unreliable [REDACTED]

[REDACTED] There are a number of other, better risk management tools available for use by the Board<sup>124</sup>.

**Measure 14**

*The Members' Manual should provide guidance on the interpretation and use of formal risk assessments. A test or tests different from VISAT should be employed, the final form of which should be discussed with, and approved by, Professor Ogloff, (or, in time, another suitably qualified expert) and be kept under review by him to ensure that the tests used are the best internationally available.*

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The position of the Board's General Manager should be elevated to the position of a chief administrative officer with authority to make all necessary administrative arrangements, including the reorganisation of staff qualified to better assist the Board.

**Measure 15**

*A chief administrative officer of sufficient seniority should be appointed with full authority over the day-to-day management of the Board's work and to carry out any necessary administrative reorganisation so that the Adult Parole Board may be better assisted and so that the Chair of the Board may fulfil his or her substantive functions with fewer distractions.*

Applications for post-sentence detention orders are currently made by the Director of Public Prosecutions. I have discussed the perceived unsatisfactory element of criminality that the DPP's involvement brings to these applications.

**Measure 16**

*Consideration be given to moving responsibility for making applications for detention orders from the DPP to, for example, Corrections Victoria or the Department of Justice.*

The Board and, in the case of detention orders, the Court, necessarily has to rely on expert reports assessing a prisoner's likely behaviour and risk of offending when released on parole. In this regard I note that a number of people have advised me that a prisoner's behaviour while in gaol is an unreliable guide to his or her behaviour on release.

It follows that those reports should only be obtained from very experienced forensic psychiatrists or psychologists to ensure that, to the maximum extent possible, the decisions reached are based on sound professional advice and judgment.

**Measure 17**

*Only very experienced forensic psychiatrists or psychologists should be engaged to prepare assessment reports, especially in cases in which detention might be sought.*

A division of the Board (DSO division) is now charged, pursuant to section 64D of the *Corrections Act* 1986 (Vic), with the post sentence supervision of some offenders. Some recommendations were made in relation to this role by the Sentencing Advisory Council in a



report of May 2007. Relevantly it was recommended that offenders within a high-risk category would come under the management of the Parole Board who would then make all decisions concerning the offender's parole. Since then the *Serious Sex Offenders (Detention and Supervision) Act 2009* has been enacted. This confers additional functions upon that division of the Parole Board including monitoring compliance, instruction and directing where authorised by the Court, and reviewing and monitoring the progress of offenders subject to orders. The Parole Board had expected that a different and new statutory creature would undertake these functions as a specialist Board. The Government of the day in 2009 did not meet this expectation because, I have been told, it was not prepared to provide the funding for it.

I have been provided with statistics which show that these functions are onerous, time consuming and a distraction from the conventional work of the Board. It is easy to see that the Parole Board could be well equipped to perform these functions (with sufficient resources) because of its experience with offenders. It should not be expected to do so however without those resources. On current trends there will be about 130 or so post-sentence orders under the supervision of the Board. The work is very resource intensive as it involves micro-management of offenders.

**Measure 18**

*I would endorse the recommendation of the Sentencing Advisory Council that there be a suitably resourced separate body to perform the supervisory functions to which I have referred, or better that a DSO division of the Board be provided with staff, resources and funding to enable it to do so adequately.*

Elsewhere I discussed the work load and capacity of that section of Corrections Victoria responsible for the supervision of offenders on release from prisoner or performing community services. The following Measure is a consequence of a consideration of those matters.

**Measure 19**

*Corrections is heavily pressed in relation to the number of parole officers. There need to be incentives to attract and retain efficient and mature staff to do the important and difficult work of supervision in the field, that is, case management. The ratio of offenders to parole officer or supervisors needs to be reduced. Managers need to be enabled, if necessary by the appointment of office assistants and Principal Practitioners, to oversee, train and mentor staff working in the field. Changes should be made to ensure that there are career paths for Corrections Victoria staff supervising offenders outside prison. Graduated streams of supervisory staff according to categories of offenders to be supervised should be established within Corrections Victoria.*

Some members of the Board told us, and I think there is independent evidence to support it, that there is some inconsistency between panels in making decisions. This will inevitably occur as it does in the courts because different views can sensibly be formed about some matters. Consistency is, however, an ideal which should be sought to be achieved insofar as it can be. The Board has not had a practice of holding regular seminars at which this and other relevant matters can be discussed. Nor does the Board conduct seminars for continuing education of Parole Board members by relevant experts external to the Board. All professions now quite properly insist upon continuing professional education.

**Measure 20**

*The Parole Board should be enabled to, and should, conduct regular seminars for continuing education, to raise the standards and knowledge of its members, and to promote consistency in the making of decisions. The Board should avail itself of the expertise external to it in the fields of criminology, psychiatry and related disciplines.*

My Terms of Reference require me to provide options for increased transparency in the making of decisions by the Board. Elsewhere, I have weighed the advantages and disadvantages of subjecting the Board to the requirements of natural justice. Some of the considerations relevant to that are also relevant to the question of transparency.

One form of transparency would be to require the Board to publish reasons in some cases – perhaps the more serious ones. I do not favour it, not only because it would be time consuming and might tend to invite collateral or administrative challenges, but also because it raises the question whether a prisoner should have a legal right to have an input into those reasons. It should be the duty of the Board simply to apply the prescribed relevant

considerations to the facts as it knows them, to take advantage of its experience, and in a risk averse way to exercise its discretion whether to grant parole or not. I have no hesitation in saying that it would be better for the Board, if it were to err, to err on the side of conservatism in granting parole. Nothing should, in my opinion, be done that might impair that.

In New South Wales, as I have already observed, the Minister may challenge a decision of the Parole Board. That might, at first sight, appear an attractive idea. But provisions for such a challenge, either by the Minister or by a prisoner, which would probably follow as a reciprocal right, is based upon a false premise, that is, of a form of Constitutional separation of the Parole Board from the Executive, almost as if the Parole Board were an arm of the judiciary.

Most of the matters the subject of the submission from Shine Lawyers, are I think covered elsewhere in this Report and some of them I had already independently concluded were justified and are the subject of measures which I state in this paragraph. To the extent that I accept the submission and have not already dealt with the matters raised by it, I now do so in the following measures relating to transparency.

**Measure 21A**

*The best way I think of ensuring transparency is to make sure that parole is only granted when the conditions, to which I have elsewhere referred, are satisfied, and those conditions of, for example, paramountcy of community safety, and negligibility of reoffending, are clearly stated legislatively and in the Members' Manual. It might also help to improve transparency if the media were to be present, or to participate in the seminars which I recommend be conducted. Victims too will feel more confident about transparency if their views are more carefully considered and relevant timely notices about offences and parole are given to them.*

**Measure 21B**

*In order to enhance its transparency and accountability, the Board should make its Members Manual, Secretarial Operations Manual and all relevant Corrections Victoria Director's Instructions relevant to parolee management publicly available.*

**Measure 21C**

*The Board should report publicly on all homicides and other serious offences committed by parolees.*

**Measure 21D**

*If the Measures recommended in this Report to the extent that they are accepted and adopted by government, do not result in a major improvement in the performance of the Board in relation to serious violent and serious sexual offenders, consideration should be given to the establishment of a Corrections and Criminal Justice Inspectorate of the kind that operates in Western Australia<sup>125</sup> to monitor compliance and effectiveness of the performance of the Board.*

As I have said, the Parole Board has tended to treat the date of the end of the non-parole period as an imperative for the release of offenders. This may have led to undue haste and a lack of appropriate consideration of all relevant material before a prisoner is released on parole.

**Measure 22**

*The Parole Board should treat the date of the expiration of a non-parole period as a target date only for the release of an offender on parole. Nobody should be released on parole unless the Parole Board is satisfied that it has before it and has considered all relevant information, including Police information relating to the prisoner's likely conduct on parole whether there have been delays in the provision of that information or not.*

I have left until last a consideration of the issue of release within the community of medium to long-term prisoners, including PDPs at or near the end of their sentence without parole, or on parole for only a short period. The efficacy of parole is in the view of many informed, if not all informed people, overstated. That arguable proposition needs to be balanced against the conviction of many in Corrections Victoria that parole is either highly beneficial, or perhaps even necessary for an orderly reintroduction of an offender into

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<sup>125</sup> See *Inspector of Custodial Services Act 2003* (WA).

society. If the measures which I suggest are adopted, there will certainly be fewer grants of parole, and perhaps shorter periods of parole.

The question comes down to whether the benefits to the community, and the benefit to the relevant prisoners of a relatively long period of parole, outweigh the benefits to the community of longer detention, and therefore the lessening of the possibility of recidivism during that parole. I am not impressed by an argument that I heard that an offender such as Bayley, and others like him, would be just as likely to offend after they were released without parole, as they were while on parole. Any time spent in detention by such offenders is time out of their lives when they cannot offend against the general community.

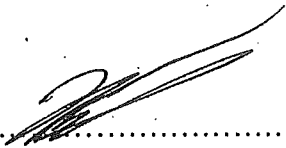
The argument that release under supervision is the best way to ensure that an offender has a chance to return safely to society and, to lead a lawful and useful life in it, is one that cannot be easily dismissed. I accept it, but caution that the Board needs, in future, to give effect to it in a risk averse way bearing in mind these realities:

1. The resources of Government are limited. The Board needs to keep in mind and to make a careful and realistic assessment of just how much supervision a parolee will have on release.
2. Even greatly increased supervision and assistance will be unlikely to prevent crime by determined violent or sexual offenders.
3. The benefits of parole as a preventative of recidivism (or same statistics) have been overstated and remain, to some extent at least, controversial.
4. On any view, there is a need for more in-prison preparation for release of prisoners, whether or not on parole.

**Measure 23**

*In addition to offenders' education and other Corrections programmes, there should be programmes designed by Corrections Victoria in consultation with appropriate experts (for example, Professor Ogloff and criminological educators) to prepare offenders in prison for release from it.*

Signed



.....  
**IDF Callinan AC**

Dated:

**Appendix 1**

**PERSONS CONSULTED AND SUBMITTERS**

**People Met and Consulted**

██████████ Victoria Legal Aid

██████████ Victoria Legal Aid

Mr Ken Lay - Chief Commissioner of Police

Mr Graham Ashton – Deputy Commissioner of Police

The Hon. Philip Cummins – Chair, Victorian Law Reform Commission

The Hon. Justice Frank Vincent AO – Former Chair Adult Parole Board

The Hon. Bernard Teague AO

The Hon. Marilyn Warren AC – Chief Justice of Victoria

Justice Curtain - Chairperson, Adult Parole Board

Chief Judge Rozenes AO QC - Chief Judge of the County Court

Mr Peter Lauritsen – Chief Magistrate

Deputy Chief Magistrates, Mr Robert Kumar and Ms Jelena Popovic

Mr John Champion SC – Director of Public Prosecutions Victoria

Judge David Jones

Mr Ross Betts

Professor James Ogloff

Ms Julia Griffith – Executive Director, Health & Crime Prevention, Corrections Victoria,

██████████ Strategic Policy & Planning, Corrections Victoria

Mr Andrew Reaper – Deputy Commissioner, Offender Management, Corrections Victoria

Mr Rod Wise – Deputy Commissioner, Operations, Corrections Victoria

Mr Len Norman – General Manager, Barwon Prison

Ms Jan Shuard – Commissioner, Corrections Victoria

[REDACTED] South Eastern Centre Against Sexual Assault

Mr David Provan - General Manager, Adult Parole Board

Ms Fiona Chamberlain – Director Community Operations, Victim Support Agency

[REDACTED] Victorian Association for the Care and Resettlement of Offenders (VACRO)

[REDACTED] Australian Community Support Organisation (ACSO)

[REDACTED] Australian Community Support Organisation (ACSO)

[REDACTED] Australian Community Support Organisation (ACSO)

[REDACTED] Jesuit Social Services

[REDACTED] Jesuit Social Services

[REDACTED] Brosnan Services, Jesuit Social Services

[REDACTED] Jesuit Social Services

Ms Carmel Arthur – Member, Adult Parole Board

[REDACTED] Caraniche Pty Ltd

### List of Submitters in Writing

Victoria Legal Aid		11 June 2013
[REDACTED]	*	10 July 2013
[REDACTED]		11 July 2013
[REDACTED]		11 July 2013
Shine Lawyers		16 July 2013
[REDACTED]	*	12 July 2013
Victoria Police		28 June 2013
Ms Carmel Arthur		30 June 2013
[REDACTED]	*	16 July 2013

\*De-identified names of victims who made submissions



**Appendix 2**  
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**Appendix 3**  
**MANAGEMENT CHART**  
**Corrections Victoria**



**Appendix 4**  
**PAROLE BROCHURE**  
**Corrections Victoria**

### 12. What happens if parole is cancelled?

If a parolee is not already in custody, a warrant for apprehension and return to prison is issued. If parole is cancelled, the parolee owes the entire parole period, from the date of release to the date that parole would have expired. Under the Sentencing Act 1991, any new sentence of imprisonment for an offence committed while on parole is normally required to be served in addition to the time owed for cancellation of parole.

### 13. What happens after return to custody?

After a parolee has been returned to custody, the Board will review the case when a report is received from Community Correctional Services.

The Board may grant reparole (if the prisoner is not currently serving an additional sentence), defer the case or deny reparole. The Board will often interview the prisoner prior to making a final decision. Compliance with conditions prior to cancellation is a factor that is considered by the Board when determining if and when reparole is granted.

### 14. Further Information

For further information, contact the:

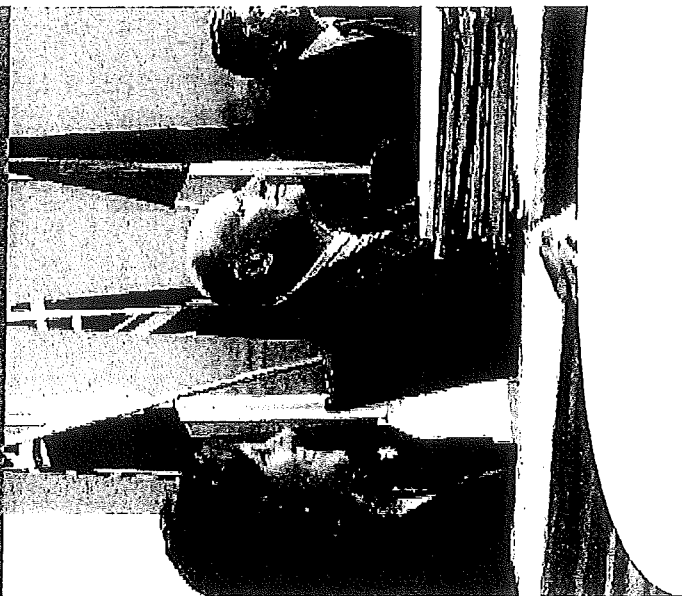
General Manager  
Adult Parole Board of Victoria  
Level 4, 444 Swainston Street  
Carlton Victoria 3053

DX 211768 Carlton  
Telephone: (03) 9094 2111  
Victorian country callers: 1300 765 946

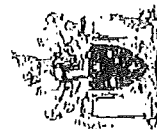
Interpreter Service:

Call 131 450 and ask for the Adult Parole Board  
Facsimile: (03) 9094 2125  
Email: [apb.enquiries@justice.vic.gov.au](mailto:apb.enquiries@justice.vic.gov.au)  
Internet: [www.justice.vic.gov.au/paroleboard](http://www.justice.vic.gov.au/paroleboard)

The information contained in this brochure was accurate as of 1 March 2009. Published March 2009.



Adult Parole Board of Victoria



Adult Parole Board of Victoria

## General Guide to Parole

### 1. Introduction

This is a general guide to parole only. Each case is dealt with on its merits.

### 2. What is the Adult Parole Board of Victoria?

The Adult Parole Board of Victoria (the Board) is an independent statutory body, established under the Corrections Act 1986, with jurisdiction over the release of prisoners onto parole, upon the expiry of their non-parole period. The Board decides a date for release and the conditions of the parole order. The Board also makes decisions in relation to cancellation of parole orders.

### 3. What is parole?

Parole is serving the balance of a prison sentence in the community, on conditions fixed by the Board and under the direct supervision of a Community Corrections Officer. Parolees must comply with the conditions of their parole order.

### 4. Are all prisoners eligible for parole?

No, only those prisoners who have a non-parole period fixed by the sentencing court. The parole eligibility date is the earliest date on which a prisoner may be released on parole. The Board does not have the power to release prisoners on parole before their eligibility date. The Board is not required to grant parole on the prisoner's earliest eligibility date and may defer release to a later date or may deny parole.

### 5. How can a prisoner increase the likelihood of being released on parole at their earliest date?

The Board expects prisoners to participate in programs that address their offending behaviour, to provide clean urine samples and avoid involvement in prison incidents. If a prisoner has not had parole before, it is likely that they will

be granted parole, although each case is considered on an individual basis. To be released on parole, prisoners must have suitable accommodation that has been approved by the Board. It is common for parole to be granted on the eligibility date, although it may occur on a later date. After an order is made for release on parole, the Board is notified of any further positive urine tests and prison incidents. The Board often revokes or defers parole in such cases.

### 6. What happens when the Board interviews prisoners?

Although the Board endeavours to interview most prisoners who are under the jurisdiction of the Board while they are in prison, it is not possible for the Board to interview all prisoners who are eligible for parole.

When interviewing a prisoner, the Board may discuss the offence for which the prisoner is in custody, previous court appearances, medical history, drug use both inside and outside prison, programs the prisoner has undertaken to address offending behaviour, the prisoner's understanding of parole, and release plans.

### 7. When is a parole decision made?

Cases are considered automatically. A Community Corrections Officer, who will provide a parole assessment report for the Board to consider, usually interviews prisoners a few weeks prior to their earliest eligibility date. Wherever possible, cases are considered prior to the parole eligibility date.

### 8. What information is required at the interview for the Parole Assessment Report?

Family background, health, prison behaviour, program participation and release plans, including confirmed accommodation arrangements, are discussed at the prison interview with the Community Corrections Officer. Prisoners must have suitable accommodation and should begin

making arrangements at an early stage. Prisoners can seek assistance from their case manager. Assistance is also available for Koorie prisoners from the Aboriginal Wellbeing/Indigenous Liaison Officers located in prisons.

### 9. What are the conditions of parole?

Standard conditions, which apply to all parolees, include that they do not break the law, report to Community Correctional Services and obey directions. During the first three months of parole, most parolees are required to report more regularly and participate in community work. The Board may impose other conditions considered appropriate such as geographical restrictions or participation in counselling. The Board also has the power to vary, delete or add conditions at any time during the parole period.

### 10. What must parolees do on release?

Parolees must report within two working days to the Community Corrections location stated on their parole order. Parolees will increase the likelihood of successfully completing their parole by understanding and complying with the conditions of parole, by not committing further offences, and by cooperating with their Community Corrections Officer who provides both supervision and support.

### 11. What happens if the parole conditions are breached?

Parole may be breached by failure to comply with conditions or for further offences committed while on parole. The Board will decide what action should be taken, which may include noting the breach but taking no further action, issuing a warning, adding conditions or cancelling the order. A parole order can also be cancelled after the expiry of the order if a parolee is subsequently convicted and sentenced to more than three months in prison for offences committed during the parole period.

**Appendix 5**

**COMPARATIVE TABLE OF PAROLE SYSTEMS**



# Comparative Table of Parole Systems

Chairperson	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
Victoria Justice Simon Whelan Chairperson	Jan Pike AM Chairperson	Peter McInnes President	Frances Nelson QC Presiding Member	Judge Robert Cock Chairman	Marcia Duvnjak Chairman	Graham Delaney Chairperson	Justice Stephen Southwood Chairman	Justice Warwick Gendall Chairperson Judge of the High Court (full-time)
Judge of the Supreme Court (part-time)	Retired Chief Magistrate (part-time)	Lawyer (full-time)	Lawyer (part-time)	Judge of the District Court (full-time)	Lawyer (part-time)	Lawyer (part-time)	Judge of the Supreme Court (part-time)	Hon Marion Frater Deputy Chairperson (although there is no formal provision in the Parole Act for such a position) Former Judge of the High Court (part-time)
<b>Composition of the Board</b>								
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
Total members 24. Judicial Members 14 Community Members 8 Full-Time Member 1 Departmental Representative (Secretary to the Department of Justice) 1	Total members 23 Judicial members 4 Community Members 15 Official members (who are appointed by the chairperson to 'dispose of routine business') - 4.	Total members 20. Legal/Judicial Members 2 Community Members - 7 Psychologist/Doctor Members 5 Indigenous or Torres Strait Islander Members 5 Departmental Representative (Commissioner's Representative) 1	Total members 10. Legal/Judicial Members 3 Psychiatrist Member 1 Social Work Member 1 Victims Rep. 1 Indigenous Rep. 1 Community Rep. 1 Former Police Officer 1 Deputy Member (to replace someone who cannot attend a meeting) 1	Total members 16. Judicial Members 5 Community Members 11	Total members 6. Lawyer 1 Community Members (sociology, criminology, penology or medicine) 5	Total members 8. Legal/Judicial Members 2 Departmental Representative (Senior Manager, Corrective Services) 1 Police Rep. 1 Community Members 4	Total members 10. Judicial Member 1 Departmental Representative (ED of Correctional Services) 1 Police Rep. 1 Victims Rep. 1 Psychologist/Doctor Member 1 Community Members 5	Total Members - 37 Judicial Members 19 Non-Judicial Members 18
<b>Characteristics - Nature of Parole Board's Jurisdiction</b>								
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
1 Adult Parole Board has discretion in relation to all prisoners who have a non-parole period (NPP).	Parole is automatic for sentences of imprisonment of less than 3 years, although Parole Authority can revoke. Parole Authority has discretion for sentences longer than 3 years.	Court sets parole release for sentences less than 3 years, although parole board can revoke. Regional Parole Board has discretion for parole for sentences 3-8 years. Queensland Parole Board has discretion for sentences longer than 8 years.	Parole is automatic for certain prisoners sentenced to less than 5 years. Parole Authority has discretion for sentences longer than 5 years or for offenders excluded from automatic parole (e.g. imprisoned for sex offences, personal violence offences, arson).	Prisoners Review Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	The New Zealand Parole Board has discretion in relation to prisoners on sentences of more than 24 months. For sentences of less than 24 months, the only discretion the Board has is in respect of applications for release on compassionate grounds.

Nature and Source of Guidance		New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
2	Internal Developed by Adult Parole Board and set out in annual report and unpublished Members' Manual.	Legislative Set out in <i>Crimes (Administration of Sentences) Act 1999</i> s 135.	Mixture of ministerial guidelines and legislative Guidelines made under <i>Corrective Services Act 2006</i> s 227. The <i>Corrective Services Act 2006</i> governs cancellation of parole.	Legislative Set out in <i>Correctional Services Act 1982</i> s 67.	Legislative Set out in <i>Sentence Administration Act 2003</i> s 5A, 5B and 20(2).	Legislative Set out in <i>Corrections Act 1997</i> s 72(4).	Legislative Set out in <i>Crimes (Sentence Administration) Act 2005</i> s 120.	Internal Powers set out in <i>Parole of Prisoners Act 1979</i> . Guidelines (published in annual report), which emphasise that each case is considered on its merits, and that the factors listed are a guide only.	Legislative Set out in the <i>Parole Act 2002</i>
<b>Threshold Test or Overriding Principle</b>									
3	None.	The Parole Authority must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest ( <i>s 135(1)</i> ).	Principles for Board decision-making. Highest priority should always be the safety of the community (Guideline 1.2). The Parole Board should consider whether there is an unacceptable risk to the community if the offender is released to parole and whether the risk to the community would be greater if the offender does not spend a period of time on parole (1.3).	The paramount consideration of the Parole Board when determining an application under this section for the release of a prisoner on parole must be the safety of the community ( <i>s 67(3)(a)</i> ).	The Prisoners Review Board or any other person performing functions under this Act must regard the safety of the community as the paramount consideration ( <i>s 5B</i> ).	None.	The Parole Board may make a parole order for an offender only if it considers that parole is appropriate for the offender, having regard to the principle that the public interest is of primary importance ( <i>s 120(1)</i> ).	None.	The paramount consideration for the Board in every case is the safety of the community ( <i>s7(1)</i> ) Other guiding principles include: • Offenders must not be detained any longer than is consistent with the safety of the community and must not be subject to release conditions that are more onerous or last longer than is consistent with the safety of the community ( <i>s7(2)(a)</i> ). • Offenders must be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them ( <i>s7(2)(b)</i> ).

**Factors for Consideration in Granting Parole**

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
4	Nature and circumstances of the offence(s).	The nature and circumstances of the offence to which the offender's sentence relates (s 135(2)(c)).		Where the prisoner was imprisoned for an offence or offences involving violence, the circumstances and gravity of the offences, or offences, for which the prisoner was sentenced to imprisonment (but the Parole Board may not substitute its view of these matters for the view expressed by the court in passing sentence) (s 67(4)(c)).	The circumstances of the commission of, and the seriousness of, an offence for which the prisoner is in custody (s 5A(b)).			Nature and circumstances of the offence(s).	
5	Prior criminal history.	The offender's criminal history (s 135(2)(e)).	The prisoner's prior criminal history and any patterns of offending (2.1(c)).	Any relevant remarks made by the court in passing sentence (s 67(4)(a)).	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) (s 5A(c)).		The offender's antecedents (s 120(2)(b)).	The prisoner's criminal history and patterns of offending.	All relevant information relating to the offender's current and previous convictions (s43(1)(e))
6	Comments made by the sentencing court.	Any relevant comments made by the sentencing court (s 135(2)(d)).	The recommendation for parole, parole eligibility date or any recommendations or comments of the sentencing court (2.1(a)).	The behaviour of the prisoner during any previous release on parole (s 64(4)(e)).	The behaviour of the prisoner when subject to any release order made previously (s 5A(h)).	Any remarks made by the court in passing sentence (s 72(4)(d)).	Any relevant recommendation, observation and comment made by the sentencing court (s 120(2)(a)).	Comments made by the sentencing judge when imposing sentence.	
7	Previous history of supervision in the community.	The prisoner's compliance with any other previous grant of community-based release, resettlement leave program, community service or work program (2.1(f)).	The prisoner's compliance with any other previous grant of community-based release, resettlement leave program, community service or work program (2.1(f)).		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	The behaviour of the prisoner during any previous release on parole (s 72(4)(h)); the behaviour of the prisoner while subject to any order of a court (s 72(4)(i)).		Previous history of supervision in the community.	
8	Assessment of the potential risk to the community if the offender is released from custody.	The likelihood of the prisoner committing further offences (2.1 (d)). Whether there are any other circumstances that are likely to increase the risk the prisoner presents to the community (2.1 (g)) (see also (h) below).				The likelihood of the prisoner reoffending (s 74(4)(a)); the protection of the public (s 72(4)(b)).	The likelihood that, if released on parole, the offender will commit further offences (s 120(2)(f)).	The possibility of the offender reoffending while on parole and the likely nature of the reoffending.  The risk of harm to the community and the victim.	In assessing whether an offender poses an undue risk, the Board must consider the likelihood of further offending; and the nature and seriousness of any likely future offending (s7(3))

**Factors for Consideration in Granting Parole**

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
9	Release plans and whether suitable accommodation is available.		Whether the prisoner has access to supports or services that may reduce the risk the prisoner presents to the community (2.1 (h)).	The probable circumstances of the prisoner after release from prison or home detention (s 67(4)(g)).	community (s 5A(a)); the likelihood of the prisoner committing an offence when subject to an early release order (s 5A(i)).	The probable circumstances of the prisoner after release from prison (s 72(4)(k)).		Release plans including accommodation and employment.	The support and supervision available to the offender following release (s28(2)(a))
10	Assessments and recommendations made by appropriate professionals, including psychiatrists, psychologists, and community corrections officers.	Any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service, as referred to in section 135A(i) and any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the state (s 135(2)(i)).	Any submissions made to the Parole Board by an eligible person (2.1 (e)). Any medical, psychological, behavioural or risk assessment report relating to the prisoner (2.1 (f)).	Any reports tendered to the Parole Board—(i) on the social background, or the medical, psychiatric condition, of the prisoner; (ii) from community corrections officers or other officers or employees of the Department (s 67(4)(f)).		Any reports tendered to the Parole Board on the social background of the prisoner, the medical, psychological or psychiatric condition of the prisoner or any other matter relating to the prisoner, including in the case of a prisoner who is or has been a forensic patient any report of the Chief Forensic Psychiatrist (s 72(4)(l)).	Any report required by regulation in relation to the granting of parole to the offender (s 120(2)(e)); any other report prepared by or for the Territory in relation to the granting of parole to the offender (s 120(2)(f)).	Reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychiatrists, psychologists, custodial staff and/or community corrections officers.	Decisions must be made on the basis of all the relevant information that is available to the Board at the time (s7(2)(g))  Note that the offender, victims, the prison manager, the Police are all able to make submissions to the Board.
11	Submissions made by the offender, the offender's family, friends and potential employers, or any other relevant individual.							Submissions made by the prisoner, the prisoner's family, friends and any potential employers or other relevant individuals; submissions made by the legal representatives of the prisoner.	See 10 above.  In addition, the offender may be accompanied by one or more support persons who may, with leave of the Board, speak in support of the offender (s49(3)(d))
12	Written submissions made by the victim(s) or by persons related to the victim(s).	The likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole (s 135(2)(g)).	If, in relation to an offence for which the prisoner was imprisoned, there is a registered victim – the impact that the release of the prisoner on parole is likely to have on the registered victim and the registered victim's family (s 67(4)(ca)).	Issues for any victim of an offence for which the prisoner is in custody if the prisoner is released, including any matter raised in a victim's submission (s 5A(d)).	Any statement provided under subsection (2B) by a victim, or, if applicable, the parent or guardian of the victim, of an offence for which the prisoner has been imprisoned to (s 72(4)(ca)).	Any submission made, and concern expressed, to the Parole Board by a victim of the offender (s 120(2)(c)).  The likely effect of the offender being paroled on any victim of the offender, and on the victim's family, and, in particular, any concern, of which the board is aware, expressed by or for the victim, or the victim's family, about	Any submission made, and concern expressed, to the Parole Board by a victim of the offender (s 120(2)(c)).  The likely effect of the offender being paroled on any victim of the offender, and on the victim's family, and, in particular, any concern, of which the board is aware, expressed by or for the victim, or the victim's family, about	The victim's safety, welfare and whereabouts.  Representations made by the victim or by persons related to the victim.	The rights of the victims must be upheld and submissions by victims and any restorative justice outcomes must be given due weight (s7(2)(d))  Any reports arising from restorative justice processes (if relevant) (s43(1)(b))  The victim may be

**Factors for Consideration in Granting Parole**

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
13	Conduct of the offender while in custody and whether any positive drug tests have been recorded.		The prisoner's cooperation with authorities both in securing the conviction of others and preservation of good order within the corrections system (2.1(b)).	The behaviour of the prisoner while in prison or on home detention (s 67(4)(d)).	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 (s 5A(e)).	The behaviour of the prisoner while in prison and, if the prisoner has been in a secure mental health unit, while in that secure mental health unit (s 72(4)(g)).	The offender's conduct while serving the sentence of imprisonment (s 120(2)(g)).	Institutional reports in relation to the prisoner's behaviour while in prison.	A report by the Department of Corrections or relevant institution if the offender is detained elsewhere eg. a hospital (s43(1)(d-f))
14	Willingness to participate in relevant programs and courses while in custody.		Recommended rehabilitation programs or interventions and the prisoner's progress in addressing the recommendation (2.1(g)).		Whether the prisoner has participated in programs available to the prisoner when in custody, and if not the reasons for not doing so (s 5A (f)); the prisoner's performance when participating in a program mentioned in paragraph (f) (s 5A(g)).		The offender's participation in activities while serving the sentence of imprisonment (s 120(2)(h)).	Rehabilitation courses undertaken by the prisoner. Education courses undertaken by the prisoner.	
117									
16		The need to protect the safety of the community (s135(2)(a)).							
17		The need to maintain public confidence in the administration of justice (s 135(2)(b)).							
18		The likelihood of the offender being able to adapt to normal lawful community life (s 135(2)(f)).							
		If the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the Drug Court Act 1996, the circumstances of that decision to decline							The public interest in the reintegration of the offender into society as a law-abiding citizen (s28(2)(b))

Factors for Consideration in Granting Parole								
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
19	to make the order (s 135(2)(a)). Such guidelines as are in force under section 185A (s 135(2)(j)).							
20			The likelihood of the prisoner complying with the conditions of parole (s 67(4)(b)).	The likelihood of the prisoner complying with the standard obligations and any additional requirements of any early release order (s 5A(j)).	The likelihood of the prisoner complying with the conditions (s 72(4)(e)).	The likelihood that, if released on parole, the offender will comply with any condition to which the parole order would be subject (s 120(2)(i)).	Whether the prisoner can be adequately supervised in the community under the standard conditions of parole or whether further conditions of parole should be imposed.	
21					The rehabilitation of the prisoner (s 72(4)(c)).	Whether parole is likely to assist the offender to adjust to lawful community life (s 120(2)(k)).		
22							The security rating of the prisoner within the prison.	
23	Such other matters as the Parole Authority considers relevant (s 135(2)(k)).		Any other matters that the Parole Board thinks are relevant (s 67(4)(h)).	Any other consideration that is or may be relevant to whether the prisoner should be released (s 5A(k)).	Any other matters that the Parole Board thinks are relevant (s 72(4)(f)).	Any special circumstances in relation to the application (s 120(2)(j)); anything else prescribed by regulation (s 120(2)(m)); Subsection (2) [the list of criteria] does not limit the matters the board may consider (s 120(3)).	Any other matters that the Parole Board thinks are relevant.	
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Cancellation or Revocation of Parole		New Zealand						
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand
24	<p>Power provided by s 77.</p> <p>No statutory criteria. Some factors for consideration set out in Members' Manual (but only relate to situations where parolee has reoffended and charges are outstanding).</p>	<p>Parole Board may amend, suspend or cancel a parole order (Corrective Services Act 2006, s 205).</p> <p>Statutory criteria below.</p>	<p>Cancellation is automatic on Parole Board finding breach of designated conditions (§ 73) or on imprisonment for offence while on parole (§ 74A).</p> <p>Parole Board has power to cancel for breach of non-designated conditions (§ 74) or to impose community service for breach of non-designated condition (§ 74AA).</p> <p>No statutory criteria or published guidelines.</p>	<p>Powers provided by §§ 43 and 44 of the Sentence Administration Act 2003.</p> <p>No statutory criteria or published guidelines.</p>	<p>Power provided by s 79.</p> <p>No statutory criteria.</p>	<p>Parole Board has power provided by s 156.</p> <p>No statutory criteria.</p>	<p>Power provided by s 5.</p> <p>No statutory criteria or published internal guidelines.</p>	<p>The Board may make a final recall order recalling the offender to continue serving his or her sentence in a prison if it is satisfied, on reasonable grounds, that one or more grounds for a recall have been established (s66). Statutory criteria below:</p>
25	<p>Compliance with conditions.</p>	<p>Reasonable belief that the prisoner has failed to comply with the parole order (s 205(2)(a)(i)).</p>	<p>If it is satisfied that the offender has failed to comply with the offender's obligations under the order (s 170(1)(a)).</p>					<p>The offender has breached his or her release conditions (s61(b)).</p> <p>If an offender is subject to residential restrictions, (i) the offender is jeopardising the safety of any person at his or her residence; or (ii) a suitable residence in an area in which a residential restriction scheme is operated by the chief executive is no longer available; or (iii) the offender no longer wishes to be subject to residential restrictions (s61(d)).</p> <p>If an offender is subject to a special condition that requires his or her attendance at a residential programme, (i) the offender is jeopardising the safety of any person at the residence, or the order or security of the residence; or (ii) the</p>

Cancellation or Revocation of Parole									
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	New Zealand	
								offender has failed to remain at the residence for the duration of the programme, or (iii) the programme has ceased to operate, or the offender's participation in it has been terminated for any reason (s61(e))	
26	Nature of the original/outstanding offences.								
27	In the case of an offender who has been granted parole on the grounds that the offender is in imminent danger of dying or is incapacitated to the extent that the offender no longer has the physical ability to do harm to any person, as referred to in section 154A(3), it is satisfied that those grounds no longer exist (s 170(1)(a1)).	If the Parole Board receives information that, had it been received before the parole order was made, would have resulted in the Parole Board that made the order making a different parole order or not making a parole order (s 205(2)(b)).							
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28	If the offender fails to appear before the Parole Authority when called on to do so (s 170(1)(b)).								
29		Poses a serious risk of harm to someone else (s 205(2)(a)(ii)).						The offender poses a undue risk to the safety of the community or any person or class of persons (s61(a))	
30		Reasonable belief that the prisoner is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas (s 205(2)(a)(iv)).							
31		If the prisoner is charged with committing an offence (s 205(2)(c) – suspend						The offender has committed an offence punishable by imprisonment, whether	



Cancellation or Revocation of Parole							
Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
		or amend only).					
32		Poses an unacceptable risk of committing an offence (s 205(2)(a)(iii)).					or not this has resulted in a conviction (s61(C))
33	Whether or not offender has been remanded in custody pending the hearing of the outstanding offences.						
34	Time spent on parole; time left before parole expires; various other factors.						

## Appendix 6

### OUTLINE OF SOME OF THE ADMINISTRATIVE REFORMS TO BE IMPLEMENTED BY AN ADMINISTRATION FACILITATOR OR PANEL

1. Removal of unnecessary elements or procedures, streamlining of its processes and maximisation of the efficient disposition of work by the Board members and staff should occur.
2. Forms of language in documentation need to ensure that it reflects that parolees are still under sentence and that parole is a concession or privilege, not a right. For example, the expression *End of Non-parole Period* could be substituted for *Earliest Eligibility Date*.
3. Procedures for more decisions on the papers, whether by an electronic round robin in straight forward or simple cases should be adopted.
4. Ensure that the skills, experience and training of the staff supporting the Board meet the new requirements of the Board.
5. Information about parole needs to be made to prisoners in gaol by Corrections Victoria officers to inform them about the things they have to do before a parole application will be considered.
6. The ordering of files and data generally needs to be carefully considered and changed to ensure that the Board has, and does actually deliberate upon all relevant information before granting parole. At the very least, the files should contain and keep up to date, a chronology of offending, police facts, sentencing remarks, victims' submissions and impact statements, and relevant police and psychiatric opinions.
7. Current supervision and intensive supervision processes need to be improved so that the Board can be confident that it has before it all relevant information for a consideration of a grant of parole.
8. Accommodation of and provision for liaison with the Police Fugitive Offenders' Unit will need to be made.
9. A process to ensure all breaches of parole are at least noted by Community Corrections Officers on the prisoner's APB file needs to be put in place.