ALS
Aboriginal Legal Service (NSW/ACT) Limited
ABN: 93 118 431 066

30 October 2013

Hon James Wood AO QC
The Chairperson
NSW Law Reform Commission
By Email: nsw_lrc@agd.nsw.gov.au

Dear Sir,

Re: Parole Question Papers

This submission is made on behalf of the Aboriginal Legal Service ('the ALS') in response to the NSW Law Reform Commission ('the Commission') question papers on paroles.

Thank you for your invitation to respond to the question papers.

Question Paper 1: The design and objectives of the parole system

Question 1.1: Retention and objectives of Parole

(1) Should Parole be retained?

> The ALS firmly supports the retention of parole. Numerous quantitative studies have confirmed that parole fulfils a positive role by reducing the risk of re-offending amongst parolees. From a qualitative perspective, it is the view of the Aboriginal Legal Service that parole has a positive impact, in that it motivates our clients to continue to address risk factors for re-offending within a community setting.

(2) If retained, what should be the objectives of the parole system in NSW?

> The ALS believes that particular importance should be placed upon the rehabilitation of offenders with a view to their reintegration into the general community. This is one of the objects already recognised under s2A(1)(d) of the CAS Act. With respect to the identification and management of high risk offenders, it would be concerning if an over-emphasis upon this particular objective led to a larger number of high risk offenders serving the majority or entirety of their sentences, before being released with a minimal or non-existent period of supervision. The public safety consequences of such a situation are clear.

(3) Should there be an explicit statement of the objectives or purposes of parole in the Crimes (Administration of Sentences) Act 1999 (NSW)?

The ALS is in favour of an explicit statement of the objectives and purposes of parole in the *Crimes (Administration of Sentences) Act 1999 (NSW)*, providing that particular emphasis is places upon the rehabilitation of offenders with a view to their successful reintegration into the community.

Question 1.2: Design of the parole system

(1) Should NSW have automatic parole, discretionary parole, or a mixed system?

The ALS is in favour of maintaining the mixed system of parole that presently exists in NSW.

(2) If a mixed system, how should offenders be allocated to either automatic or discretionary parole?

The ALS is in favour of the retention of the current allocation between automatic and discretionary parole.

(3) Does there need to be a mechanism to ensure supervised reintegration support for offenders serving short sentences? What should such a mechanism be?

This service would oppose the implementation of a mechanism by which offenders serving sentences of six moths or less for the same reasons stated by the NSWLRC in its *Sentencing* report (2013).

Question 1.3: Difficulties for accumulated and aggregate sentences

What changes should be made to legislation for aggregate and accumulated approaches to sentencing to ensure consistent outcomes for parole?

Since judicial officers retain the discretion to impose either accumulated or aggregate sentences, this service is of the opinion that any concerns regarding discrepancies that could arise with regard to parole can and should be raised by the defence or the prosecution during sentencing.

Question 1.4: SPA's power to take over decision making responsibility

(1) What safeguards should there be on automatic parole?

The ALS agrees with the proposition put forward by Shoptfront Youth Legal Centre that pre-release revocation by SPA of court-ordered parole should occur in exceptional cases only. It also shares the concern of Legal Aid NSW that pre-release revocation for lack of suitable

accommodation unfairly disadvantages homeless offenders. This service is also concerned that this situation often occurs because the process of organising appropriate accommodation has only commenced close to the release date.

(2) Should there be any changes to SPA's power to take over parole decision making for offenders with court based parole orders?

The ALS supports the implementation of legislation that would ensure that court-ordered parole could only be revoked by SPA in exceptional circumstances.

Question 1.5: Supervision conditions on court based parole orders

Should there be any changes to the way supervision conditions are imposed on a court based parole order?

This service shares the concern of Legal Aid NSW regarding the number of court based parole orders that are revoked prior to release for lack of appropriate accommodation. It is contended that this severely disadvantages offenders who were homeless at the time of their imprisonment and also offenders suffering from mental health issues. The Aboriginal Legal Service would be in favour of a legislative amendment requiring the Department of Corrective Services to arrange suitable accommodation for these vulnerable offenders some months prior to their earliest release date.

Question Paper 2: Membership of the State Parole Authority and Serious Offenders Review Council

Question 2.1: Membership of SPA

(1) Does the balance of members on SPA or SPA's divisions need to be changed in any way?

We believe a psychiatrist should also be on SPA to understand the specific needs of mentally ill inmates, and the management of mentally ill inmates being considered for parole.

(2) How can the selection and performance of SPA's community members be improved?

The ALS is in favour of a more formal process being adopted in respect to the selection of SPA's community members. The introduction of standardised selection criteria will ensure that SPA's community members have the appropriate skill set and requisite expertise to preside over parole decisions. Selection criteria will also serve to instil in community members a stronger sense of what is expected of them in their capacity as members of the SPA as well as being an important tool for assessing and measuring performance.

(3) Should SPA's community members be representing the community at large or be representing specific areas of expertise?

The ALS supports an increase in the number of SPA members who are Aboriginal identified. Given the very live and real issue of overrepresentation of Aboriginal persons in custody the ALS is of the view that an Aboriginal person should be required to sit on the parole board and be active in making decisions regarding parole of Aboriginal prisoners.

Question 2.2: Membership of SORC

(1) How can the selection and performance of SORC's community members be improved?

In line with the above response (Q 2.2, (2)), the ALS adopts a similar recommendation in respect to the community members of SORC. Standardised selection criteria will allow for community members and applicants to have a more clear and concise understanding of their role as members of the SORC and which skills and expertise they should be drawing on to perform to the requisite standard in that capacity.

(2) Should SORC's community members be representing the community at large or be representing specific areas of expertise?

The ALS strongly encourages the inclusion of an Aboriginal identified community member of SORC. As previously discussed, the overrepresentation of Aboriginal persons in the custodial system is of huge concern. The inclusion of an Aboriginal community member would

bring a level of awareness, knowledge and expertise to the parole process which is highly relevant to Aboriginal offenders who are being considered for parole.

Question Paper 3: Discretionary Parole Decision Making

Question 3.1: The public interest test

(1) Should the current public interest test in s 135(1) of the CAS Act be retained, or does the Queensland test, or something similar, better capture the key focus of the parole decision?

The ALS believes that the 'public interest test' is far too elusive and vague. Furthermore, as discussed by Rothman J in *Esho v Parole Board Authority of NSW* [2006] NSWSC 306 at [49], in our view the current test is mistakenly perceived at times to be in the "interests of the community". As His Honour indicates, the 'public interest' would ordinarily be understood to be broader than the 'interests of the community'.

The ALS is in favour of a test based on the ability and potential of the inmate, if released, to remain law abiding within the over-riding context that it is generally better to release a prisoner under supervision than to release them at the end of their total sentence without any opportunity for supervision..

Question 3.2: The matters that SPA must consider

(1) Should any matters for consideration be added to or removed from the lists in s 135(2) and s 135A of the CAS Act?

No. The ALS believes that the matters listed for consideration as contained in s135(2) and s135A adequately encompass the areas which SPA should direct their concern and consideration when making parole decisions.

Question 3.3: Specific issues given weight by SPA

(1) Should any changes be made to the way SPA takes completion of in custody programs into account when making the parole decision? If so, how?

SPA should give greater consideration to the number of factors beyond an offender's control which may contribute to an offender not completing in custody programs. Should an offender be prevented from participating in a program for reasons beyond their control SPA should be required to consider whether the failure to participate is something which can be excused in the circumstances or if there are ways which the offender can participate in such a program or a similar program in the community as part of their release. Furthermore, ALS is of the view that should the completion of certain and specific programs be required of an offender prior to their release upon parole greater onus should be placed upon Community Corrections Officers to facilitate an offender's participation in such a program at an earlier stage.

Usually in our experience offenders are contacted by CCOs a few months before they are to be considered for parole, and by this stage at times it can be too late for any programs to be organised and completed.

(2) Should any changes be made to the way SPA takes security classification into account when making the parole decision? If so, how?

The ALS is of the view that SPA should look more closely at an offender's progress through the security classifications throughout their whole period of incarceration rather than solely focusing on the classification they hold when they are considered for parole. There are a number of reasons why an offender may not have reached a minimum security classification which may not be determinative of their capacity to adapt to normal lawful community life and this should be considered accordingly by SPA when determining parole.

(3) Should any changes be made to the way SPA takes homelessness or lack of suitable accommodation into account when making the parole decision? If so, how?

The lack of suitable accommodation is an issue which further disadvantages many ALS clients when a parole decision is being made. Many addresses which are put forward are assessed as being unsuitable, without any further information being offered as to how and why this assessment was reached. Greater transparency and communication of the criteria that Community Correction's rely upon in this assessment would allow offender's to work more proactively in the process of securing accommodation and ensure that decisions made as to suitability of accommodation are not made arbitrarily. The ALS is also concerned with the closure of COSPs and the impact that this will have on offenders and their ability to secure suitable accommodation. In an effort to counteract any further disadvantage to offenders through the closure of COSPs the ALS strongly recommends that the SPA work in close conjunction with Community Corrections to foster ongoing and supportive relationships with the non-government organisations and community groups which can provide accommodation for offenders, and allocate resources accordingly.

(4) Are there any issues with the way that SPA makes decisions about risk?

It is accepted by the ALS that risk assessment in the parole context is both a difficult and complex task; however, the ALS is of the view that SPA assigns too much weight upon the LSI-R as a measure of an offender's risk of re-offending. The ALS welcomes the introduction of the Community Impact Assessment tool to compliment the LSI-R, though it is yet to be implemented and its effectiveness tested in a practical sense. The ALS is in favour of an instinctive synthesis approach which draws upon various sources of information and material to assess the risk that an offender

poses, rather than placing reliance upon actuarial risk assessment instruments.

Question 3.4: Deportation and SPA's parole decision making
Does there need to be any change to the way SPA takes likely deportation into account when making the parole decision?

This issue is not applicable to our clients, and we cannot assist the Commission in this regard.

Question 3.5: SPA's caseload and resources
Do any changes need to be made to SPA's administrative practices, workload or resources?

The ALS strongly opposes the suggestion that offenders should be required to apply for parole rather than be automatically considered. The ALS is of the view that such a change will have the effect of seeing more Aboriginal offenders in custody for longer than intended. The ALS is of the view that the workload of SPA, whilst a relevant consideration to the workings of parole, should not be prioritised to the detriment of offenders and the community at large.

Q3.6: Any changes regarding parole planning?

The ALS is of the view that Community Correction Officers need to be more consistently and frequently involved with offenders who are serving a custodial sentences of three years or more. More regular involvement with offenders will allow offenders to feel more supported and actively engaged in their process towards rehabilitation. Too frequently offenders are nearing the end of their sentences to be told that there are objectives or goals that they have not yet met which will prevent them from being released on parole. Community Corrections officers should be required to make contact with inmates at regular intervals during their incarceration, with the contact becoming more frequent as the inmate reaches the end of their sentence. This will ensure that the offenders are more readily aware of the need for them to be working actively towards set goals so that they may be eligible for release when their non parole period expires.

Question 3.7: Victim involvement and input into SPA decisions
(1) Should victims' involvement in SPA's decisions be changed or enhanced in any way?

No. The ALS is of the view that the current involvement of victims' in parole decisions is adequate and appropriate.

(2) Does the role, purpose or recommended content of victim submissions to SPA need to be changed or clarified?

We do not propose any changes to the current system in relation to victim submissions.

Question 3.8: Role of the Serious Offenders Review Council

(1) Should the separate parole decision making process for serious offenders be retained?

The ALS is in favour of retaining the Serious Offenders review Council as a separate decision making body to advise the SPA on the parole decision making process with respect to serious offenders.

(2) If yes, do any changes need to be made to the role played by the Serious Offenders Review Council in parole decisions for serious offenders?

The ALS would support the alteration of the legislation to remove the restriction that requires SPA to refuse parole to a serious offender if parole is opposed by SORC, except in exceptional circumstances. Given that a quorum of the SPA must include a judicial member, and SPA is ultimately the decision making body, it is argued that SPA should be allowed to have greater discretion with respect to the grant of parole to serious offenders than it presently does.

Question 3.9: A different test for serious offenders

Should SPA apply a different test when making the parole decision for serious offenders? If yes, what should it be?

This service would be opposed to the introduction of any separate legislative test being implemented with respect to serious offenders. Serious offenders are already subject to the recommendations of SORC. It is also usually the case that the Commissioner will take an interest in the release of a serious offender and seek to make submissions. It is the opinion of this service that these two processes already represent a highly rigorous and sufficient process of assessment before a serious offender is granted parole.

Question 3.10: Security classification and leave for serious offenders

Are there any changes that can be made to improve the interaction between security classification, access to external leave and the parole decision for serious offenders?

This service has concerns regarding the number of serious offender matters which have their final resolution delayed considerably in order to facilitate requests by the Commissioner to have offenders reduce their classification or to participate in external leave. This is of concern because in the experience of this service such requests are increasingly made close to the final review date. This has often occurred when action could

have been implemented by the Department many months earlier in order to facilitate lowering of an offender's classification or their participation in leave.

Question 3.11: Submissions by the Commissioner and the State
Do any changes need to be made to the powers of the Commissioner and the State to make submissions about Parole.

We do not propose any changes to the current system.

Question 3.12: Parole and the HRO Act
What changes, if any, should be made to improve the interaction between decision making and the provisions of the Crimes (High Risk Offenders) Act 2006 (NSW)?

We do not propose any changes to the current system.

Question 3.13: The definition of "serious offender"
Should any change be made to the current definition of "serious offender"?

We concede it may be more appropriate for a broadening of the definition of serious offenders to include high risk offenders for the purposes of the HRO Act so that SORC may also manage such high risk offenders and the system may be more streamlined. However, we do not believe any reduction in the period is required in the already established definition of serious offenders to enable this purpose.

Question 3.14: Parole in exceptional circumstances
Are there any issues with SPA's power to grant parole in exceptional circumstances?

There are two changes that we propose to this provision currently contained in s160 of CAS.

Firstly, at present it is our experience that SPA considers these matters in a private meeting. We ask LRC to recommend legislative amendments to ensure that such applications may be heard in public if warranted, so that arguments may be presented in addition to any evidence tendered.

Secondly, we propose that there be legislative guidance regarding the interpretation of 'dying' for the purposes of the section. It is our experience that SPA will usually not entertain such an application unless the prognosis for the offender is 6 months to live or less. We seek legislative clarity to ensure SPA considers each case on its particular merits as the legislature does not specify 'dying' to be only a prognosis of 6 months to live or less.

Question 3.15: Offender involvement and input into SPA decisions

(1) Should there be more scope for offender input and submissions to SPA at the first stage of the decision making process (i.e. the private meeting where a decision is taken or an initial intention formed)?

Yes. We are of the view that there should be greater involvement for offenders to have an input, even at such an early stage of the decision making process. Allowing for such involvement in our view assists the public interest for two reasons. Firstly, it allows inmates to know exactly what concerns Community Corrections or SORC are raising and allows them to submit on any areas where they may disagree. Secondly, it empowers inmates to have a greater involvement in their parole matter and thereby motivates them to rehabilitate.

(2) Should any change be made to the availability of public review hearings after a decision is made to refuse parole?

Yes. We ask the Commission consider reverting to the pre 2005 system, where all inmates were given public hearings.

(3) Is there currently sufficient assistance available to help offenders make meaningful applications for and submissions to review hearings, and to help offenders understand what happens at review hearings?

In our experience, until the public review hearing stage when PLS/ALS become involved, there is little assistance that is given to inmates making applications or filling the Form 2B(r). Many clients have low educational attainment and literacy abilities, and if inmates are able to obtain assistance it is usually from Welfare Officers who often have little knowledge of the relevant issues particularly relating to an inmates parole. This is an additional reason to revert to the pre-2005 system.

(4) Are there any problems with offenders not being provided with material which supports SPA's decisions?

Yes. Although we are of the view that there may be occasions when material should not be disclosed, there should be a general presumption for SPA to disclose all material to the offender. Whether or not material should be withheld should be a matter considered solely by the judicial officer as a matter of law, in light of the general duty to disclose.

We do not believe material should be disclosed to legal practitioners with a prohibition from disclosing the material to clients as this prevents any instructions from being obtained, and may create a difficulty if the material provided to practitioners directly contradicts with a client's instructions.

Question 3.16: Reasons for SPA's decisions

Should any changes be made to the manner or extent to which SPA provides reasons for its decisions?

Yes. We are of the view that SPA should be required to disclose and provide detailed reasons for decisions. We are also of the view that SPA should provide comments as to matters which may assist the prisoner in making a further application for parole. This will assist in clarifying the issues for the inmate and thereby also motivate the inmate to rehabilitate, whilst in custody.

Question 3.17: Appeal and judicial review of SPA's decisions

Should there be any changes to the mechanisms for appeal or judicial review of SPA's decisions, including the statutory avenue in s155-156 of CAS Act?

Yes. We propose a change in the mechanism for appeal of SPA's decisions to allow for an appeal on merit by right, similar to an appeal from the Local Court under Crimes (Appeal and Review) Act 2001 to the District Court, possibly in defined circumstances. We propose that these defined circumstances may be, for example, where the decision of SPA to refuse parole will result in the offender having absolutely no supervision on release. It does happen, from time to time, that inmates serve out the entirety of their sometimes lengthy sentences in custody. Although there may well be very good reasons for a complete refusal of parole, we are of the view that the public interest in having supervision, especially after a lengthy period in custody, becomes so paramount, that at the very least, it must be a decision open to review on merit to uphold the public interest.

Question 3.18: Reconsideration after refusal of parole

(1) Should the 12 month rule (as it applies to applications for parole after parole refusal) be changed in any way? If so, how?

Yes. The ALS is firmly of the view that this rule should be completely abolished for two main reasons. Firstly, it allows SPA more flexibility to consider the offenders particular sentence and circumstances, especially if the parole period left is particularly short and the inmate does not have a lengthy period left. Secondly, it avoids crushing any motivation inmates may have as they are able to given an incentive to rehabilitate with a view to reintegrate as provided for in s2A(1)(d) of the Act.

We are of the view that the pre-2005 was a better system in this regard, without the '12 month rule'.

(2) Are there any issues with the requirement to apply for parole reconsideration or the assistance that offenders receive to apply?

As indicated previously (at Question 3.15), in our experience inmates have little or no assistance in custody to make applications. We therefore suggest that the pre-2005 system was better adapted to address the specific purposes that must be accomplished by SPA and parole generally.

Question 3.19: Drug Court as a parole decision maker

Are there any issues with the Drug Court's operation as a parole decision maker?

We do not propose any changes to the current system in the Drug Court's operation as a parole decision maker. However, we do note at present if an offender is referred and accepted into the Drug Court for an offence committed whilst on Parole, SPA has a memorandum of understanding to facilitate that process. We would ask the Commission to consider legislative changes to ensure SPA form the same understanding where a court refers an inmate under section 11 of the Crimes (Sentencing Procedure) Act 1999 (previously known as a "Griffiths Remand" per *Griffiths v The Queen* (1977) 137 CLR 293) to undertake full-time rehabilitation for an offence committed whilst on parole.

Yours faithfully
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