[NSWLRC Note: the Memorandum prepared by Terry Halloran and Alyson McDade referred to in this submission is an internal SORC document, not a submission to the LRC parole reference. It is not publicly available]

NSWLRC-PAROLE REFERENCE

Serious Offenders Review Council (SORC)

Memorandum

Introduction

This Memorandum has been prepared by its author as Chairperson of SORC. However it reflects essentially personal observations based on holding the office for over seven years. The very composition of SORC precludes a collegiate submission, the body being made up of Judicial, Official and Community members.

Nonetheless I have been provided with the Memorandum prepared by Mr Terry Halloran (Director, Offender Classification, Case Management and External Leave Programs) and Ms Alyson McDade (Executive Officer & Registrar-SORC) – [Halloran/McDade].

Further, one experienced Community Member has provided me with thoughts and observations which I will include and to which I have had regard.

Question Paper 1.

Question 1.2.

I do not propose to canvass the thorough overview in this Paper.

What must be stressed is the proposition set out in paragraph 1.2 concerning the relationship between parole and sentencing. Sight must not be lost of the fact that SORC's work commences *after* the sentence has been imposed. Save for those parts of the Remarks on Sentence that may inform SORC's function (plea, remorse, judicial observations on likelihood of rehabilitation , victim impact and the like), it is *not* SORC's function to question the merits of the sentence or to seek to subvert it in its operation.

SORC is conscious of the sentencing process and the extraordinary burden that the sentencing judge bears, a burden affected by complexities in principle, policy and practice to be applied to the facts of the individual case.

This leads me to expressly agree with the statements in paragraphs 1.40 and 1.41 under the heading "Parole and truth in sentencing".

Neither SORC nor SPA nor the Commissioner is or should be empowered to "resentence" an offender by the manipulation of the classification regime or in any other way.

It has been recognised by the Legislature that so drastic a step must be exercised judicially: *Crimes (High Risk Offenders) Act 2006.*

Otherwise I agree with Halloran/McDade.

<u>Question Paper 2</u>

Question 2.1: Membership of SPA

(See below re SORC as to "Representing the community"," Selection, appointment and professional development", "purpose of community members".)

An anecdote: I can recall an interview with a long serving serious offender, after a then recent press release, the offender saying, "Well with Inkster and Woodham up there, what hope do I have?"

I do not support the membership of SPA of currently serving Police Officers/Correctional Service Officers (serving or recently retired). I have at the moment an open mind on the Community Corrections member. Valuable expertise can be accompanied by the baggage of personal acquaintance, animus, or institutional prejudices. There is a high risk that perceived and actual impartiality will be compromised by the presence of such members. The statement in paragraph 2.22 "*Through their agency's computer systems … in a* timely way." is troubling. The information relevant to the particular applicant for parole must be tendered to SPA independently of the generalized knowledge or available access of particular members. This would conform to transparency and accountability.

For myself, and I am confident I speak for some other SORC members, the appointment of a recently retired Commissioner of Corrective Services simply

should not be permitted by law. The reason is simply stated: the progress of a serious offender through the classification system and, indeed, through the administration of his/her sentence overall, depends on the Commissioner's exercise of his exclusive decision making power on such matters.

As I stated in the informal meeting I had with the LRC, the Commissioner will move from being a Gaoler to a Judge. He will be perceived to be so changing his role to, or worse, will by the change of role, give rise to fears and concerns as to impartiality and detachment.

As to the reservation I mentioned as tothe Community Corrections (CC) member: compared to a former/serving Police Officer and Corrective Services Commissioner, such a member's value will be that person's focus on an offenders *future* prospects,conduct and supervision in the very context with which parole and SPA will be concerned.

At the juncture I will interpolate s matter that does concern SORC vis-à-vis SPA and CC. A "serious offender" remains such until the end of the full sentence. If parole is granted, SORC must be kept informed of the offender's progress during parole and a protocol should be in place to provide for this. It is desirable that this be so lest there be revocation and return to custody and for completeness in SORC's role in the whole of sentence administration. This may be the subject of consideration and discussion later.

Question 2.2 (1) & (2)

First, I set out the comments of a community member of SORC with which I am in overall agreement.

Performance could be improved through a more rigorous and transparent selection process of community members. Prospective members should have more information about the role available to them before application and/or appointment. They should be apprised of the fact that requires more than just attendance at SORC meetings and assessment visits –many hours, before each of these events need to be dedicated to reading and reviewing the files for the agenda or visit.

An orientation on appointment could be given to new community members by official members. An existing community member could act as a mentor to a newly appointed community member. Documents relating to policy and practice of CSNSW could be made available to them and updated on a regular basis.

In reference to selection:

Community members should be appointed to reflect:

Male/female population

City/regional/rural population

Aboriginal/Torres Strait Islander population on the additional basis that they comprise a larger proportion of the prison population than their percentage of the population at large

The diverse ethnicity of the population of NSW

The position of victims and/or family of victims.

*Community members should**not** be appointed on the basis of:*

Political affiliation

Religious adherence

Former CSNSW employees as CS is represented on the Council (SORC) by official members

Former members of the NSW Police. Both of these categories could give rise to a conflict of interest regarding particular inmates or offences.

Being a Community Member of SORC is not an easy job: there are copious files to read, reflect and comment on; there is legalese and correctional centre jargon to navigate; there are visits to Correctional Centres throughout NSW to interview inmates on a regular basis; there are meetings to attend and serious and far reaching decisions to be made.

While adhering to the view that community members should represent the community at large some selection process would be advisable rather than the current system that appears to operate without guidelines.

A selection process could involve at least one serving member of SORC, preferably the Chairperson, who would be best to judge an applicant's suitability and/or capacity for the role. This should not be predicated on a prior knowledge of CSNSW policy or practices: there would be few in the general population with such knowledge. The first year in the role is an extraordinarily steep learning curve and an applicant has to be ready and capable of reading,

listening, questioning and involvement in the inmate assessment process and decision making process required of him/her.

As I stated above, I am in overall agreement with these observations.

There is presently serving a retired senior police officer whose contribution has been invaluable. The remarks above are not to be taken to be *ad hominem.* A selection process as adverted to would in my view eliminate concerns about a former police officer.

S195(2)(c) states that community members "*are to be persons who reflect as closely as possible the composition of the community at large…"*. I agree with the exclusions (save for a police officer) mentioned above.

Whilst the appointment is a matter for the Governor on the advice of the Executive Government, I do favour the establishment of guidelines, call for expressions of interest and a selection process to advise the Minister.

Question 2.2 (2)

Arguably, "a person representing specific areas of expertise" would not reflect and would not be seen to be reflecting the community at large. I note the Halloran/McDade comment re mental health/drug/alcohol areas. At this point I will only remark (and this would also apply to SPA) that perhaps consideration can be given to creating a new category – a "specialist" member; not "expert", not within "community" but separate and identifiably so. This, with respect, will require careful consideration. Some of the difficulties are referred to by Halloran/McDade in their last paragraph under this heading.

<u>Question Paper 3</u>

Question 3.1 Public Interest test.

I am in agreement with Halloran/McDade.

However one matter that has become of some concern in this context is as follows. S135 of CAS Act is concerned with the General Duty of the Parole Authority. The nub of the matter is "the public interest". The terms of S135(2)(k) are noted.

In the weekly returns SPA provides SORC there is a reference to "Media Interest". I have already provided to Ms Button citations for the cases of *Chappell* and *Barbaro* where Hunt J pronounced upon important distinctions between gossip, matters no more than items of news and matters substantively of legitimate public interest. What is of concern is what role, if any, the existence of media interest plays or can play in the Public Issue question. They are of course not the same thing. I respectfully suggest that this be explored with SPA.

Question 3.11

Submissions by the Commissioner and the State.

S.153 generally and S153(5)

I refer to my observations in answer to Q.2.1.

The role of the Commissioner is virtually unfettered in relation to the administration of a sentence imposed by a Court of Law. The occupant of the Office is the State's Gaoler.

In relation to serious offenders there can be no movement or progression in the administration of the offender's sentence without the Commissioner's express approval. SORC is an advisory body only. SORC is acutely conscious of the need to preserve the integrity of the Sentence as imposed by the Judicial process. It seeks to ensure that subject to resources for therapeutic programs, offender conduct, risk assessment and the ultimate security of the community, it can conform with the Sentence's structure by advising SPA that it is appropriate for that body to consider the offender for release to parole at the time, or as near as possible to that, fixed by the sentencing Court.

The achievement by SORC of these objectives is and can only be reached by compliance with the Commissioner's approvals. The link between SORC's view as to an inmate's progression and the making of a recommendation conformably with that view, is always and intimately tied to the Commissioner's exercise of his powers.

At a point in this recommendation-approval/non-approval process, SORC gives its advice to SORC that it is appropriate for that body to consider an offender for release to parole. At that point the State may intervene. Pausing there, as a matter of principle no objection can be taken to the State having that power.

But if it is exercised by the Commissioner (S135(5)) in the name of the State, the whole process of sentence administration as between SORC and the Commissioner becomes, in my view, perverted. By all means let the Attorney General or Minister for Justice be the intervener for the State, but not the Officerwithout whose approval every step of the way that critical point cannot be reached!

SORC has never, to the best of my knowledge, protested an intervention by the Commissioner in the name of the State nor otherwise sought to engage in an adversarial way before SPA in such circumstances and would be loath, to say the least, to do so.

I have read paragraphs 3.96-3.99 of LRC Question 3 document (and happen to note the absence of reference to SORC). SPA it would now seem, could receive one advice from CC, another from SORC, and a submission from the Commissioner, each of which is based on a different body of information, each of which is also from essentially the same Department. This is as cumbersome a state of affairs as it is potentially demeaning to each institution that comprises it. I add that SORC is often deprived of the timely provision of CC information for the purpose of it preparing its advice and usually learns via SPA that the State is invited to make a submission which turns it to be by the recipient of SORC's advisory recommendations, the Commissioner!

I can but submit that this is a particular area of sensitivity that will require, with respect, the closest of consideration, the more so in the interests of robustness, transparency and accountability.

Preliminary Conclusions

From the text of LRC document accompanying the Questions, I take it that there will be further consultations and opportunities further submissions if considered necessary.

The Hon. David Levine AO RFD QC

Chairperson: SORC

3rd November 2013