



**New South Wales
Law Reform Commission**

Parole Question paper 1

The design and objectives of the parole system

September 2013
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Question Paper 1:

Design and objectives of the parole system

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- 1.1 This Question Paper looks at the overall design of the parole system in NSW, including whether parole serves a useful purpose. We consider the distinction between automatic and discretionary parole and also consider the objectives of parole, as system design can only be evaluated in the context of what the system is trying to achieve. Later Question Papers will discuss the membership of the parole decision maker (Question Paper 2), the specifics of how parole decision making is done (Question Paper 3), the management of parolees in the community (Question Paper 4), breach and revocation of parole (Question Paper 5) and parole for juveniles (Question Paper 6).

Current design of the NSW parole system

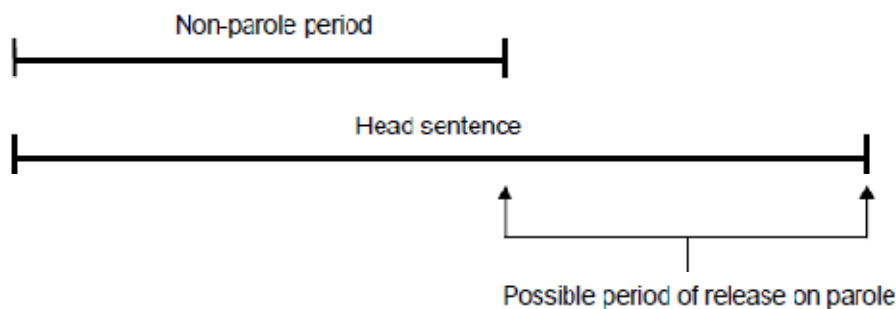
Relationship between parole and sentencing

- 1.2 A court determines the appropriate sentence for an offender through the process of “instinctive synthesis” of the relevant sentencing principles and factors.¹ When an

1. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 3, ch 4.

offender is sentenced to imprisonment by a court in NSW, the court usually imposes a non-parole period (the minimum period that the offender must spend in custody) and a head sentence (the maximum period that the offender may be detained in custody). The offender may be released on parole at some point between the expiry of the non-parole period and the end of the head sentence (see Figure 1.1).

Figure 1.1: Structure of sentences in NSW



- 1.3 When an offender is released on parole, the person serves the balance of the head sentence in the community and can be recalled to prison for breaching the conditions of parole.
- 1.4 A court may in some circumstances also choose to impose a “fixed term” of imprisonment,² which will not have the structure shown in Figure 1.1. An offender must spend the whole of a fixed term of imprisonment in custody and is released unconditionally at the end of the term. There is no possibility of parole as part of a fixed term of imprisonment. In NSW, all sentences of six months or less must be fixed terms.³

Mixed system of automatic and discretionary parole

- 1.5 NSW has a mixed parole system. Offenders who are sentenced to a head sentence of three years or less (where the sentence is not a fixed term) are generally released to parole automatically at the expiry of the non-parole period by order of the sentencing court. The court also determines the conditions attached to the parole order.⁴ A court *must* make a parole order directing the release of the offender at the end of the non-parole period if the head sentence is three years or less.⁵ In this sense, NSW has automatic parole for such sentences.
- 1.6 NSW also has a discretionary safeguard on automatic parole. Under certain circumstances, the State Parole Authority (SPA) may revoke a court-made parole order before the offender is released to parole.⁶ This power allows SPA to override

2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45.

3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.

4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51.

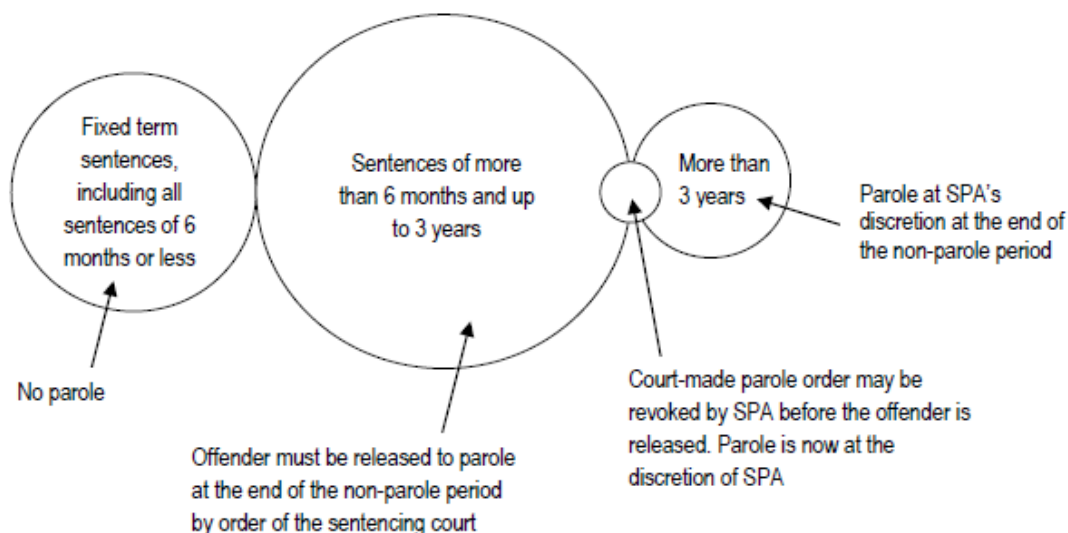
5. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.

6. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 232; *Crimes (Administration of Sentences) Act 1999* (NSW) s 130, s 159.

automatic parole and substitute a discretionary parole decision for offenders serving sentences of three years or less.

- 1.7 If an offender is sentenced to a head sentence of more than three years, the court does not make an order. Instead, release to parole is at the discretion of SPA (see Figure 1.2).

Figure 1.2: Parole system in NSW



Note: the size of each circle has been used to approximate the relative number of sentences that fall into each category.

- 1.8 SPA may decide to release an offender at the end of the non-parole period, or at some later point during the possible period of release on parole, or not at all. SPA is guided by different considerations than those that guide the sentencing discretion of courts. We look in detail at SPA's parole decision making in Question Paper 3.
- 1.9 If SPA grants parole, it also determines the conditions that will be part of the parole order (conditions are discussed further in Question Paper 4). Nearly all offenders who have been consistently refused parole will still be released at the end of the head sentence. The only exceptions are the few offenders serving life sentences or subject to a continuing detention order under the provisions of the *Crimes (High Risk Offenders) Act 2006* (NSW).
- 1.10 As courts in NSW may also choose to impose a fixed term of imprisonment instead of a sentence structured as a head sentence and a non-parole period, the sentencing courts also effectively have a role in parole decision making. The court may choose to impose a sentence as a fixed term so there is no possibility of eligibility for parole.

Objectives of the parole system

- 1.11 Any evaluation of the design of the parole system depends on an understanding of the objectives of the system. In this section, we outline the objectives of parole that have been raised by stakeholders in preliminary consultations or stated elsewhere.

Reducing reoffending

1.12 The NZ Law Commission in its 2006 review of the NZ parole system stated that the “explicit and widely recognised rationale for parole” is that it is a “method of administering sentences with a view to reducing the risk of reoffending”.⁷ The NZ Law Commission argued that parole can reduce reoffending by providing:

- an incentive for prisoners to participate in prison treatment programs
- an opportunity to manage the release and reintegration of prisoners, with the effect of postponing their recidivism (according to empirical evidence), and
- a vehicle for identifying and differently managing high risk prisoners by either detaining them for a greater proportion of their sentence or managing them more closely on release bolstered by the threat of recall.⁸

We will use the Commission’s three point summary below to consider the ways that parole may achieve the objective of reducing reoffending.

Incentive for offenders to address their offending behaviour

1.13 Corrective Services NSW provides a range of in-custody therapeutic and rehabilitative programs that are designed to help offenders address their offending behaviour and reduce the likelihood of offending in future.⁹ The programs target matters known to be connected to offending, like alcohol and other drug addiction, gambling addiction, anger management, psychosexual disorders and impulse control.

1.14 When exercising its discretion to grant or refuse parole, SPA gives great weight to whether an offender has successfully completed recommended in-custody programs (see more on this in Question Paper 3). This creates an incentive for offenders to participate in these programs. Whether offenders respond to this incentive in good faith or not, completion of such programs may reduce their risk of reoffending.

1.15 In systems without parole or with automatic parole, there is no incentive to participate in programs.¹⁰ US research has found that a move away from discretionary parole in one state significantly reduced offenders’ participation in in-custody programs.¹¹

Reintegration and supervised release

1.16 The most obvious way that parole can reduce reoffending is by providing a period of managed transition between custody and unsupervised freedom in the community. During the parole period, parolees are supervised by Community Corrections

7. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 96 (2006) 46.

8. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 96 (2006) 46.

9. See Corrective Services NSW, *Compendium of Correctional Programs in NSW* (2012).

10. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 96 (2006) 53.

11. I Kuziemko, “How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed Sentence Regimes” (2013) 128(1) *Quarterly Journal of Economics* 371.

officers. This involves monitoring parolees to detect breaches, but also involves case management to help parolees to adjust to life after imprisonment, by:

- ensuring that parolees have suitable accommodation
- referring parolees to relevant therapeutic community services like counselling, Alcoholics Anonymous or drug treatment,
- helping parolees engage with other government services relating to employment, education, housing and health, and
- helping parolees manage financial, personal and other problems that they may encounter during their transition to the community.

1.17 These activities aim to support an offender's reintegration into normal lawful community life and so protect against reoffending. The protective effects of reintegration support, the deterrent effects of parole supervision and the threat of return to custody upon revocation, in combination, aim to reduce reoffending.

1.18 The idea that a key objective of parole is to supervise reintegration in order to reduce reoffending is widespread. The second reading speech for the *Parole of Prisoners Act 1966* (NSW) which introduced the parole system stated that "the purpose of parole is to restore a measure of freedom to the prisoner and to give him guidance and supervision during the period of transition from controlled to uncontrolled living".¹² The Minister continued:

...in a sense, parole is a concession to the offender, but a concession which it is expected will benefit the community by bringing the life of the offender under the guidance and control of a skilled officer with the intention of assisting resettlement in the community and so providing the environmental influences which will militate against the offender committing further criminal activity.¹³

1.19 The second reading speech to the *Probation and Parole Act 1983* (NSW) observed that "this package embodies the philosophy that the community has a corporate responsibility not only to punish those who offend against society's laws, but also to endeavour to help those offenders to return later to a law-abiding life."¹⁴ Similarly, the US Parole Commission declares that two of three purposes of parole are:

(1) through the assistance of the United States Probation Officer, a parolee may obtain help with problems concerning employment, residence, finances, or other personal problems which often trouble a person trying to adjust to life upon release from prison; (2) parole protects society because it helps former prisoners get established in the community and thus prevents many situations in which they might commit a new offense.¹⁵

1.20 The Californian Penal Code states:

...the period immediately following incarceration is critical to successful reintegration of the offender into society and to positive citizenship. It is in the interest of public safety for the state to provide for the effective supervision of

12. NSW, *Parliamentary Debates*, Legislative Assembly, 20 September 1966, 972.

13. NSW, *Parliamentary Debates*, Legislative Assembly, 20 September 1966, 975.

14. NSW, *Parliamentary Debates*, Legislative Assembly, 24 November 1983, 3461.

15. US Parole Commission, "Frequently Asked Questions", <<http://www.justice.gov/uspc/faqs.html>>.

and surveillance of parolees, including the judicious use of revocation actions, and to provide educational, vocational, family and personal counselling necessary to assist parolees in the transition between imprisonment and discharge.¹⁶

- 1.21 The Parole Board of Canada has defined parole as “a carefully constructed bridge between incarceration and return to the community”.¹⁷ The Victorian Sentencing Advisory Council recommended in 2012 the Victorian Adult Parole Board adopt the following statement about the purposes of parole, which encapsulates a similar idea:

...the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion.¹⁸

- 1.22 Supervised and supported reintegration assumes particular importance in light of the fact that nearly all offenders who are imprisoned will be released at the end of their head sentence. As a result “it makes little sense to forgo any attempt to...supervise their efforts to reintegrate into society when there are free”.¹⁹ Indeed, for serious offenders who have spent extended periods in prison, there is a risk that any benefits of in-custody programs could be undone by failure to assist with reintegration into the community.

Risk management

- 1.23 Parole may also reduce reoffending through a risk management approach. A parole decision maker can distinguish between offenders based on their levels of risk and grant parole to those that pose a low risk to the community. High risk offenders can be kept in custody for longer and can be managed more closely in the community if they are released on parole.
- 1.24 SPA implements a risk management approach in its parole decision making. Usually, only those offenders who are able to demonstrate markers of low or reduced risk – for example through program participation, low security classification, satisfactory behaviour in custody, and participation in external leave – are granted parole (see Question Paper 3). This means that lower risk offenders are paroled and can access the benefits of reintegration support and supervision, which is aimed at further reducing their risk. For high risk offenders, SPA can decide if the benefit to the community of incapacitating the offender in prison for the entire head sentence (and so preventing their reoffending) outweighs the benefits of reintegration support in reducing reoffending. SPA’s risk management approach for serious offenders is enhanced by the Serious Offenders Review Council, which also reviews serious offenders before they can be considered for parole. The role of the Serious Offenders Review Council is discussed in more detail in Question Paper 3 and its membership is examined in Question Paper 2.

16. Cal Penal Code § 3000 (a)(1).

17. Parole Board of Canada, “Parole”, <<http://www.pbc-clcc.gc.ca/parole/parole-eng.shtml>>.

18. Victorian Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) 4.

19. P Larkin, “Clemency, Parole, Good-Time Credits and Crowded Prisons: Reconsidering Early Release” (2013) 11(1) *Georgetown Journal of Law and Public Policy* 1, 30.

- 1.25 The role of risk management in parole and reducing reoffending has also been recognised elsewhere. In Canada, for example, the Corrections and Conditional Release Act (Can) states that “the purpose of conditional release is to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release”.²⁰ In its deliberations about whether parole should be retained, the NZ Law Commission specifically focused on the risk management aspects of parole in reducing reoffending. The Commission concluded:

Parole is a vehicle for identifying and managing high risk prisoners

This, in our opinion, is the chief reason to retain parole. As well as being a rehabilitative tool, parole is simultaneously an incapacitative tool for inmates whose risk is judged to be too high to justify release, and who therefore remain in prison for the full term of their sentence. It builds flexibility into the system for the purpose of managing high risk prisoners.²¹

- 1.26 A decision maker exercising discretion at the end of a non-parole period must weigh the risks of releasing an offender on parole, and the risks of not releasing an offender on parole, in order to achieve decisions which minimise the risk of reoffending. Offenders released automatically to parole cannot be filtered through a risk management approach.²² In NSW, SPA’s power to revoke a court-made parole order for offenders serving sentences of three years or less is effectively a risk management safeguard on automatic parole. The circumstances in which SPA may exercise the power are:

- where the offender requests that the order be revoked,
- where SPA believes that the offender is unable to adapt to normal lawful community life, or
- where satisfactory accommodation arrangements or post-release plans have not been made or are not able to be made.²³

These are all circumstances that are likely to mark an elevated risk of reoffending.

Other objectives of a parole system

- 1.27 Parole may serve other identified objectives apart from reducing reoffending. The most pragmatic of these objectives is control of prison populations and costs. Supervising parolees in the community is much less costly compared to keeping the same offenders incarcerated. Some of the earliest variants of parole in the common law world, as well as the modern parole system in England and Wales, were explicitly developed in response to a crisis of prison overcrowding.²⁴ A recent audit of parole decision making in WA found that changes in approach by the Prisoners

20. *Corrections and Conditional Release Act*, SC 1991 (Can) s 100.

21. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 56-7.

22. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 96 (2006) 53-54.

23. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 232.

24. AK Bottomley, “Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s” (1990) 12 *Crime and Justice* 319, 324, 329-332.

Review Board of WA have resulted in an additional 700 prisoners in custody at an annual cost of \$42 million.²⁵

- 1.28 Another possible objective of parole, and specifically discretionary parole, is that it aids in the management of offenders in custody.²⁶ The High Court has recognised that the potential to be released on parole results in offenders likely being “better behaved while in confinement”.²⁷ A preliminary consultation with SPA members confirmed that parole plays a crucial role in behaviour management.²⁸ However, this objective is relevant to discretionary parole only, as automatic parole is not contingent on offenders avoiding infractions in custody. US research has found that, upon a change from discretionary parole to a system where offenders could only be released after serving 90% of their sentences, the affected offenders committed significant more infractions in custody than a control group of offenders.²⁹

Retention of parole

- 1.29 The existence of parole is controversial. Not everyone is convinced that the objectives of parole outlined above are sufficient to justify its retention as part of sentencing and the criminal justice system. Any time spent on parole is, in effect, an opportunity for an offender to reoffend that would not be available if the offender was in custody.
- 1.30 Opposition to parole comes from three main ideas:
- parole does not in fact reduce reoffending
 - parole offends the principle of “truth in sentencing”, and
 - parole is overly lenient, is a windfall for undeserving offenders and puts the interests of offenders ahead of the interests of victims and the community.

Does parole reduce reoffending?

- 1.31 Some are sceptical about parole’s ability to actually achieve the objective of reduced reoffending³⁰ and research on the question is scarce. Descriptive Australian studies have found lower rates of recidivism for parolees compared with offenders released unconditionally at the expiry of their sentences.³¹ However,

25. Office of the Auditor General (WA), *The Management of Offenders on Parole*, Report No 11 (2011) 7, 13-15.

26. R Simpson, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999) 3.

27. *R v Shrestha* (1991) 173 CLR 48, 69 (Deane, Dawson and Toohey JJ).

28. State Parole Authority, *Preliminary consultation PPAC1*; State Parole Authority, *Preliminary consultation PPAC2*.

29. I Kuziemko, “How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed Sentence Regimes” (2013) 128(1) *Quarterly Journal of Economics* 371.

30. I Callinan, *Review of the Parole System in Victoria* (2013) 21-22.

31. See, eg, B Thompson, “The recidivism of early release, parole and mandatory release prisoners in NSW 1982-85” (Paper presented at 5th Annual Conference of the ANZ Society of Criminology, Sydney University, 1989); L Roeger, *Recidivism and parole* (Department of Correctional Services, South Australia, 1988). See also C Jones and others, *Risk of re-offending among*

these studies did not control for other variables that are known to be linked to recidivism like offence type, previous criminal history, age and sentence length. As a result, it is not possible to conclude from these studies whether lower recidivism rates for parolees are a result of parole (a “parole effect”) or due to the reality that offenders that are less likely to reoffend are more likely to be selected for parole by parole decision makers (a “selection effect”).

- 1.32 Table 1.1 summarises the main research from the common law world that has attempted to control for key recidivism-relevant variables in order to isolate the parole effect from selection effects and determine whether parole reduces reoffending.

Table 1.1: Quantitative research on the effect of parole on reoffending

Study	Comparison groups	Study period	Definition of reoffending	Results	Conclusion of researchers
Nuttall & others (1977) UK	Comparing male parolees released through discretionary parole to male prisoners released unconditionally at the end of their sentences	2 years after release from prison	Reconviction	Parolees reoffended 5 percentage points less than expected at the 6 month mark but there was no difference at 2 years	Parole may reduce reoffending during the parole period, but findings were also consistent with the operation of selection effects 32
Home Office (1978) UK	Comparing male parolees released through discretionary parole to male prisoners released unconditionally at the end of their sentences	2 years after release from prison	Reconviction	There was little difference in reoffending for offenders released from sentences of 4 years or less but large difference between parolees and non-parolees for prisoners released from sentences of more than 4 years	Results may reflect that offenders discharged from longer sentences have more to lose through reconviction or that longer periods on parole are more effective at reducing reoffending 33
Sacks & Logan (1979, 1980) US	Small sample (n=172) of male offenders convicted of low-level felonies from one US state, comparing parolees with those released unconditionally	3 years after release from prison	Reconviction	After 1 year parole “modestly” reduced recidivism but the effect dissipated after the parole supervision period was over	“Parole seems to affect recidivism while the parolee is on parole...but these effects begin to dissipate and tend to disappear by the time the parolees have finished 2 full years in the community” 34

parolees, Crime and Justice Bulletin No 91 (NSW Bureau of Crime Statistics and Research, 2006).

32. C Nuttall and others, *Parole in England and Wales* (Home Office Research Study No 38, 1977).
 33. Home Office, *Prison Statistics England and Wales 1977* (Cmnd 7286, 1978).
 34. HR Sacks and CH Logan, *Does parole make a difference?* (University of Connecticut School of Law Press, 1979); HR Sacks and CH Logan, *Parole: Crime Prevention or Crime Postponement* (University of Connecticut School of Law Press, 1980) 15.

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Hann & Harmann (1988) Canada	Comparing male parolees with male prisoners released unconditionally at the end of their sentences	2.5 years after release from prison	Reconviction	No overall numerical results reported but parolees reoffended less than non-parolees with the same reconviction risk score	"It is plausible that parole as practised does have a modest role in reducing reconviction" 35
Broadhurst (1990) Australia	WA sample of male non-Aboriginal offenders, comparing parolees with offenders released from fixed term sentences	Not reported	Re-imprisonment (includes non-reoffending breach and revocation of parole)	No overall numerical results reported but parolees had lower recidivism than on-parolees	"Results tell us that parole works modestly better than unconditional release but we cannot be sure why. It appears that short-term benefits of community supervision plus selection factors account for the differences observed" 36
Brown (1996) NZ	Small sample of parole eligible offenders serving prison terms of less than 7 years, comparing parolees with offenders released automatically to a short term of supervision with no treatment programs or possibility of recall to prison	2.5 years after release from prison	Reconviction	Only high risk parolees reoffended less than the comparison group over the short term. No long term differences in reoffending were found between the two groups	Parole has a delaying effect on reoffending for high risk offenders 37
Ellis & Marshall (2000) UK	Comparing reconviction rates of parolees released through discretionary parole to predicted rates calculated from their characteristics; also comparing reconviction rates of parolees to those of prisoners released unconditionally at the end of their sentences	2 years after release from prison	Reconviction	Parolees reoffended 2 percentage points less than predicted; Parolees reoffended 3 percentage points less than non-parolees	Parole reduces reoffending at least over two years. Although the parole effect seems small, this was a significant proportionate reduction 38
Solomon, Kachnowski & Bhati (2005) US	Very large sample from 15 US states, comparing parolees released through discretionary parole, parolees released through automatic parole, and prisoners released unconditionally at the end of their sentences	2 years after release from prison	Rearrest including arrests not leading to conviction (includes non-reoffending breach and revocation of parole)	Automatic parolees and offenders released unconditionally reoffend at the same rate. Reoffending of discretionary parolees is 4 percentage points lower	"This modest difference may be due to factors other than supervision, given that parole boards base their decisions on such factors as attitude, motivation and preparedness for release that our model cannot take into account" 39

35. R Hann and W Harmann, *Release Risk Prediction: A Test of the Nuffield Scoring System* (Ministry of the Solicitor General, 1988); R Hann, W Harman and K Pease, "Does Parole Reduce the Risk of Reconviction?" (1991) 30(1) *The Howard Journal* 66, 74.
36. R Broadhurst, "Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?" (Paper presented at Keeping People Out of Prison, Hobart, 27 March 1990) 37.
37. M Brown, "Serious Offending and the Management of Public Risk in New Zealand" (1996) 36(1) *British Journal of Criminology* 18
38. T Ellis and P Marshall, "Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners" (2000) 33(3) *Australian and New Zealand Journal of Criminology* 300.
39. A Solomon, V Kachnowski and A Bhati, *Does Parole Work? Analysing the Impact of Postprison Supervision on Rearrest Outcomes* (Urban Institute, 2005) 15.

Ostermann (2013) US	Large sample of offenders from one US state, comparing offenders released through discretionary parole with prisoners released unconditionally at the end of their sentences	3 years after release from prison	Rearrest including arrests not leading to conviction (includes non-reoffending breach and revocation of parole)	Reoffending of parolees is 1 percentage point lower than that of prisoners released unconditionally. Reoffending of parolees that are still on parole and being supervised at the 3 year mark is 8 percentage points lower	"Supervision can insulate offenders from recidivism, but after supervision has expired, parole does not have substantial long-lasting effects" 40
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- 1.33 Overall, it is difficult to draw hard conclusions from the existing empirical evidence. As one reviewer of the UK literature wrote in 2004:

After thirty-five years of research, can it now be said with confidence that parole either does or does not have a beneficial effect on recidivism? Sadly...the answer is no. It has been possible to establish that parolees are, on average, less likely to be reconvicted (at least in the short term) than non-parolees. But it has not been possible to demonstrate conclusively that there is a "parole effect" that operates independently of a possible "selection effect".⁴¹

- 1.34 The results of the research summarised above may be biased in favour of parole, due to the selection effect, or may be biased against parole, as the reoffending of supervised parolees would be more likely to be detected than that of offenders released unconditionally.⁴² Most jurisdictions adjust the level of supervision provided to parolees according to their risk levels, with higher risk offenders receiving intensive supervision and low risk offenders receiving little or no supervision. It is impossible to tell what confounding effect this might have had on the results of the research. The studies summarised above also use different definitions of recidivism, and some explicitly count breaches of parole conditions leading to revocation and reimprisonment as "reoffending" even though no criminal conduct took place. This definition leads to overestimates of the reoffending of parolees compared to non-parolees.
- 1.35 Additionally, only small differences may be detected in the reoffending of offenders released unconditionally and those released to parole because the incentive effect (that encourages offenders to participate in programs to address their offending behaviour) operates through the existence of a discretionary parole system, whether or not a particular offender is actually granted parole. In other words, the existence of discretionary parole may reduce reoffending amongst offenders who are not in fact paroled.
- 1.36 It also needs to be borne in mind that the effect parole could have in reducing reoffending may not be strongly apparent in the empirical research because the management and support of parolees in the community needs to be done better (see more on this in Question Paper 4). Each study can only report the extent to

40. M Ostermann, "Active Supervision and Its Impact Upon Parolee Recidivism Rates" (2013) 59 *Crime and Delinquency* 487, 504-5.

41. S Shute, "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2(1) *Ohio State Journal of Criminal Law* 314, 321.

42. However this caveat only applies to parolees during their supervision periods.

which parole is working to reduce reoffending in that particular jurisdiction at the time of the study.⁴³ They cannot tell us whether or not parole reduces reoffending in NSW or whether, if done better, it would be capable of reducing reoffending in NSW. Researchers have cautioned against drawing conclusions about parole based on research from different jurisdictions given how greatly parole systems and the management of parolees may differ.⁴⁴

- 1.37 Finally, there is a difference between a lack of evidence that something works and evidence that something does not work. All that can be concluded from the existing empirical research is that there is currently a lack of strong evidence that parole works to reduce reoffending.

Parole and truth in sentencing

- 1.38 One writer has defined parole as “the procedure whereby a sentence imposed by a court may be varied by administrative action”.⁴⁵ This definition associates parole with the old NSW remissions system, where offenders could earn discounts on their sentences through good behaviour. The discount was granted by the executive and allowed an offender to achieve true “early release” from the sentence set by the court, with no further possibility of supervision or recall to custody.⁴⁶
- 1.39 Remissions were abolished in NSW in the 1980s in favour of “truth in sentencing”, where offenders are required to serve the sentence imposed by the sentencing court. The truth in sentencing movement has gone further in international jurisdictions, and in some places has also led to the abolition of parole, or at least the abolition of discretionary parole.⁴⁷ Discretionary parole is considered by some to offend the principle of truth in sentencing because it involves the exercise of executive discretion about the length of time an offender must be in custody.
- 1.40 The contrasting view is that the definition of parole as a means of administratively varying a sentence fundamentally misunderstands the relationship between modern parole and sentencing in NSW. An offender may only be released to parole in accordance with the sentence imposed by the sentencing court. The sentencing court sets limits on discretionary parole by setting a minimum term (the non-parole

43. For a critique of the services provided to parolees in the US, possibly affecting the results of the US reoffending research, see J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) ch 4; J Petersilia, “Parole and Prisoner Reentry in the United States” (1999) 26 *Crime and Justice* 479, 501-509. For criticisms of the management of parolees in the UK see T Ellis and P Marshall, “Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners” (2000) 33(3) *Australian and New Zealand Journal of Criminology* 300, 309.

44. M Schlager and K Robbins, “Does Parole Work? – Revisited” (2008) 88(2) *Prison Journal* 234, 237.

45. I Vodanovich, “Has Parole a Future?” in I Potas (ed) *Sentencing in Australia*, Seminar Proceedings No 13 (Australian Institute of Criminology/Australian Law Reform Commission, 1987) 285.

46. See R Simpson, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999) 7-8.

47. J Petersilia, “Parole and Prisoner Reentry in the United States” (1999) 26 *Crime and Justice* 479; D Dharmapala, N Garoupa and JM Shepherd, “Legislature, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing” (2012) 62 *Florida Law Review* 1037, 1045.

period) and a maximum term (the head sentence). The parole decision maker decides when (or if) an offender should be released to parole only within this court-determined zone of discretion (see Figure 1.1).

- 1.41 When an offender is paroled, the parole period remains part of the sentence. The offender is supervised and subject to conditions and will be returned to prison if the conditions are breached and parole is revoked. In these circumstances, terming parole “early release” is misleading as it creates the impression that an offender’s sentence is finished when the offender is paroled.

Offender’s interests versus the community’s interests

- 1.42 The description of parole as “early release” sometimes also implies that parole is a windfall for offenders.⁴⁸ The popular media sometimes characterises individual parole release decisions as unduly lenient and as privileging the rights of offenders over the interests of the community.⁴⁹
- 1.43 Similarly, the recent Callinan review of the Victorian parole system argued against “a mode of thinking, an assumption, perhaps almost a *presumption*” that an offender has a right to parole upon the expiry of the non-parole period. The review emphasised that offenders are merely eligible for parole after the non-parole period expires, and “[t]he onus should be upon a prisoner to demonstrate that he or she *deserves* parole.”⁵⁰ The review recommended that serious offenders be required to satisfy the parole authority that the risk of reoffending is “negligible” before being granted parole.⁵¹
- 1.44 Like other critics of parole, Callinan seemed to be influenced by a conception of parole as an act of executive clemency towards an offender.⁵² He argued that an offender who does not “deserve” release on parole “should not be allowed to re-enter the community and offend again any earlier than necessary.”⁵³ This view is an extension of the concept of parole as a form of early release that thwarts the intention of the sentencing court and that is of primary benefit to offenders.
- 1.45 This view contrasts with the NZ Law Commission’s view of parole as a mechanism for reducing reoffending and enhancing public safety that is in the interests of the community. We wrote in 1996 that parole:

48. R Simpson, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999) 4.

49. See, eg, M T Reist, “Offenders’ rights must be secondary to those of victims”, *The Sydney Morning Herald* (Sydney), 25 August 2013; “Hard truth in sentencing is long overdue”, *The Sunday Telegraph* (Sydney), 23 June 2013; “Justice for whom?”, *The Sydney Morning Herald* (Sydney), 22 June 2013; “Safety of citizens must come first”, *The Daily Telegraph* (Sydney), 21 June 2013.

50. I Callinan, *Review of the Parole System in Victoria* (2013) 64-5.

51. I Callinan, *Review of the Parole System in Victoria* (2013) 91.

52. I Callinan, *Review of the Parole System in Victoria* (2013) 50.

53. I Callinan, *Review of the Parole System in Victoria* (2013) 65.

...is not an act of clemency, compassion, or, necessarily, a reward for good conduct. It is part of the continuum of punishment of the offender, and the sentence continues even though the offender is free from custody.⁵⁴

The pragmatic view

- 1.46 It is logical for those who are not convinced that parole can reduce reoffending to object to parole on the grounds that it inappropriately privileges the interests of an offender over the interests of the community. As outlined above, the empirical evidence on this question is difficult to interpret. The general approach of many commentators has been to give parole the benefit of the doubt. As one often quoted analysis of this literature has concluded:

It would seem unwise to dismiss out of hand the claim that parole release might have some positive effects on those to whom it is granted – certainly during the period of supervision, if not beyond. To disentangle the particular aspects of parolee status that might be responsible for these effects is very much more challenging.⁵⁵

- 1.47 The NZ Law Commission reached the view that:

We should not design whole sentencing systems on unsupported hopes; but nor should we be hasty about abolishing existing systems when the evidence is marginally positive, even if we cannot be precise about the reason.⁵⁶

- 1.48 Similarly, in the face of the currently incomplete evidence that parole reduces reoffending, the Victorian Sentencing Advisory Council stated:

...the Council considers it reasonable...to adopt the hypothesis that, to the extent that parole addresses factors likely to contribute to reoffending, the supervised, conditional release of prisoners on parole is likely to reduce reoffending.⁵⁷

- 1.49 In other words, it may be common sense that parole works to reduce reoffending through the three mechanisms highlighted by the NZ Law Commission. In the absence of good evidence to the contrary, most have decided to proceed on the basis that parole is in the community's interests. As outlined in the next section of this Question Paper, all Australian states and territories and nearly all overseas common law jurisdictions retain some form of parole.

Question 1.1: Retention and objectives of parole

(1) Should parole be retained?

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

54. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) 269.

55. AK Bottomley, "Parole in Transition: A Comparative Study of Origins, Developments, and Prospects for the 1990s" (1990) 12 *Crime and Justice* 319, 338. Quoted in: NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 55; S Shute, "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2(1) *Ohio State Journal of Criminal Law* 314, 320.

56. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 56.

57. Victorian Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) 9.

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

Design of the parole system

- 1.50 If parole is retained, it is necessary to look at the design of the parole system. Some objectives of parole can only be served by a system of discretionary parole release. Others may be better served by a system of automatic release.
- 1.51 As we outlined at the beginning of this Question Paper, NSW currently has a mixed parole system (see Figure 1.2). Short sentences are ineligible for parole, as are sentences that the sentencing court chooses to structure as fixed terms. For parole eligible sentences of three years or less, an offender is released at the end of the non-parole period by order of the sentencing court. It is simpler to think of this as a type of automatic parole, as the court “must” make parole orders for these offenders that cause the offenders to be paroled at the end of the non-parole period. Discretionary parole operates for offenders serving head sentences of more than three years. As an override on automatic parole, SPA has the power to revoke the court-made parole order in some circumstances and effectively transfer an offender to discretionary decision making.

Systems in other jurisdictions

Australian parole systems

- 1.52 Other Australian jurisdictions have fairly similar systems to NSW (see details at Annexure A). In Victoria, SA, WA, the NT and the ACT, parole is not available for short sentences of less than 12 months.⁵⁸ In these jurisdictions, as in NSW, the sentencing court may also in some circumstances choose not to fix a non-parole period for longer sentences, meaning that the offender will not be eligible for parole.⁵⁹ Tasmania does not have a restriction on parole for short sentences, but again the sentencing court may choose not to set a non-parole period, in which case the offender will not be eligible for parole.⁶⁰ Only Queensland has a system where parole must apply to all sentences, but in that state the court may set the parole eligibility or release date as the last day of the sentence, effectively meaning that there can be no parole.⁶¹
- 1.53 For parole eligible sentences, Victoria, WA, Tasmania, the NT and the ACT have systems entirely of discretionary parole. In these jurisdictions, a parole decision maker like SPA will decide whether a parole-eligible offender should be released to parole once the non-parole period has been served.

58. *Sentencing Act 1991* (Vic) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1995* (WA) s 89(2); *Sentencing Act* (NT) s 53; *Crimes (Sentencing) Act 2005* (ACT) s 65.

59. *Sentencing Act 1991* (Vic) s 11(1); *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c); *Sentencing Act 1995* (WA) s 89(4); *Sentencing Act* (NT) s 53(1); *Crimes (Sentencing) Act 2005* (ACT) s 65(4).

60. *Sentencing Act 1997* (Tas) s 17.

61. *Penalties and Sentences Act 1992* (Qld) s 160B.

- 1.54 Only Queensland and SA are similar to NSW in having some type of automatic parole. In Queensland, where a court imposes a sentence of three years or less, and the sentence is not in relation to a serious violent or sexual offence, the court must set a date at which the offender will be released on parole.⁶² Discretionary parole decision making applies to other sentences.
- 1.55 In SA, there is automatic parole for head sentences of less than five years provided the sentence does not relate to a sexual offence, personal violence offence, an act of arson or serious firearm offence. For sentences that come under automatic parole, the parole board must order an offender's release on parole at the end of the non-parole period.⁶³ Other SA sentences are subject to discretionary parole decision making. Unlike NSW, SA and Queensland do not have any safeguard or check on automatic parole.
- 1.56 The Commonwealth operates a different kind of mixed system for federal offenders. When sentencing a federal offender to a term of imprisonment of three years or less, the court must make a recognizance release order unless the court decides that it is not appropriate to do so, having regard to the nature and circumstances of the offence and the antecedents of the offender.⁶⁴ A recognizance release order carries similar conditions to a parole order and means that the offender is released providing that he or she abides by the conditions. The court can set the recognizance release order to start at any date during the offender's term of imprisonment.⁶⁵ If an offender is sentenced to a term of imprisonment of six months or less, the court may choose to make a recognizance release order but is not required to do so.⁶⁶
- 1.57 For sentences of more than three years, a court may either make a recognizance release order or set a non-parole period.⁶⁷ If the court sets a non-parole period, the offender is considered for discretionary release to parole at the end of the non-parole period by the Commonwealth Attorney-General.⁶⁸ Effectively, then, federal offenders subject to sentences with a non-parole period come under a system of discretionary parole decision making. Federal offenders subject to a recognizance release order come under a somewhat automatic system. A court may decline to make a recognizance release order but, if an order is made, the offender must be released in accordance with the order.

NZ, Canada and the UK

- 1.58 NZ operates a reasonably similar system to NSW, SA and Queensland. In NZ, offenders serving sentences of two years or less are automatically released on parole by statute after serving one half of their sentence.⁶⁹ The NZ Parole Board must consider the release of an offender serving a sentence over two years at the

62. *Penalties and Sentences Act 1992* (Qld) s 160B.

63. *Correctional Services Act 1982* (SA) s 66(2).

64. *Crimes Act 1914* (Cth) s 19AC.

65. *Crimes Act 1914* (Cth) s 20(1).

66. *Crimes Act 1914* (Cth) s 19AC.

67. *Crimes Act 1914* (Cth) s 19AB.

68. *Crimes Act 1914* (Cth) s 19AL.

69. *Parole Act 2002* (NZ) s 86.

end of the non-parole period,⁷⁰ which is usually one third of an offender's sentence.⁷¹

- 1.59 Automatic parole is much more commonly used in other international jurisdictions than it is in Australia or NZ. In Canada, for example, offenders serving sentences of two years or more can apply for discretionary parole after serving one third of their sentence or seven years, whichever is less.⁷² If parole is not granted, however, most offenders are still eligible for automatic parole (called "statutory release"). All offenders (except those serving a life or indeterminate sentence)⁷³ must be released with supervision after serving two thirds of their sentence.⁷⁴ There is no possibility for the sentencing court to impose a sentence where the offender is ineligible for discretionary or automatic parole, unless an indeterminate sentence is imposed.
- 1.60 As a safeguard on statutory release, Correctional Service Canada can refer cases to the Parole Board, and the Parole Board will prevent an offender from being automatically released if it is satisfied that the offender is likely to commit an offence involving death or serious physical or psychological harm, a sexual offence involving a child, or a serious drug offence.⁷⁵ In these cases, the Parole Board then takes over responsibility for making the parole decision for these offenders.
- 1.61 In England and Wales, most offenders serving sentences of more than 12 months are automatically released into the community at the halfway point of their sentence.⁷⁶ The exception is offenders who are serving extended determinate sentences. Extended determinate sentences may be imposed on an offender if the following conditions apply:
- the offender has committed a specified violent or sexual offence⁷⁷
 - there is significant risk of serious harm to the public by the commission of further specified offences
 - the court is not required to impose a sentence of imprisonment for life,⁷⁸ and
 - at the time the offence was committed, the offender had already been convicted of a specified offence⁷⁹ OR the custodial term in the sentence will be at least 4 years.⁸⁰
- 1.62 These sentences consist of a custodial term and an "extension period" during which the offender is released on licence, as set by the sentencing court.⁸¹ Offenders are

70. *Parole Act 2002* (NZ) s 21.

71. *Sentencing Act 2002* (NZ) s 86; *Parole Act 2002* (NZ) s 84.

72. *Corrections and Conditional Release Act*, SC 1992 (Can) s 120(1).

73. For offenders serving a life sentence, parole eligibility is set by the sentencing court. For first degree murder, eligibility is automatically set at 25 years, and for second degree murder, eligibility may be set at between 10 to 25 years. See *Criminal Code*, RSC 1985 (Can) s 745.

74. *Corrections and Conditional Release Act*, SC 1992 (Can) s 127.

75. *Corrections and Conditional Release Act*, SC 1992 (Can) s 129.

76. *Criminal Justice Act 2003* (UK) c 44, s 244.

77. These offences are listed under *Criminal Justice Act 2003* (UK) c 44, sch 15 pts 1-2.

78. See *Criminal Justice Act 2003* (UK) c 44, s 224A, 225(2).

79. These offences are listed under *Criminal Justice Act 2003* (UK) c 44, sch 15B.

80. *Criminal Justice Act 2003* (UK) c 44, s 246A(1)-(4).

to be automatically released after serving two thirds of the custodial term, unless the custodial term is 10 years or more or the offence is of a particular type.⁸² If one or both of these conditions are applicable, the offender will not qualify for automatic release. Instead, the offender will be considered by the parole authority for discretionary parole after serving two thirds of the sentence.⁸³ The parole authority may not release the offender unless it is satisfied that it is no longer necessary for the protection of the public that the offender remain in custody.⁸⁴

US parole systems

- 1.63 In the US, there was a large scale movement away from discretionary parole in the 1970s and 1980s. In 1976, 65% of all prison releases in the US were to discretionary parole, as decided by a parole board, compared to 24% in 1999.⁸⁵ By 2002, only 16 US states still had a fully discretionary parole system. Nineteen states had moved to a mixed system where discretionary parole was not available for some types of offences or sentences. In the remaining 15 states, discretionary parole had been abolished altogether.⁸⁶
- 1.64 Commentators have attributed the US pattern of abolishing or limiting discretionary parole to several factors. It was partly a result of the disillusionment in the 1970s with the effectiveness of rehabilitation and the rise of the “nothing works” movement. Reviews of correctional programs at the time found that they had little or no effect on recidivism. This led to an increased emphasis on punishment and “just deserts” in sentencing.⁸⁷ Against this background, discretionary parole was perceived as emphasising the interests of the offender over the interests of the community; or, as one commentator has put it, “the perception that violent and dangerous offenders were being released too early because of a naïve emphasis on rehabilitation rather than a commitment to incapacitation and retribution”.⁸⁸
- 1.65 At the same time, a sentencing reform movement grew which advocated restricted judicial discretion in sentencing. Many states moved from indeterminate to determinate sentencing models and introduced sentencing guidelines, mandatory minimum sentences and “three strikes and you’re out” laws. A natural extension of this reform movement was the restriction or abolition of the discretion of parole boards.⁸⁹

81. *Criminal Justice Act 2003* (UK) c 44, s 226A, 226B.

82. *Criminal Justice Act 2003* (UK) c 44, s 246A(2). The disqualifying offences are listed in sch 15B pts 1-3.

83. *Criminal Justice Act 2003* (UK) c 44, s 246A.

84. *Criminal Justice Act 2003* (UK) c 44, s 246A(6).

85. J Travis and S Lawrence, *Beyond the Prison Gates: The State of Parole in America* (Urban Institute, 2002) 4.

86. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 66-7.

87. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 63-4.

88. H Aviram, V Kraml and N Schmidt, “Dangerousness, Risk and Release” (2010) 7 *Hastings Race and Poverty Law Journal* 175, 176.

89. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 68; D Dharmapala, N Garoupa and JM Shepherd, “Legislature, Judges and Parole

- 1.66 A simultaneous push for “truth in sentencing” gave further impetus for the abolition of discretionary parole. Proponents of truth in sentencing argued that certainty of release after serving a set (and high) percentage of the sentence led to greater honesty in sentencing decisions and longer periods in custody for serious offenders.⁹⁰ Federal funds were made available to US states that ensured that offenders convicted of certain offences served at least 85% of their full sentence in custody. The 27 states that implemented an 85% system did so either by abolishing or limiting discretionary parole and replacing it with a system of automatic parole at the 85% (or higher) mark.⁹¹
- 1.67 However, most states recognised the importance of continuing some type of post-custody supervision and so this aspect of parole remained in all but two states even when discretionary parole was abolished.⁹² In recent years, budget pressures in the US have led to a focus on justice reinvestment, and more funding and attention has been allocated to improving support and programs for parolees and to increasing access to parole with the aim of reducing recidivism rates.⁹³

Automatic parole, discretionary parole or a mixed system?

- 1.68 A key advantage of discretionary parole is that it enables a risk management approach to the release of offenders where offenders are differentiated based on their risk. A decision maker can choose to release low risk offenders, saving the community the cost of their unnecessary continued incarceration. The decision maker can choose not to release or to delay the release of offenders that pose a high level of risk to community safety and can manage the release of these offenders much more stringently. This benefit of discretionary parole can be realised even if one interprets the evidence as showing that parole itself does not reduce reoffending.
- 1.69 Discretionary parole also means that parole can operate as an incentive for offenders to address their offending behaviour, and as an incentive for general good behaviour in custody. Under a discretionary parole system, both of these incentives may operate to change the behaviour even of those offenders who are not in fact

Boards: The Allocation of Discretion under Determinate Sentencing” (2012) 62 *Florida Law Review* 1037, 1042-9.

90. J Petersilia, “Parole and Prisoner Reentry in the United States” (1999) 26 *Crime and Justice* 479, 480; D Dharmapala, N Garoupa and JM Shepherd, “Legislature, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing” (2012) 62 *Florida Law Review* 1037, 1048; H Aviram, V Kraml and N Schmidt, “Dangerousness, Risk and Release” (2010) 7 *Hastings Race and Poverty Law Journal* 175, 176; D Fetsco, “Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends” (2011) 11(1) *Wyoming Law Review* 99, 110.
91. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 68-9.
92. J Petersilia, “Parole and Prisoner Reentry in the United States” (1999) 26 *Crime and Justice* 479, 481-2. See also S Shane-DuBow, A Brown and E Olsen, *Sentencing Reform in the United States: History, Content and Effect* (US Department of Justice, 1985).
93. US Bureau of Justice Assistance, *The Justice Reinvestment Initiative: Experiences from the States* (US Department of Justice, 2013); P Larkin, “Clemency, Parole, Good-Time Credits and Crowded Prisons: Reconsidering Early Release” (2013) 11(1) *Georgetown Journal of Law and Public Policy* 1, 32; D Fetsco, “Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends” (2011) 11(1) *Wyoming Law Review* 99, 118-9.

paroled. As one commentator wrote of the US trend towards automatic parole, “the public does not understand the tremendous power that is lost when [discretionary] parole is abandoned”.⁹⁴

- 1.70 The disadvantages of discretionary parole are that parole decision making is resource intensive and that, under a risk management approach, there is no guarantee that all offenders will be subject to supervision and receive support upon leaving custody. Those offenders denied parole may serve out their head sentence and then be released unconditionally into the community, negating any opportunity to reduce their recidivism risk through supervised reintegration.
- 1.71 Originally, NSW had a system entirely of discretionary parole. The current mixed system with automatic parole for sentences of three years or less was introduced on the recommendation of the 1978 Nagle Commission and was entirely directed at reducing the workload of the discretionary parole decision maker to manageable levels.⁹⁵ We recognised the practical advantages of automatic parole in our 1996 review, and said that it was “justified by administrative convenience and the allocation of scarce resources”.⁹⁶
- 1.72 However, automatic parole may also serve other purposes. Importantly, it ensures that all offenders are subject to a period of supervision and the attendant opportunity to attempt to reduce their recidivism risk. However, it cannot provide an incentive for good behaviour in custody or for offenders to participate in programs unless there is a means to revoke or override automatic parole for some offenders. It also cannot be part of a risk management approach.
- 1.73 Restricting automatic parole to shorter sentences conforms to a risk management approach, if one assumes that offenders serving shorter sentences are less likely to pose a risk to the community. Offenders serving longer sentences who may be higher risk are subject to the scrutiny of a discretionary decision maker. SA and Queensland restrict automatic parole based on a combination of sentence length and offence type. This would be intended to operate as an extra safeguard against high risk offenders being automatically paroled.
- 1.74 In a submission to our recent sentencing reference, Legal Aid NSW suggested that the three year cut off for court based parole orders be extended to apply to head sentences of up to five years.⁹⁷ As we noted in our 1996 report on sentencing, “in a sense, any cut off point is arbitrary” although our view was that automatic parole for shorter sentences makes sense as an offender needs to be in custody for a sufficient length of time for new considerations to emerge in order for an exercise of SPA’s discretion to be meaningful or necessary.⁹⁸ Submissions made in 1996 generally regarded the three year cut off for automatic parole as “an acceptable balance between available resources and the need for the decision to be a

94. J Petersilia, “Parole and Prisoner Reentry in the United States” (1999) 26 *Crime and Justice* 479, 480.

95. Parliament of NSW, *Report of the Royal Commission into NSW Prisons* (1978) 402-3.

96. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 246.

97. Legal Aid NSW, *Preliminary submission PSE18*, 8.

98. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 246-8.

discretionary one in which the public interest is considered".⁹⁹ In 1996, SPA's workload did not demand an increase in offenders entitled to automatic release on parole, which was the only argument we considered would justify raising the threshold.¹⁰⁰

- 1.75 There may be other ways to draw the dividing line in a mixed system. For example, the court at the time of sentencing could order the offender to be subject to either automatic parole or discretionary parole. This could be achieved in NSW by amending the legislation to provide that the court "may" make a parole order (instead of "must") and removing the reference to sentences of a particular length.
- 1.76 In our 1996 sentencing report, we considered requiring the sentencing court to determine whether an offender should be released automatically or by the parole authority. At the time, we considered that adopting this approach would introduce inconsistency into the parole process and complicate the sentencing decision. We did not consider it appropriate to "place greater responsibility on the court to make judgements about an offender's suitability for parole possibly quite a long time into the future without more than speculative knowledge of what his or her circumstances will be."¹⁰¹
- 1.77 Another way of allocating offenders to either automatic or discretionary parole would be to explicitly use the idea of risk. If parole decisions are about managing risk, perhaps the system could best reflect this by creating a boundary between automatic and discretionary parole based on the level and type of risk posed by an offender. In view of the arguments against the sentencing court undertaking a risk assessment, an alternative would be an expert risk assessment. Options include a risk assessment by Community Corrections as part of sentencing or the risk assessment currently conducted upon an offender's entry to custody. On the basis of this risk assessment, an offender could be channelled into a path for automatic parole (with an appropriate safeguard in place) or a path for discretionary parole. Offenders subject to automatic parole would be released to parole at the end of the non-parole period. Offenders subject to discretionary parole would be considered for release by SPA at the end of the non-parole period. This system would aim to ensure that low risk offenders are automatically released and high risk offenders are actively considered by SPA for discretionary release.

The problem of short sentences

- 1.78 In NSW, all sentences of six months or less must be fixed terms without the possibility of parole. Several submissions to our recent sentencing reference proposed that this restriction should be removed and parole should be possible for short sentences.¹⁰² However, Corrective Services NSW and the Probation and

99. Department of Corrective Services, *Submission* (15 July 1996) 17; NSW Young Lawyers Criminal Law Committee, *Submission* (19 July 1996) 19; Legal Aid Commission of NSW, *Submission* (18 July 1996) 4-5; Law Society of NSW, *Submission* (19 July 1996) 25.

100. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 248.

101. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 246.

102. Legal Aid NSW, *Submission SE31*, 4; Law Society of NSW, *Submission SE16*, 3; NSW Bar Association, *Submission SE27*, 3; The Shopfront Youth Legal Centre, *Submission SE28*, 4; Children's Court of NSW, *Submission SE18*, 5 (for juvenile offenders).

Parole Officers' Association of NSW submitted that short periods of parole allow little opportunity to address an offender's criminogenic needs or provide the type of services and support likely to lead to reduced reoffending.¹⁰³

- 1.79 We recommended that parole should continue to be unavailable for sentences of six months or less, on the basis that "the potential period for release is too short to serve any useful purpose".¹⁰⁴ However, this does mean that offenders serving short sentences of imprisonment are not supervised and have no access to reintegration support. This may put these offenders at high risk of reoffending and create a "revolving door" situation where they are frequently returned to custody for relatively minor offences.
- 1.80 A bill is currently before the UK parliament that aims to ensure that all offenders, even those serving short sentences, are supervised for 12 months after release from custody.¹⁰⁵ Under the proposed new system, all offenders sentenced to less than 12 months will be released to parole at the halfway point of their sentence. The parole period will then be supplemented by an additional "supervision period" of the length necessary to make the total period of community supervision up to 12 months. For example, an offender sentenced to a term of six months will be in custody for three months and then released on parole for three months. The offender will then be subject to supervision for a further nine months to make up a total of 12 months supervision in the community.¹⁰⁶
- 1.81 Under the UK proposal, the parole period will operate in the normal way and offenders will be returned to custody if parole is revoked. The supervision period will not be part of the custodial sentence and conditions will be limited to supervision and rehabilitative activity. Breaches of the conditions applying to the supervision period will be dealt with by a court, which will have the power to sanction the offence with a fine, unpaid work, a curfew, or return to custody for up to 14 days.¹⁰⁷

Question 1.2: Design of the parole system

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

103. Corrective Services NSW, *Submission SE52*, 3; Probation and Parole Officers' Association of NSW, *Submission SE39*, 3-4.

104. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 166-7.

105. Offender Rehabilitation Bill 2013 (UK).

106. UK Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform* (2013) 13.

107. UK Ministry of Justice, *Transforming Rehabilitation: A Strategy for Reform* (2013) 23.

Specific issues concerning court based parole

- 1.82 In the course of our recent sentencing reference and preliminary consultations for this reference, stakeholders informed us of a few discrete issues with court based parole in NSW.

Difficulties with accumulated and aggregate sentences

- 1.83 When a court sentences an offender for multiple offences, the court must either impose a separate sentence for each offence¹⁰⁸ or impose an aggregate sentence.¹⁰⁹ If the court imposes separate sentences then it must determine the structure of the overall sentence, including whether any of those sentences will be accumulated or served concurrently or consecutively.¹¹⁰ In practice, if the court wishes to accumulate or partially accumulate the sentences for different offences, this is done by staggering some or all of the starting dates of the sentences as well as the non-parole periods.
- 1.84 If the court imposes an aggregate sentence it will impose an aggregate head sentence and aggregate non-parole period, and it must disclose the separate sentences that would have been imposed if a different approach to sentencing had been taken.¹¹¹
- 1.85 Although there are two different ways for a court to approach sentencing for multiple offences, an offender should receive an effective sentence of the same length under either approach. That is, the offender should have the same effective sentence whether the sentencing judge imposes an aggregate sentence or accumulated sentences. However, the availability of two different approaches has the potential to create inconsistencies for court based parole orders.
- 1.86 The first difficulty for parole arises in sentencing for multiple offences where the separate offences attract head sentences of three years or less. Because the parole decision maker is determined by sentence length, the sentencing judge's approach to sentencing (whether accumulated or aggregate) may change the parole decision maker.
- 1.87 For example, an offender is being sentenced for three offences. The sentencing judge may impose accumulated sentences, which would involve staggering three non-parole periods and three head sentences. In this example, the separate sentences are two years each and the effective sentence is five years. However, the sentencing judge also has the option of imposing an aggregate sentence of five years (and disclosing that the offender would have received three two-year sentences if an accumulated approach had been taken).¹¹² There is no inconsistency in the effective sentence; the offender has received five years in total through both approaches. However, because accumulated sentences are made up

108. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53.

109. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.

110. *Pearce v The Queen* [1998] HCA 57; 194 CLR 610.

111. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.

112. This is required by *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A(2)(b).

of separate sentences of three years or less each, the sentencing court must make three corresponding parole orders. In contrast, the aggregate sentence is longer than three years, which means SPA will be the parole decision maker.

- 1.88 This inconsistency could possibly be resolved by an additional provision allowing the parole decision maker for an offender with accumulated sentences to be determined by the *effective* length of the offender's accumulated sentences.
- 1.89 The second difficulty is that imposing accumulated sentences involves creating multiple non-parole periods and multiple court based parole orders when all but one will be artificial. If an offender receives accumulated sentences, only the non-parole period and parole order for the last sentence will be meaningful. The parole orders associated with the earlier sentences have no effect in practice.

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?

Power of SPA to take over decision making responsibility

- 1.90 SPA's power to revoke court based parole orders acts as a safeguard on automatic release, allowing SPA to assume parole decision making responsibility for offenders with sentences of three years or less who appear to require closer consideration.
- 1.91 In submissions to our 2013 sentencing reference, some stakeholders expressed concerns over SPA's power to revoke a court based parole order.¹¹³ Shopfront Youth Legal Centre was of the view that revoking a court based parole order *before* release is contrary to a sentencing court's intention that an offender be automatically released.¹¹⁴ Shopfront Youth Legal Centre supported pre-release revocation in "exceptional cases" only,¹¹⁵ and did not think it appropriate for SPA to revoke parole for failures to undertake programs in custody or failures to demonstrate good behaviour in custody.¹¹⁶
- 1.92 Stakeholders have also expressed concern over court orders being revoked on the basis of a lack of accommodation, sometimes as late as one day prior to an offender's expected release.¹¹⁷ Legal Aid NSW was of the view that this unfairly disadvantages homeless offenders, and does not support it as a sole basis for revocation.¹¹⁸ The problems of finding suitable accommodation for offenders and paroling offenders with no accommodation are discussed further in Question Paper 3.

113. Shopfront Youth Legal Centre, *Submission SE28*, 5; Legal Aid NSW *Submission SE31*, 3; NSW Bar Association *Submission SE27*, 4.

114. Shopfront Youth Legal Centre, *Submission SE28*, 5.

115. Shopfront Youth Legal Centre, *Submission SE28*, 5.

116. Shopfront Youth Legal Centre, *Submission SE28*, 5.

117. Legal Aid NSW & the Aboriginal Legal Service (NSW/ACT), *Preliminary Consultation PPAC3*.

118. Legal Aid NSW & the Aboriginal Legal Service (NSW/ACT), *Preliminary Consultation PPAC3*.

- 1.93 It seems appropriate for a safeguard to be in place so that SPA takes over decision making if circumstances change, an offender has no suitable post-release plans or the offender poses an obvious risk of reoffending. Rather than SPA having the power to revoke a court order, perhaps an alternative would be a legislative requirement for offenders to be released at the end of the non-parole period unless SPA orders otherwise. This would overcome the perception that automatic release is the sentencing court's intention and may address some of the dissatisfaction or misunderstanding that seems to arise from this perception. It would also overcome the problems that sometimes occur when the court does not, for whatever reason, make a parole order. Stakeholders notified us of this issue in our recent sentencing reference.¹¹⁹

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

- (1) What safeguards should there be on automatic parole?
- (2) Should there be any changes to SPA's power to take over parole decision making for offenders with court based parole orders?

Supervision and conditions on court based parole orders

- 1.94 Section 51(1AA) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the conditions of a court based parole order must include supervision unless the court expressly states otherwise.¹²⁰ The requirements of a supervision condition are set out in the *Crimes (Administration of Sentences) Regulation 2008* (NSW) and include a requirement for an offender to reside at an address approved by Community Corrections.¹²¹ The presumption of parole supervision was imposed in 2003,¹²² when it was found that most parolees were unsupervised while on parole, yet supervision was identified by Community Corrections as being a key factor in reducing the risk of recidivism.¹²³ Supervised offenders were considered less likely to reoffend on parole than offenders with little or no assistance from Community Corrections.¹²⁴
- 1.95 Legal Aid NSW suggests that s 51(1AA) is responsible for SPA's practice of revoking court based parole before release if an offender is unable to nominate a place of residence in NSW.¹²⁵ The concern was raised again in preliminary consultations for this reference.¹²⁶

119. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 137.

120. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51(1AA).

121. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 229(2)(d).

122. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51(1AA) (amended by *Crimes Legislation Amendment (Parole) Act 2003* (NSW), commenced on 3 November 2003).

123. See the second reading speech to the *Crimes Legislation Amendment (Parole) Act 2003* (NSW): NSW, *Parliamentary Debates*, Legislative Council, 21 May 2003, 781.

124. NSW, *Parliamentary Debates*, Legislative Council, 21 May 2003, 782.

125. Legal Aid NSW, *Submission SE31*, 4.

126. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) *Preliminary Consultation PPAC3*.

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- 1.96 Legal Aid NSW has suggested that s 51(1AA) be amended to reverse the presumption and provide that parole is unsupervised unless expressly ordered by the court.¹²⁷ However, this amendment may disregard the value of supervision in reducing the risk of recidivism. Another possibility is to specifically address the problem of accommodation after release, perhaps by requiring Corrective Services NSW to assess an offender's access to accommodation and begin making plans for accommodation at an early stage of the offender's sentence.

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?

127. Legal Aid NSW, *Submission SE31*, 4.

Annexure A: Design of parole systems in Australia

	Any sentences ineligible for parole?	Any automatic parole?	Any discretionary safeguard on automatic parole?	Rules about minimum length of possible parole period	Ambit of discretionary parole (decisions of a parole board or similar)
NSW	Yes – sentences 6 months or less; also if court chooses to impose fixed term	Yes – sentences more than 6 months to 3 years	Yes – SPA may revoke court parole order before release	No	Sentences more than 3 years where an NPP has been fixed
Vic	Yes – sentences of 1 year or less; also where the court chooses to impose a fixed term	No	N/A	NPP must be at least 6 months less than the term of the sentence	All sentences of more than 1 year where an NPP has been fixed
Qld	No	Yes – sentences 3 years or less (unless for certain violent or sex offences) court must fix date for release on parole	No	No	Sentences more than 3 years; or sentences 3 years or less but precluded from automatic parole due to offence type
SA	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	Yes – sentences 1 year or more but less than 5 years (unless sentence for certain serious offences) parole board must order release on parole at end of NPP	No	No	Sentences 5 years or more; or sentences 1 year or more but less than 5 years precluded from automatic parole due to offence type
WA	Yes – sentences less than 1 year; also if court chooses for the sentence to not be a parole eligible sentence	No	N/A	Maximum parole period is 2 years. Parole eligible sentences of 4+ years, offenders are eligible to be considered for parole 2 years before end of sentence. Sentences less than 4 years are eligible to be considered for parole at halfway point	Sentences 1 year or more where court has made a parole eligibility order
Tas	Yes – sentences where court has chosen to impose a fixed term	No	N/A	No	All sentences where an NPP has been fixed
NT	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	No	N/A	No	All sentences of more than 1 year where an NPP has been fixed
ACT	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	No	N/A	No	All sentences of more than 1 year where an NPP has been fixed

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Cth	Yes – if court chooses not to make a recognizance release order or set a non-parole period	No	N/A	No	All sentences where a recognizance release order has been made, offender must be released in accordance with the order (ie court is discretionary decision maker at time of sentencing) and all sentences where a non-parole period has been fixed (Attorney General the discretionary decision maker at end of non-parole period)
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NPP = non-parole period. Life sentences and the different types of indefinite or indeterminate sentences that exist in some jurisdictions are not included.



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