NEW SOUTH WALES
BAR ASSOCIATION

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Mr Paul McKnight
Executive Director
New South Wales Law Reform Commission
GPO Box 5199
SYDNEY NSW 2001

Dear Mr McKnight,

Review of the law in relation to parole: question paper 1

The Bar Association welcomes the opportunity to make submissions in relation to the first of the three question papers about Parole in New South Wales.

The broad position of the Association is that the system of parole is generally appropriate and working reasonably well but there are some aspects of the current system, such as the '12 month rule' and the composition of the State Parole Authority (SPA), which are in need of urgent reform.

Question 1.1: Retention and objectives of parole

(1) Should parole be retained?

Yes.

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

The objectives ought to be to:

- assist offenders to adapt, or re-adapt, to normal lawful community life;
- protect the community from unacceptable risks of re-offending during, and after the expiration of, sentences; and
- encourage offenders to participate in rehabilitation programs in custody and in the community.

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

Yes. This may assist the SPA when making parole decisions and considering the various factors it is required to consider.

Question 1.2: Design of the parole system

(1) Should New South Wales have automatic parole, discretionary parole, or a mixed system?

A mixed system, as is currently in place, with some refinements.

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

It would be appropriate to retain the current provision that a court must order release to parole where the sentence is three years or less.

The Association considers that, for sentences of between three and five years, the sentencing judge should have a discretion whether or not to make an order releasing the offender to parole at the end of the non-parole period (if the judge does not exercise that discretion, it will be a matter for the SPA). Such a discretion may be particularly important in cases where a judge imposes a non parole period which is equivalent to, or not significantly longer than, the time already served and intends that the offender be released either immediately or in the relatively near future.

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

Parole ought to be available for sentences of any length, including sentences of six months or less. The argument that 'the potential period for release is too short to serve any useful purpose' (page 22 of Question Paper 1), ignores the fact that parole periods for sentences over six months can also be very short. If the normal statutory ratio is applied to a sentence of 12 months, this allows three months on parole. For a sentence of seven months, the normal statutory ratio provides parole for one month and three weeks. Given that findings of special circumstances would be available, parole for periods of up to five months would be available for sentences of six months or less.

A very important consideration for a large number of offenders is that the Department of Housing generally only allows a prisoner to retain his or her home for up to three months while incarcerated. Having the power to impose a non parole period would allow magistrates and judges to impose appropriate head sentences with a non parole period, which would allow a prisoner to maintain accommodation and avoid the obvious setback to rehabilitation that sudden and unexpected homelessness may cause.

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?

There is no reason why the imposition of an aggregate sentence ought to prevent a court from ordering parole where it could have done so with each of the individual sentences. A sentencing judge who imposes an aggregate sentence is required to state the term of the sentence which would otherwise have been appropriate for each offence. The Association suggests an amendment to the law to provide that, if none of the putative individual offences would have been over three years, parole on the aggregate sentence should be ordered by the judge. Consistent with the Association's position on Q1.2, it is also suggested that if none of the putative individual sentences are over five years, but one or more is between three and five years, then the judge ought to have discretion to order parole.

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

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

The current safeguards on automatic parole are more than adequate. For sentences involving a parole period of less than 12 months, or where parole is ordered to be unsupervised, revocation of court ordered parole before release should only be available in exceptional circumstances.

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

See 1.4(1) above.

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?

Yes. Rather than having a 'default' provision, courts should be required, as part of the exercise of their sentencing jurisdiction when imposing a sentence where court ordered parole is required or available, to specifically consider whether supervision is necessary and to make an order about whether there will be supervision and, if so, to what extent. A failure to make any specific order would be a sentencing error which would need to be corrected under section 43 of the *Crimes (Sentencing Procedure) Act 1999*.

Question 2.1: Membership of SPA

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

In order to reflect the diversity of our community, the number of community members ought to be returned to the previous level. Further or alternatively, given the potential conflict of interest, it may be appropriate for Police and Community Corrections members to be advisers to SPA, who could be present and take part at meetings and hearings but not have voting rights.

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

The composition of community membership of SPA, like that of modern juries, ought to reflect the diversity of our community. Given that there are other positions for members drawn from the Department of Corrective Services, the judiciary (and thus the legal profession) and the Police, anyone with such a background ought to be disqualified from holding a position as a community member. It is extremely concerning, and totally inappropriate, that a former senior police officer and a former Commissioner for Corrective Services have apparently been appointed as community members. Community membership ought to be open to anyone of good character, with sufficient education to understand the process and who is unbiased and does not fall into one of the existing specialised categories of membership.

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

The community members ought to represent the community at large. If specific areas of expertise are required, there ought to be separate positions akin to those already allocated to Police and the Department of Corrective Services. For example, where SPA is considering a person who was a juvenile at the time of committing an offence, there could be a specialist member with specific knowledge and experience of juvenile offenders.

Question 2.2: Membership of SORC

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

See above in relation to SPA at Q2.1(2).

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

See above in relation to SPA at Q2.1(3).

Question 3.1: The public interest test

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

The current public interest test is appropriate. Parole decisions, like sentencing decisions, involve the balancing of a number of considerations in the public interest, some of which point in different directions. The current test has been the subject of judicial consideration over a number of years and any change in wording is likely to introduce uncertainty and/or unintended alteration of the law.

Question 3.2: The matters that SPA must consider

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

No.

Question 3.3: Specific issues given weight by SPA

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

Yes. There ought to be no assumption that completion of courses in custody is necessarily a better method of reducing risk or promoting the rehabilitation of an offender than the undertaking of such programs in the community on parole unless there is empirical evidence to that effect. The Compendium of Correctional Programs in NSW (2012) does not appear to address this issue. For programs with the highest level of accreditation, the Compendium refers to studies showing that those particular custody based programs can reduce levels of re-offending. There does not appear to be a comparison between the effectiveness of any program in custody compared with in the community. Further, only a few custodial programs are accredited at the highest level.

The fact that an offender has been willing, for some time, to engage in a program which has not been made available to him or her in custody should be taken into account as a very significant factor when considering whether to grant parole, particularly when a similar program is available in the community.

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

An offender's behaviour in custody, evidence of which is available from various reports, is the relevant matter to be taken into account. The security classification is only secondary evidence of this and, of itself, is of little relevance. In the case of an escapee, the classification may stem from conduct which occurred years before the present period of incarceration.

The only relevance of a security classification would be its practical effect in preventing an inmate from undertaking certain programs or qualifying for external leave. While it may be desirable for offenders to have such opportunities, their unavailability ought not exclude an offender from a grant of parole.

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

Yes. There are tens of thousands of homeless people in NSW at any given time. Homelessness does not equate with criminality. Homelessness should only be taken into account if there is evidence that, for the particular inmate, it renders him or her unable to adapt to normal lawful community life.

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

Yes. As set out at page 14 in Question Paper 3, research indicates that validated actuarial risk assessment instruments such as the LSI-R are more accurate than unstructured assessments. SPA should not, therefore, act upon opinions of Community Corrections officers suggesting a different level of risk from that indicated by such an instrument. Likewise, it is suggested that SPA itself should only assess risk differently from such an instrument if there are compelling reasons to do so.

Question 3.4: Deportation and SPA's parole decision making

Does there need to be any change to the way SPA takes likely deportation into account when making the parole decision?

No.

Question 3.5: SPA's caseload and resources

Do any changes need to be made to SPA's administrative practices, workload or resources?

No.

Question 3.6: Planning for parole and assistance with parole readiness

What changes (if any) are needed to improve parole planning and ensure that suitable offenders can demonstrate their readiness for parole?

Staff with knowledge of the prerequisites to recommending grants of parole should be involved at an early stage in the preparation of a case plan for offenders so that expectations are made clear from the outset of any sentence. Ideally, the same officers who present reports to SPA should be formulating the case plans.

Question 3.7: Victim involvement and input into SPA decisions

(1) Should victims' involvement in SPA's decisions be changed or enhanced in any way?

No.

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

Yes. The Association supports the suggestion at 3.78 of the Question Paper that any standard form should make clear the type of information which is relevant to parole decision making.

Question 3.8: Role of the Serious Offenders Review Council

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

Yes.

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

No.

Question 3.9: A different test for serious offenders

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

No. This would unnecessarily complicate SPA's task.

Question 3.10: Security classification and leave for serious offenders

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

Yes. All information used by the Commissioner in making decisions about a particular offender's security classification or external leave should be provided to both SPA and SORC. Any such information would be highly relevant to their decision making and the content of the information is protected by section 194 of the CAS Act. Given SORC's expertise, the Commissioner should only be permitted to disregard SORC's recommendation about classification in exceptional circumstances.

Question 3.11: Submissions by the Commissioner and the State

Do any changes need to be made to the powers of the Commissioner and the State to make submissions about parole?

There are differing views about this matter and the Association is not in a position to make a submission one way or the other. The differing views relate to the timing of the making of submissions, in particular where SPA has held a public hearing and decided to grant parole and submissions are made after that decision but before release. While it is undesirable for submissions to be made so late in proceedings, there also appear to be practical reasons why it may be difficult for them to be made earlier.

Question 3.12: Parole and the HRO Act

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

No change is required. The two schemes are separate and involve different considerations, rules of procedure and jurisdictions.

Question 3.13: The definition of 'serious offender'

Should any change be made to the current definition of 'serious offender'?

No. There is no need to seek to align two different concepts from different schemes.

Question 3.14: Parole in exceptional circumstances

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

No.

Question 3.15: Offender involvement and input into SPA decisions

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

Given the resources of the Prisoners' Legal Service and the Aboriginal Legal Service, no.

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

Yes. SPA ought not be permitted to refuse to hold a review unless an application is frivolous or vexatious.

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

There is not sufficient assistance available to help offenders apply for review hearings. There is adequate assistance available from the PLS and the ALS once a review hearing is granted.

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

From information provided by members of the Association it is apparent that offenders and their legal representatives are not always provided with all of the material upon which SPA relies. For example: earlier parole files and police intelligence reports. Where section 194 questions arise, the existence of such material is often not made known unless an offender's legal representative makes a direct and specific enquiry. The existence of such material ought to be disclosed. The material ought to be provided to the legal representative of an offender, if necessary upon undertakings not to disclose it to the offender.

Question 3.16: Reasons for SPA's decisions

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

Yes. The reasons provided to the offender should be the same as those recorded on the file, subject to any section 194 considerations.

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

Should there be any changes to the mechanisms for appeal or judicial review of SPA's decisions, including the statutory avenue in sections 155-156 of the CAS Act?

Yes. The statutory avenue in the CAS Act is of little utility. There ought to be a simplified method of appeal on a question of law or, with leave, mixed fact and law and power to remit a matter for decision according to law, including by a differently constituted SPA.

Question 3.18: Reconsideration after refusal of parole

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

Yes. The yearly review ought to be the minimum, not the maximum, frequency with which parole is reviewed. SPA ought to be able, at its discretion, to set an earlier review date at the time of refusal. Where there are less than two years of a sentence left, there ought to be a review every 6 months unless SPA determines otherwise. An offender ought to be able to apply for reconsideration of parole before the next review date where there has been any substantial change of circumstances since the decision to refuse (similar to section 22A of the Bail Act).

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

No. It is understood that generally the PLS or ALS would assist an offender to make such an application.

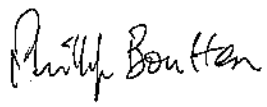
Question 3.19: Drug Court as a parole decision maker

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

No. It is appropriate for the specialised Drug Court to be the sole decision maker in relation to all aspects of offenders subject to a CDTO.

Should you or your officers require any further information, please do not hesitate to get in touch with the Association's Executive Director, Philip Selth on 9232 4055 or at pselth@nswbar.asn.au.

Yours sincerely



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