PAROLE

QUESTION PAPERS 1, 2 AND 3

Legal Aid NSW submission

to the New South Wales Law Reform Commission

November 2013

About Legal Aid NSW

The Legal Aid Commission of New South Wales (Legal Aid NSW) is an independent statutory body established under the *Legal Aid Commission Act 1979* (NSW) to provide legal assistance, with a particular focus on the needs of people who are economically or socially disadvantaged. Legal Aid NSW provides information, community legal education, advice, minor assistance and representation through a large in-house legal practice and through grants of aid to private practitioners. Legal Aid NSW also funds a number of services provided by non-government organisations, including 35 community legal centres and 28 Women's Domestic Violence Court Advocacy Services.

The Legal Aid NSW Prisoners Legal Service (PLS) provides legal advice and minor assistance to prisoners; and representation for prisoners at:

- hearings at the State Parole Authority (SPA)
- life sentence determinations
- segregation appeals, and
- visiting magistrate hearings

Legal Aid NSW welcomes the opportunity to provide these comments. Should you require further information, please contact Dara Read on 9219 5714 or at Dara.Read@legalaid.nsw.gov.au or Will Hutchins on 8688 3963 or at William.Hutchins@legalaid.nsw.gov.au.

Introduction

Legal Aid NSW considers that parole is an important sentencing option which provides an opportunity for the courts to construct a sentence incorporating a period of conditional release with considerable oversight and supervision in the community. NSW has a mixture of automatic and discretionary parole. Offenders sentenced to a head sentence of 3 years or less are generally released to parole automatically at the expiry of the non-parole period by a parole order made by the sentencing court at the time of sentencing (commonly referred to as court based parole). With sentences exceeding 3 years, a parole order must be made by the State Parole Authority (SPA) when the offender is eligible. SPA has a very wide discretion in determining whether or not to grant parole. SPA also determines parole in relation to parole orders which have been revoked, even those where the original sentence was 3 years or less.

Discretionary parole involves a rigorous review process including detailed risk assessment and post release planning. The legislative framework requires SPA to be satisfied that the release of an offender is appropriate in the public interest. Legal Aid NSW considers that this test should be retained, as it allows for a range of factors, including risk, to be taken into consideration in the parole determination.

Legal Aid NSW considers that the legislative framework for parole is largely appropriate. This submission outlines a number of proposed legislative reforms that would enhance procedural fairness in the parole process, including repealing the "12 month rule", requiring a notice to be given to an offender and their legal representative if a "section 194 direction" has been made to withhold information and removing what is in effect a power of veto by the Serious Offenders Review Council (SORC) in relation to serious offenders. Introducing a right of appeal from SPA's parole decisions would also significantly enhance the transparency and procedural fairness of the parole system in NSW.

This submission also highlights a range of proposed reforms to the current administrative framework for the parole system in NSW. Without appropriate systems and processes within Corrective Services NSW, any principles of fairness and transparency in the legislation can be significantly undermined. Aspects of the submission focus on some of the administrative practices within Corrective Services NSW that can have a considerable bearing on an offenders' suitability for parole and SPA's parole determination. These include the preparation of case plans and looking behind an offender's participation or non-participation in programs and classification to consider whether there were factors influencing this that were outside the offender's control. Legal Aid NSW also proposes including requirements for written submissions opposing parole and papers to be provided to the offender and the offender's legal representative in advance of a review hearing and publishing SPA decisions of public interest.

The parole system in NSW has attracted significant public and political attention recently as a result of a number of high profile matters involving parole, both in NSW and in other jurisdictions. Legal Aid NSW considers that any significant departure from the current legislative framework in NSW, particularly in relation to the overarching test to be applied to the parole decision and the purposes and principles of parole, should be based on objective evidence rather than community law and order concern.

Legal Aid NSW makes the following priority recommendations in relation to the current parole system:

Recommendation 1: Repeal the "12 month rule".

Recommendation 2: Retain the public interest test outlined in s135(1) of the *Crimes (Administration of Sentences) Act 1999*.

Recommendation 3: Remove the mandatory application of all items of a supervision condition contained in cl 229(2) of the *Crimes (Administration of Sentences) Regulation 2008* and require the court to consider which supervision items are appropriate on a case by case basis.

Recommendation 4: Remove the requirement for mandatory supervision as set out in s51(1AA) of the *Crimes (Sentencing Procedure) Act 1999*. Alternatively, give the sentencing court discretion to select which items of supervision contained in cl 229(2) of the *Crimes (Administration of Sentences) Regulation 2008* will apply.

Recommendation 5: Repeal or amend cl 232(1)(c) of the *Crimes (Administration of Sentences) Regulation 2008* to limit the circumstances in which automatic parole can be revoked on the basis that satisfactory accommodation arrangements have not been made.

Recommendation 6: Require the development of a case plan, detailing the programs that an offender is to complete prior to their earliest release date and an exit plan, in all matters where the head sentence exceeds 3 years.

Recommendation 7: Introduce selection criteria for community members on SPA and SORC and create identified positions for a forensic psychologist or psychiatrist and an Aboriginal or Torres Strait Islander community member.

Recommendation 8: Publish parole decisions of public interest.

Recommendation 9: Introduce a requirement for any papers for a hearing to be provided to the offender and the offender's representative no later than 1 week before a review hearing.

Recommendation 10: Introduce a requirement for a notice to be given to an offender and their legal representative if a "s 194 direction" has been made, as well as a general outline of the nature of the material that has been withheld.

Recommendation 11: Introduce a requirement for the Commissioner and the State to give notice of their intention to make written submissions 14 days before a review hearing and serve the submissions on the offender's legal representative up to 7 days before a hearing.

Recommendation 12: Introduce a right of appeal for parole decisions to a single judge of the Court of Criminal Appeal.

Recommendation 13: Repeal the provisions in s 139(1)(b)(ii) and 146(1)(b)(ii) of the *Crimes (Administration of Sentences) Act 1999* which provide that there will be a review hearing only if SPA is satisfied that a hearing is warranted**.**

Recommendation 14: Repeal s135(3) of the *Crimes (Administration of Sentences) Act 1999* which effectively gives SORC a power of veto in relation to serious offenders and their parole applications.

QUESTION PAPER 1

Question 1.1: Retention and objectives of parole

(1) Should parole be retained?

Legal Aid NSW considers that the current parole regime in NSW works well for the most part and should be retained. Parole serves a number of important functions including:

- Providing an incentive to comply with prison rules and regulations and participate in treatment programs in custody to address offending behaviour
- Supervision upon release to the community and support to reintegrate into the community
- Assessment, monitoring and management of any risk posed by serious offenders to the community

Legal Aid NSW considers that it is in the public interest to retain parole as a sentencing option. Automatic parole, in most cases, enables the court to ensure that an offender is monitored and supervised upon return to the community. In addition, discretionary parole enables the State Parole Authority (SPA) to make an assessment of the offenders' ability to adapt to normal lawful community life and their likely risk of re-offending prior to release based on up to date information. In both cases, there are serious consequences for failing to comply with conditional release to parole. The regime provides significant oversight which enhances community safety while offenders are serving the balance of a sentence in the community.

Legal Aid NSW acknowledges the research outlined in *Parole Question Paper 1* regarding the effectiveness of parole in reducing offending in a range of other jurisdictions as well as the observation that '[r]esearchers have cautioned against drawing conclusions about parole based on research from different jurisdictions given how greatly parole systems and the management of parolee may differ.'[1] Legal Aid NSW is not aware of any research or evidence to suggest that the current parole system is not working well in NSW. The Prisoners Legal Service (PLS) has observed a large number of clients benefit from supervision and support upon return to the community and successfully complete periods of parole without reoffending. The PLS solicitors have also observed that the parole system provides motivation to clients to focus on their rehabilitation while in custody and upon release from custody.

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

The objectives of the parole system in NSW should be:

- To provide for laws relating to the release from detention of offenders serving sentences of imprisonment
- To promote the rehabilitation of the offender
- To support the reintegration of the offender upon return to the community

Having regard to:

- The public interest; and
- The need to protect the safety of the community

[1] NSW Law Reform Commission, *Parole,* Discussion Paper 1 (2013) 1.36

The Commission may also wish to consider recommending a set of principles to guide parole decision making. Legal Aid NSW supports the 'guiding principles' set out in section 7(2) of the *Parole Act 2002* (NZ) and considers these principles, or similar principles, should be outlined in the NSW legislation:[2]

- That offenders must not be detained any longer than is consistent with the safety of the community, and that they must not be subject to release conditions that are more onerous, or last longer, than is consistent with the safety of the community; and

- That offenders must, subject to any of section 13 to 13AE,[3] be provided with information about decisions that concern them, and be advised how they may participate in decision-making that directly concerns them;

- That decisions must be made on the basis of all the relevant information that is available to the Board at the time; and

- That the rights of victims are upheld, and submissions by victims and any restorative justice outcomes are given due weight

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

The *Crimes (Administration of Sentences) Act 1999* (CAS Act) currently sets out a range of objects, not all of which relate to parole. While section 2A(1)(d) of the CAS Act relates to parole, most of the other objects are not directly relevant to parole. For example, the objective contained in s 2A(1)(a) of the CAS Act, 'to ensure that those offenders who are required to be held in custody are removed from the general community', does not align with the purposes of parole. Legal Aid NSW considers that there is value in setting out objectives in relation to parole separately given that the administration of the parole regime is quite different to the other parts of the Act, and the objectives of the other parts of the Act.

Setting out the objectives of parole clearly in the CAS Act may also assist in clarifying the purposes and principles of parole and address any misconceptions about parole, for example, that it is a form of 'executive clemency' or 'early release'. It may also assist community members to better understand their role on SPA.

Question 1.2: Design of the parole system

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

Legal Aid NSW considers that the current parole system, which allows for a mixed system of automatic and discretionary parole, works well. However, as noted in the Legal Aid NSW preliminary submissions, Legal Aid NSW considers that the three year cut off for court based parole orders should be extended to apply to head sentences of up to five years.

The current system enables the sentencing magistrate or judge discretion to impose a sentence which is appropriate having regard to the circumstances of the offending and the offender, and

[2] *Parole Act 2002* (NZ) s 7

[3] These provisions relate to the general rules about information to be given to offenders and the making of confidentiality orders.

the impact on the victim. If the court considers that parole should not be automatic and the offending is sufficiently serious to warrant a lengthier sentence, it can impose a longer head sentence requiring the offender to be considered for release to parole by SPA. It is appropriate that the sentencing magistrate or judge makes this determination.

There are significant safeguards in place for offenders who are released to parole automatically. They will ordinarily be subject to the supervision of Probation and Parole. If parole is subsequently revoked, the offender then falls within SPA's jurisdiction. If 'automatic' parole were removed or curtailed, this would generate significant amounts of work for Probation and Parole Officers. Legal Aid NSW anticipates that any increase in the amount of matters falling within the 'discretionary parole' category would have significant workload and cost implications for both Corrective Services NSW and SPA. In the view of Legal Aid NSW, this could introduce significant delays into the parole process and is likely to result in more people spending longer in custody.

The 'risk assessment' approach given consideration in *Question Paper 1* would result in a probation and parole officer deciding whether an offender should be channelled into 'automatic' or 'discretionary' parole. This proposal has significant resource and cost implications. It is likely to involve a significant amount of additional work for Community Corrections and is likely to introduce delays in the parole process, particularly in matters which currently attract 'automatic' parole. Legal Aid does not support this proposed approach in principle or in practice. Legal Aid NSW considers that a magistrate or judge is best placed to consider the way in which a sentence should be structured.

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

Please refer to the response outlined above in 1.2(1).

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

Legal Aid NSW does not consider that there is a need to ensure supervised reintegration support for offenders serving a short sentence. Legal Aid NSW considers that requiring supervision of all offenders serving a short sentence would have significant workload implications for Probation and Parole officers and cost implications for Corrective Servcies. Section 51(1AA) of the *Crimes (Sentencing Procedure) Act 1999* provides that all offenders sentenced to parole are subject to supervision unless the court expressly states otherwise. If the court considers that particular supervised reintegration support is necessary, the court can impose particular conditions on the offender, as long as they are not inconsistent with the standard conditions imposed by the regulations under the *Crimes (Administration of Sentences) Act 1999.*

The purposes of sentencing are set out in Section 3A of the *Crimes (Sentencing Procedure) Act*. These include punishing or denouncing the conduct of the offender, general deterrence and to recognise the harm done to the victim of the crime and the community, as well as rehabilitation. If the court wants to emphasise rehabilitation and ensure the person is supervised and supported in a particular manner, the court can take this into account when constructing an appropriate sentence.

Question 1.3: Difficulties for accumulated and aggregate sentences

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

Legal Aid NSW considers that the current system is working well and that the decision whether to set an aggregate non parole period or accumulate sentences should be left to the discretion of the Court.

Legal Aid NSW is not aware of how Correctional Services NSW determines when offenders will be eligible to participate in programs in custody, but understands that eligibility to some programs depends on the length of the non-parole period. It may be that accumulated sentences might be treated differently by Corrective Services and the non-parole period deemed too short to be eligible for a program. Legal Aid NSW considers that offenders should be able to participate in programs taking into account the totality of the time they will be in custody, whether that be as an aggregate non parole period or a series of accumulated sentences. If reform is needed in this respect, it could be achieved by changing systems within Corrective Services NSW, rather than requiring a change to the legislation.

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

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

Legal Aid NSW has observed a large increase in the number of revocations of automatic parole before release in circumstances where SPA decides that 'satisfactory accommodation arrangements have not been made or are not able to be made',[4] pursuant to s130 of the CAS Act and cl 232(1)(c) of the *Crimes (Administration of Sentences) Regulation 2008* (CAS Regulation). Legal Aid NSW acknowledges that SPA should have the right to revoke automatic parole, but is concerned with the frequency that this provision is relied upon to revoke parole. Legal Aid NSW considers that SPA should safeguard an offender's access to automatic parole by only allowing SPA to revoke automatic parole before release in exceptional circumstances.

This provision creates a very high and inflexible bar for offenders to achieve parole. It is not always possible or practical for offenders to identify specific suitable accommodation prior to release. The provision impacts harshly on the homeless and the mentally unwell. The Commission could consider revoking or amending cl 232(1)(c) of the CAS Regulations to address this issue. In the view of Legal Aid NSW, cl 232 (1)(b) of the CAS Regulations which enables SPA to revoke parole before release if it decides that the offender 'is unable to adapt to normal lawful community life', is sufficient to capture the matters where a lack of suitable accommodation will entirely undermine an offender's parole prospects. 'Adapting to normal community life' is a broader, more flexible concept which would allow a probation and parole officer and SPA to make a determination about whether automatic parole should be revoked prior to release, taking into account a range of factors, including risk of reoffending, conduct while in custody and the likelihood of the offender complying with the conditions of parole as well as their accommodation arrangements. While there are some cases and circumstances where confirming suitable accommodation prior to release is essential for parole, this is not always the case. In some circumstances, reporting conditions would be sufficient to facilitate appropriate supervision.

[4] *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 232(1)(c)

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

SPA currently has the power to vary parole conditions imposed, other than the mandatory conditions, pursuant to s128(2) of the *Crimes (Administration of Sentences) Act 1999*. Legal Aid NSW considers that SPA should also have the power to delete any part of the supervision condition as defined in cl 229(2) of the CAS Regulation. In the view of Legal Aid NSW, there should be an assessment about what parts of the supervision condition are appropriate for each offender at the time that they are eligible for release and when SPA has before it information regarding their post-release plan. Not all parts of the supervision condition contained in cl 229(2) of the CAS Regulation are relevant and necessary for each and every offender.

Question 1.5: Supervision conditions on court based parole orders

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

Legal Aid NSW considers that there should not be a mandatory supervision condition imposed on parole. In the view of Legal Aid, the court should turn its mind to whether to impose supervision and, if so, what parts of the supervision condition are appropriate in each matter.

In particular, Legal Aid NSW has observed that the condition 'to reside at an address approved by the officer',[5] presents a persistent problem for offenders on parole. It is particularly problematic where offender's have changeable living arrangements and where the Probation and Parole officer forms the view that the offender's residence is not appropriate. Legal Aid NSW considers that this condition should be discretionary. In the view of Legal Aid NSW, given that any breach of a parole condition can result in a revocation of parole, and given the current impediments to re-applying for parole once it has been revoked, not all parts of the supervision condition should be mandatory.

[5] *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 229(2)(d)

QUESTION PAPER 2

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?

At present, the vast majority of the community members on SPA have previously been employed by the NSW Police Force or Corrective Services NSW. Legal Aid NSW considers that the community member positions should be filled by people with a variety of professional experiences to ensure that a range of perspectives are brought to the decision making process and parole determinations. The perspectives of the NSW Police Force and Corrective Services NSW are already well represented on SPA by prescribed 'official members' and Legal Aid NSW considers that the legislation should specify that community members must not have a background working with police or corrections.

In the past, a SORC member would attend review hearings for serious offenders in an advisory capacity. Legal Aid NSW supports the reintroduction of this practice. The Secretary of SORC could attend the hearing in person or by telephone. PLS solicitors found that it was helpful to have a SORC member present to answer any questions that arose at the parole hearing or provide more detail about a matter in a timely manner because the report from SORC which is considered at the hearing is often a few months old.

Legal Aid NSW supports Community Corrections officers being members of SPA. In the experience of the PLS, the Community Corrections representative often provides SPA with considerable assistance and up to date information about an offender because they have access to an offender's case notes. Similarly, where systemic issues or shortcomings in the performance of Community Corrections officers or Corrective Services NSW are identified in a particular matter, the member is able to raise these for action within the Department.

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

Legal Aid NSW considers that there should be more rigour in to the selection process for community members. In particular, Legal Aid NSW considers that it is important for community members to have an understanding of the criminal justice system, the sentencing process and the purpose of parole to be able to perform their role properly. As noted in response to Question 2.1(1), Legal Aid NSW also considers that community members should not have a background working with police or corrections. Instead, there are a wide range of other professional and personal backgrounds which community members could be drawn from that would have a sound understanding of the criminal justice system.

Legal Aid NSW supports a model similar to that set out in section 111(3) of the *Parole Act 2002* (NZ) which requires that, 'before recommending a person as a member, the Attorney-General must be satisfied that the person has':[6]

- A knowledge or understanding of the criminal justice system
- The ability to make a balanced and reasonable assessment of the risk an offender may present to the community when released from detention; and

[6] *Parole Act 2002* (NZ) s 111(3)

- The ability to operate effectively with people from a range of cultures; and
- Sensitivity to, and understanding of, the impact of crime on victims

At present, there are no selection criteria or guide for who the Attorney General can appoint as a community member. This can result in community members being appointed with a very limited knowledge or understanding of the criminal justice system.

Legal Aid NSW also considers that ongoing training for community members, particularly on the sentencing process, the role of parole, mental health and cognitive impairments as well as cross cultural awareness is most desirable. The Commission may wish to give consideration to recommending a formal induction process for community members which includes training, as well as periods of observation and the provision of a handbook. Question Paper 2 indicates that SPA holds two policy days per year. Legal Aid NSW considers that more training would be desirable. Legal Aid NSW considers it is important for community members to understand and appreciate the principles and objects of parole and the role of SPA in the parole process.

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

As outlined in response to 2.1(1), Legal Aid considers that the composition of SPA should be broadened to include members from a greater range of professions.

The overrepresentation of prisoners with mental health impairments and cognitive impairments in NSW prisons is well documented.[7] The NSW Law Reform Commission addresses these issues in relation to parole in particular in the Report 135 on Diversion:[8]

> The Community Offender Census shows that of 3533 offenders on parole assessed (constituting 98.6% of the total number of offenders on parole), 51.5% were identified as having current mental health issues or as undergoing mental health treatment and 62.4% were identified with drug and/or alcohol abuse in the previous year. [...]
>
> A 2008 survey of Probation and Parole Officer conducted by BOCSAR found that the Officers nominated mental health treatment, drug and alcohol treatment and secure and affordable accommodation services as "extremely important" to the rehabilitation of offenders.

Given this, Legal Aid NSW considers that it is particularly important that SPA has an identified position for a forensic psychologist or psychiatrist. In the experience of PLS, people appearing before SPA commonly have cognitive or mental health impairments and SPA would benefit from an understanding of these issues and access to a SPA member with expertise in this area.

Similarly, given the well documented overrepresentation of Aboriginal and Torres Strait Islander people in prison in NSW, Legal Aid considers that SPA should have a specific role for a community member who is Aboriginal or Torres Strait Islander.

Given that only 5 members sit on SPA at any one time, and 3 of the positions are already designated to the chairperson, corrections and police, Legal Aid NSW appreciates that it will not always be possible to have a forensic psychologist and an Aboriginal or Torres Strait Islander

[7] NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135 (2012) 4.109 – 4.138

[8] NSW Law Reform Commission, *People with cognitive and mental health impairments in the criminal justice system: Diversion*, Report 135 (2012) 4.135 – 4.136

person sitting at all times. However, Legal Aid NSW considers that it is desirable to have members with this experience and background within SPA.

2.2: Membership of SORC

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

Legal Aid NSW does not have any direct dealings with members of SORC and as such, has limited knowledge of the current composition and performance of SORC. However, Legal Aid NSW considers that it would be appropriate to establish similar selection criteria to those outlined in response to question 2.1(2) for SORC community members.

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

As outlined in response to 2.1(3), Legal Aid NSW considers that SORC should have a designated role for a forensic psychologist and an Aboriginal or Torres Strait Islander person on the Council. Under the current parole regime SORC have a significant influence on the parole outcome for serious offenders and it is important that a range of relevant professional and personal experiences are represented on SORC.

QUESTION PAPER 3

Question 3.1: The public interest test

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

Legal Aid NSW supports retaining the current public interest test and is not aware of any reason why it should be changed. Legal Aid NSW considers that introducing an 'unacceptable risk' test would narrow the purview of SPA considerably. At present SPA takes into account a range of factors when considering parole, and risk is implicit in many of these factors, including 'the need to protect the safety of the community'[9] and the 'likelihood of the offender being able to adapt to normal lawful community life'.[10] Legal Aid NSW is concerned that an unacceptable risk test would reorientate the decision making process and require SPA to focus on some aspects of an offender and their offending and place less emphasis on other important aspects of the offender and the parole decision. For example, an offender may have received a sentence of parole for a very serious offence. However, they may have spent a lengthy period of time in custody, participated in all relevant programs, maintained exemplary behaviour while in custody and have a strong post release plan. In these circumstances, an overriding test that focuses on an unacceptable risk to the community may mean that too much emphasis is placed on the original offending and the risk of such an offender returning to the community that parole is ultimately refused.

The public interest test is a much broader test that has been applied in NSW for a long time. It is widely understood by SPA, the State, the Commissioner and legal practitioners. In the view of Legal Aid NSW, an 'unacceptable risk' test is 'open ended' and there is little to guide SPA and legal practitioners about how it should be applied in practice and the import of the test in the context of parole.

Question 3.2: The matters that SPA must consider

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

Legal Aid NSW considers that s 135A(e) should be amended to provide that Probation and Parole reports must address 'the offender's willingness to participate in rehabilitation programs, the success or otherwise of his or her participation in such programs *and the availability of such programs, in custody or in the community.'*

In the experience of PLS, offenders are often refused parole on the basis that they haven't participated in a particular program when the program was not in fact available to them. PLS has also observed many clients spend a lengthy period of time on a waiting list for a program to be told a few months before the end of their non parole period that the program is about to start and it will take them over their earliest release date. As outlined in response to question 3.3(1), Legal Aid NSW considers that case plans should be prepared for each offender sentenced to parole with a head sentence that exceeds 3 years. Where a client has not complied with a case

[9] *Crimes (Administration of Sentences) Act 1999* (NSW) 135(2)(a)
[10] *Crimes (Administration of Sentences) Act 1999* (NSW) 135(2)(f)

plan and completed a relevant program through no fault of their own, this should not be a barrier to achieving parole.

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?

Clause 13 of the CAS Regulation requires the Commissioner to 'ensure that a case plan (the *initial case plan*) is prepared and adopted for each convicted inmate as soon as possible after the inmate becomes a convicted inmate'.[11] However, this is not required for an offender who has less than 6 months remaining until their earliest release date.[12] In the experience of PLS, case plans are not always prepared for offenders.

Legal Aid NSW considers that a case plan should be prepared for all offenders with a sentence that contains a non-parole period and a head sentence that exceeds 3 years. The case plan should address the programs that the offender is expected to complete in custody and should set out a timetable for how an offender will complete the programs before the expiration of their non-parole period. At present, cl 13A of the CAS Regulation outlines what 'may' be included in a case plan, which includes 'the provision of services and programs to the inmate'. Legal Aid NSW considers that this provision should be more prescriptive. It is important that offenders have clear and achievable 'goal posts' set out in a case plan. If SPA, or the Commissioner insist belatedly that an offender should do a program at a late stage in their sentence, and this has never before been raised with the offender, it can frustrate the original sentence, and in practice, can be very frustrating and unfair for the prisoner. This may need to be set out in the CAS Act, rather than the CAS Regulation, to ensure that this requirement is adhered to as a matter of priority.

A copy of the case plan should be put on the Probation and Parole file and also given to the inmate. As noted above in response to Question 3.2, if the case plan has not been completed by the expiration of the non-parole period for reasons outside the control of the offender, this should not be a barrier to achieving parole. On the other hand, when an offender has not completed the case plan due to a lack of motivation or poor participation, this could also be taken into consideration by SPA.

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

In the experience of PLS, access to programs and access to leave are dependent on an offender's progression through the security classifications in custody. The Commissioner has the power to decide whether someone should be made minimum security 'C3', and whether an offender is able to access leave. Legal Aid NSW considers that SPA should look behind the classification of an offender to consider why an offender has not progressed through the classifications and whether it is due to their poor conduct in custody or due to a determination of the Commissioner which is outside the offender's control.

[11] *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 13(1)
[12] *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 13(2)

(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?

In the view of Legal Aid NSW, homelessness or a lack of suitable accommodation should not automatically be a barrier to achieving parole. Homelessness does not necessarily equate to a higher risk of committing further offences or a higher risk to the community. There can be significant differences between offenders who are homeless. Some offenders who are homeless may be high functioning and no more at risk of reoffending than an offender who has somewhere to live. Legal Aid NSW considers that suitable accommodation should not be a prerequisite for parole and that an offender's accommodation arrangements should be considered and addressed in the parole report on a case by case basis.

Offenders leaving custody face significant hurdles in trying to secure suitable accommodation. The non-government Members Submission to the NSW Premier's Council of Homelessness stated that:[13]

> Exiting people into long term sustainable accommodation is difficult unless a person has family/friends and other supports. As a result, some people who enter correctional centres from homelessness are likely to exit back into homelessness. As well, there is a decreasing availability of long term, stable housing which is available to people on very low or low incomes. There is now very high demand for such housing stock both in the private rental market and for social housing (as evidenced by long waiting lists) which further exacerbates the dilemmas faced by ex-prisoners seeking housing.

This is consistent with the experience of PLS solicitors. Case plans, including exit planning, are an essential part of supporting offenders to achieve parole. Please refer to our response to 3.3(1) in relation to the importance of proper case planning.

Community Offender Support Programs (COSPs) provided supported accommodation and reintegration programs for high risk offenders on community based orders, including parolees. Unfortunately COSPs are no longer in operation and this has left a significant gap in the service system. Legal Aid NSW encourages the Commission to make recommendations in relation to the availability of accommodation and possible replacement models for COSPs and other community based alternatives. Although this is not a legislative reform issue as such, accommodation is so often a barrier to parole and so integral to the parole determination that Legal Aid NSW considers it is central to overall working of the parole system.

Please refer to the response to Question 1.4(1) regarding the prevalence and practice of revoking of automatic parole prior to release due to a lack of suitable accommodation.

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

It is difficult for Legal Aid NSW to express a view on this as, in the experience of PLS, SPA does not articulate its decision in relation to risk in any detail and it is not clear how SPA arrive at this decisions. It is interesting to note the statement in the Question Paper that 'SPA formulates

[13] Non-Government Members' Submission to the NSW Premiers Council on Homelessness, *Pathways into homelessness through child protection,* 14 May 2013, 13 <http://www.housing.nsw.gov.au/NR/rdonlyres/E7DCA4D7-CE72-4E5A-BC9A-8EAFB31C6D21/0/MemberssubmissiontoPremiersCouncilonHomelessness.PDF>

more of an "instinctive synthesis" assessment of the risks posed by an offender based on all the material and reports available to it and uses this to inform its decision making.'[14] This is consistent with the experience of PLS solicitors who observe that SPA appears to rely heavily on the reports that they are provided with.

As we note in response to question 2.1(3), Legal Aid NSW considers that SPA would benefit greatly from having a forensic psychologist or psychiatrist on the authority. In our view, it is important that the members are able to understand and critically analyse any information regarding risk that is put before them.

Adopting a model such as the structured professional judgement (SPJ) approach referred to in the question paper is likely to require a significant amount of additional resources, given its reliance on clinicians to utilise the risk assessment tool. Legal Aid NSW would require further information about the Scottish model, the Risk Management Authority and the SPJ approach, before forming a view about whether it should be introduced in NSW. Notably, the Sentencing Council report on *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* provides that:[15]

> It should also be borne in mind that risk assessment tools are developed within certain populations and must be evaluated in other populations before they can be used with any degree of confidence. Little is known about the validity of risk assessment tools when used to assess a population of people who have been detained for many years.

Legal Aid NSW considers that before any such approach is introduced in NSW, significant research and evaluation would need to be conducted, as well as a cost/benefit analysis, particularly given the importance of the assessment and its likely impact on the ultimate parole decision.

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?

At present, SPA takes into account likely deportation when making a parole decision. From time to time SPA is persuaded by submissions from the Commissioner or the State that granting parole when the offender will be deported amounts to expunging the balance of the sentence because the offender will not be subject to supervision or the possibility of revocation of parole. Legal Aid NSW considers that deportation should not be taken into consideration when determining parole, in the same way that it is not taken into account at sentencing. *R v Shrestha*[16] is a relevant authority on this topic and the decision contains a range of relevant obiter dicta.

In practice, likely deportation can mean that an offender spends their entire sentence in custody without any period on parole. PLS have observed that SPA is very reticent to release a person to parole in circumstances where there is no way to enforce conditions of parole or take action in relation to any breaches of parole. In some matters SPA has released a person to parole after adjourning the matter for PLS to make enquiries about the offenders living arrangements in the

[14] NSW Law Reform Commission, *Parole,* Discussion Paper 3 (2013) 3.46
[15] NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) 2.106
[16] *R v Shrestha* (1991) 173 CLR 48

other country. Legal Aid NSW appreciates the practical considerations that likely deportation presents SPA but considers that placing such an emphasis on this issue can frustrate the original sentence. By contrast, deportation of Commonwealth offenders is not seen as an impediment to obtaining parole.

Question 3.5: SPA's caseload and resources

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

Legal Aid NSW considers that there need to be changes to the following practices:

- Distribution of papers and reports prior to hearings
- Listings
- The practice of withholding certain information pursuant to s 194 of the CAS Act

It is not uncommon for PLS to receive supplementary reports for a hearing on the day of the hearing or have the existence of additional material come to light in the middle of a hearing. Legal Aid NSW considers that any papers in relation to the hearing, including reports, should be provided to the offender's legal representative no later than 1 week before a hearing. A provision similar to s 183 of the *Criminal Procedure Act 1986* which requires a prosecutor to serve a brief of evidence at least 14 days before a hearing in court, should be included in the CAS Act. Parole hearings have a significant bearing on a person's liberty and there should be safeguards to ensure that all relevant information has been provided in advance of the hearing so that the legal representative has sufficient time to take instructions on the material and prepare for the hearing. A provision such as this is likely to contribute to the efficiency of the court, reduce the need for adjournments and ensure the timely finalisation of matters.

PLS solicitors have also observed that matters are not spread evenly across the list days. At present, some days have a large number of matters listed, which puts considerable pressure on the PLS duty lawyer, while other days have considerably less matters. It would be preferable if the list could be managed to ensure a more even distribution of matters across sitting days.

Section 194 enables a copy of certain material to be withheld from an offender and their legal representative. Legal Aid NSW considers that an offender and their legal representative should be given a copy of the notice if a s 194 direction has been made and a written outline of the nature of what has been withheld. Legal Aid NSW expands on this in response to question 3.15(4).

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?

In the view of Legal Aid NSW, there is considerable room for improvement regarding parole planning. As outlined in response to question 3.3(1), reform is required to ensure that a case plan is prepared in every matter where a sentence contains a non-parole period and a head sentence which exceeds 3 years. The case plan should clearly outline any programs to be completed by the time the offender is eligible for parole.

It is also important to ensure continuity of engagement between a probation and parole officer and an offender to the greatest extent possible. In the experience of PLS solicitors, it is not uncommon for a Probation and Parole officer giving evidence at a hearing to have never met the offender and base their evidence to SPA on the content of a file or case notes. PLS has observed that when offenders are transferred to a different centre their Probation and Parole officer will often change.

Legal Aid NSW considers that it is in the interests of the community that the person informing SPA about the offender, preparing the parole report and making recommendations has met and has knowledge of the offender. The CAS Act should require the probation and parole officer giving evidence at a SPA hearing to have first-hand knowledge of the offender.

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?

Legal Aid NSW does not consider that any changes need to be made regarding victims' involvement in SPA's decision making process.

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

As outlined in response to question 3.5, Legal Aid NSW considers that notice should be given to an offender and their legal representative if information has been withheld pursuant to s194 of CAS, including any material from or on behalf of victims.

Question 3.8: Role of the Serious Offenders Review Council

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

Legal Aid NSW considers that the separate parole decision making process for serious offenders should be retained. In the experience of PLS, SORC provides detailed and useful reports for the consideration of SPA. However, Legal Aid NSW does not support SORC effectively having a 'veto' power in relation to serious offenders and their applications for parole. Legal Aid NSW considers that SORC's report to SPA should be limited to making a recommendation. At present, if SORC does not consider that 'it is appropriate for the offender to be considered for release on parole',[17] SPA is not able to grant parole except in exceptional circumstances. Previously, if SORC recommended against parole and SPA formed an intention to release to parole, SPA was required to notify SORC and give SORC an opportunity to respond. The Solicitor in Charge of PLS observed that SORC was comfortable with SPA's decision in all but one matter that PLS was involved in under this regime. This provision still remains in the legislation. Legal Aid NSW supports the repeal of s135(3) of CAS and a return to the system outlined in s152 of CAS.

In practice, SORC's recommendations are likely to carry significant weight. However, removing this high, 'exceptional circumstances,' hurdle would give the SPA more discretion in appropriate circumstances.

[17] *Crimes (Administration of Sentences) Act 1999* (NSW) 135(3)

(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?

Legal Aid NSW considers that a representative from SORC should attend review hearings for serious offenders, either in person or on the phone. This was previously the practice, and PLS found that it worked well. The SORC representative was able to provide SPA with up to date information about particular offenders as well as when SORC would be sitting next so that the offender could be considered further if necessary.

Further, Legal Aid NSW considers that reports prepared by SORC should be no more than 2 months old if SPA intends to reply on them. In the experience of PLS, there are occasions where the information provided by SORC is quite dated. It is important that SPA has up to date information when making its determination. Legal Aid NSW supports a provision to this effect being included in the legislation.

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?

Legal Aid NSW considers that the same test should be applied to all offenders.

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?

Legal Aid NSW supports the alternative approach proposed in the question paper 'to restrict the Commissioner's power to disregard SORC's recommendation about the security classification of a serious offender' and to limit the Commissioner's discretion 'to cases where he or she is privy to extra information not available to SORC.'[18]

Further, Legal Aid NSW considers that a case plan should address programs that a serious offender is expected to complete in custody and should set out a timetable for how the offender will complete the programs before the expiration of their non-parole period.

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?

PLS solicitors have observed a tendency for the Commissioner and the State to indicate belatedly that they intend to make written submissions, and for matters to be adjourned to enable this to occur. Legal Aid NSW considers that the Commissioner and the State should be required to give notice of their intention to make submissions in a matter 14 days before it is listed for a review hearing and should be required to serve the submissions on the offender's legal representative 7 days before a hearing. If the submissions have not been filed by the Commissioner or the State in keeping with this timeframe, the matter should be able to proceed and a further adjournment should only be allowed in exceptional circumstances.

[18] NSW Law Reform Commission, *Parole,* Discussion Paper 3 (2013) 3.94

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)?

In the view of Legal Aid NSW, no change is required to provide for an interaction between parole decision making and the provisions of the *Crimes (High Risk Offenders) Act 2006* (NSW). Whether or not an application will be made under that Act is an irrelevant consideration for SPA. SPA is obliged to determine if it is in the public interest for the offender to be released to parole before their sentence expires. In practice, SPA will most likely refuse parole in cases where there might be an application because parole will not be recommended by Probation and Parole and/or SORC.

Question 3.13: the definition of "serious offender"

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

Legal Aid NSW considers that the current definition of "serious offender" is appropriate and should not be changed.

Question 3.14: Parole in exceptional circumstances

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

Legal Aid NSW considers that s160 of the CAS Act is an important provision. However, a more formal, transparent procedure outlining how applications are to be made and considered by SPA is required. Section 160 of the CAS Act sets out the ambit of SPA's power but does not set out any steps around how SPA should consider these applications. This should be set out in the CAS Act.

Similarly, a more formal and transparent process is required in relation to 'manifest injustice' applications pursuant to 137B and s143B of the CAS Act. At present, it is not clear how SPA processes and considers manifest injustice applications. In practice, it appears that SPA considers the request, adjourns the matter to get reports and lists the matter for hearing if SPA considers that this is the appropriate course. SPA then either grants parole or indicates that the manifest injustice application is declined. PLS considers that the latter decision is a refusal of parole and that, as a result, the offender is entitled to a review hearing. SPA does not agree with this interpretation of the Act, even if there is a hearing to consider the matter.

There is a need for clarification around the application process and the process if SPA forms the view that the offender's circumstances do not constitute manifest injustice. The legislation should be clarified to set out the process to be followed when a manifest justice application is made. This process should include a right to a review hearing if SPA forms the view that parole should not be granted.

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)?

Legal Aid does not consider that there should be more scope for offenders to provide input and submissions to SPA at the first stage of the decision making process. However, it would be helpful if all offenders were given a copy of their parole report so they were fully aware of the information that is feeding into and forming the basis of SPA's decision. It would also be useful if offenders could be given an information package outlining how the parole process works. This information could include information such as an overview to offenders' rights, applying for a hearing, preparing for a hearing, the hearing process, after the hearing and how to make a manifest injustice application.

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

Legal Aid NSW supports a return to the pre-2005 position regarding the availability of public review hearings. Legal Aid NSW considers that public review hearings should be made available to all offenders after a decision is made to refuse parole. Prior to the 2005 amendments, a public hearing was available for all cases. Post 2005, a hearing is given only if SPA is satisfied that a hearing is warranted.[19]

Under the current regime, there is no flexibility when parole is refused and, in all cases, there is a mandatory 12 month deferral and an offender must re-apply for parole and is not automatically re-considered for parole. A manifest injustice application can be made, although there are no supports in place to assist offenders to make these applications in custody. Under the pre 2005 system, SPA would refuse parole and set a date when parole would be considered again, for example, in 6 months. This allowed SPA to offer some guidance and gave hope and incentive to offenders.

Further, the power of SPA under s 139 and s 146 of the CAS Act to give a review hearing whether or not the offender requests one or only if requested and SPA is satisfied that a hearing is warranted, is procedurally unfair. Once an offender is given a public review hearing, they then have access to advice and assistance from PLS. However, PLS does not have the resources to engage with offenders until this point and therefore cannot, other than very superficially, assist an offender to request a hearing and put grounds why a hearing is warranted prior to this point. Also, as noted in the question paper, low literacy levels and low levels of educational attainment amongst prisoners limit their ability to advocate appropriately for themselves.

The reasons given for the 2005 amendments in the Second Reading Speech include:[20]

- the early reconsideration of a case is contrary to the original intention of Parliament

[19] *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(1)(b), s 146(1)(b)

[20] See the second reading speech to the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW): NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12102.

- the practice consumes the resources of SPA, Corrective Services and the Serious Offenders Review Council when a serious offender is involved
- the early consideration of cases may cause anguish to some victims
- the making of a submission would be a difficult exercise for many victims
- SPA has finite resources that should not be wasted on offenders who have made no attempt to address their offending behaviour

Legal Aid NSW does not consider that the early reconsideration of a case is contrary to the original intention of Parliament. The previous provisions allowed for procedural fairness and ensured that important decisions about a persons' liberty would be given a hearing, rather than decided behind closed doors. The process of reviewing an offenders' parole does require significant resources. However, keeping a person in custody for 12 months, potentially unnecessarily, requires considerably more resources. Victims have a choice whether to make a submission to the SPA. If it is too difficult, they do not have to prepare a submission. There is no presumption that an offender will serve their entire sentence, including the parole period, in custody. Victims should be provided with appropriate information and support to prepare for the parole process, including applications and re-applications for parole.

(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 to help offenders make meaningful applications to request a review hearing and put grounds why a hearing is warranted. As noted above, no assistance is provided to offenders until they are given a public review hearing as PLS does not have the resources to engage with offenders until this point. However, in the view of Legal Aid NSW, there is sufficient assistance to help offenders at review hearings. PLS and the Aboriginal Legal Service (NSW/ACT) provide a duty lawyer service to offenders at review hearings. However, as noted in response to 3.5 and 3.15(4), legal representation can be of limited assistance if papers are not provided to the legal representatives in a timely fashion and they are not aware that material that has been withheld pursuant to s 194 of the CAS Act.

There is scope to better assist an offender to understand what happens at review hearings. Offenders should be provided with a copy of all of the paperwork that is provided to their legal representative, including their parole report and any updated material, prior to a review hearing. It would also assist if offenders could be provided with general information about review hearings to help them understand the process and the factors taken into account by SPA. PLS solicitors explain the outcome of a review hearing to their client. However, it would assist clients to receive this information from a variety of sources to assist them to fully comprehend, or in some cases, accept the information.

Further, if parole is refused at the hearing or refused without a hearing, offenders should be provided with reasons for the decision, as well as a copy of the decision. At the moment, offenders receive paper work saying that parole has been refused 'for reasons stated' following a review hearing. Offenders would benefit from being provided with the reasons for the parole refusal so that they know what they need to focus on addressing to be in a better position to apply for parole on the next occasion.

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

Legal Aid considers that SPA should be required to give notice when material is withheld pursuant to s194 of the CAS Act and an outline of the nature of the material. The paperwork received from SPA prior to a review hearing should include a copy of the direction made under s194 and a written outline of the nature of what has been withheld. At present, SPA takes the view that, where s 194 of the CAS Act is applied, it is not required to notify the offender or their legal representative. This means that material, including prejudicial material, can be taken into account by SPA without the offender and their legal representative knowing about it and, therefore, having no opportunity to respond.[21] In *Dib v Parole Authority of NSW* [2009] NSWSC 575, his Honour Acting Justice Patten noted:[22]

> It is difficult to conceive that the public interest required the Authority to say absolutely nothing about the nature or quality of the material it proposed ot rely on, but, in any event, the Plaintiff was entitled to some reasons for the approach the Authority took.

The current practice of SPA does not appear to be consistent with this Supreme Court decision.

Legal Aid NSW does not support the system employed by the UK Parole Board whereby material is provided to the legal representative and they are required to withhold this information from their client. PLS lawyers consider this would compromise their ability to properly fulfil their duty to their client.

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?

As noted in response to question 3.15(3), Legal Aid NSW considers that offenders should be given formal notice of a decision and detailed reasons for a decision. This could be achieved by providing the offender with a transcript of the reasons for the decision. This would inform the offender what they need to focus on addressing to be in a better position to apply for parole on the next occasion. In the view of Legal Aid NSW, this would also enhance the transparency of the parole process and provide an important record for SPA about the matters that were in issue at the offenders' last appearance before SPA.

Legal Aid NSW also supports the publication of parole decisions on the SPA website. It may be that not every decision needs to be published. The New Zealand Parole Board publishes 'decisions of public interest' as well as a range of statistics about parole. This approach could minimise any resource implications and ensure that the resources were directed to publish decisions of particular public interest. Parole is an important jurisdiction that often attracts considerable interest from the broader community. Publishing decisions would set out a body of case law as a reference for lawyers and offenders and could give more imprimatur to the parole system as a jurisdiction.

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[21] W Hutchins and K Waters, "Parole, 'Normal Lawful Community Life', and Other Mysteries" (paper presented at Aboriginal Legal Service (NSW/ACT) Limited Western Zone Conference, 2013) 19.

[22] *Dib v Parole Authority of NSW* [2009] NSWSC 575.

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 s 155-156 of the CAS Act?

Legal Aid NSW considers that offenders should have a right of appeal from parole decisions, including the decision to revoke parole. Legal Aid NSW considers that the appeal should be by way of re-hearing before a single judge of the Supreme Court.

Sections 155 and 156 of the CAS Act are rarely, if ever, relied on as an avenue of review by Legal Aid NSW. This avenue of review is very limited as it only enables the offender to apply to a judge of the Supreme Court for a direction that the decision of SPA was made on the basis of false misleading or irrelevant information. In practice, this can be very difficult to prove and if successful, only results in the matter being referred back to SPA with a direction to reconsider the matter.[23] Legal Aid NSW will ordinarily use s 69 of the *Supreme Court Act 1970.* Again, these matters are not a merit appeal which results in a fresh decision. Rather, the Supreme Court determines whether there was an error of law and if there is, the matter is remitted back to the decision maker to be re-determined according to law. Ordinarily, these matters are complex and expensive to run.[24]

Given the importance of parole and the potential impact on a person's liberty, Legal Aid NSW considers that offenders should have a right of appeal rather than a limited right of review as is currently the case.

Legal Aid NSW considers that there is significant value in having a higher court guide and correct the decisions of SPA in appropriate circumstances. This would enhance the transparency of the parole decision making process. Two matters which highlight the importance of this oversight are *Escho v Parole Board [2006] NSWSC 304* and *Jonathon Davison v Commissioner for Corrective Services & Ors [2011] NSWSC 699*.

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?

As outlined in the preliminary consultation, Legal Aid NSW considers that the 12 month rule should be repealed. Legal Aid NSW strongly supports a return to the pre-2005 provisions. This system ensured that there were no barriers for offenders wishing to apply for parole as offenders were automatically reconsidered for parole. Simply replacing the 12 month rule with a shorter fixed 'rule' would perpetuate the current inflexible system.

The current system limits the discretion of SPA. An offender may not be in a strong position to apply for parole at a certain point in time because they have yet to complete a program or if they are still in the process of finalising their post-release plans, for example. However, they may be in a much stronger position in, for example, six months when they have completed the program and secured a placement in a residential rehabilitation program or arranged suitable

[23] W Hutchins, "Update on Parole & the State Parole Authority" (paper presented at Legal Aid NSW Criminal Law Conference 2012) 11

[24] W Hutchins, "Update on Parole & the State Parole Authority" (paper presented at Legal Aid NSW Criminal Law Conference 2012) 11

accommodation. Under the 12 month rule, subject to the uncertainty of a manifest injustice application, SPA's hands are tied and there is no scope to fix a future date for reconsideration within the following 12 months.

The pre-2005 system gave offenders a clear incentive to address outstanding issues in relation to their parole application in anticipation that they may be able to achieve parole before the expiration of their full term. It allowed SPA to offer some guidance to offenders on what they needed to focus on in the short term to be in a better position to obtain parole on the next occasion.

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

Legal Aid NSW does not have any concerns with the current requirement to apply for parole reconsideration.

3.19: Drug Court as a parole decision maker

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

Legal Aid NSW considers that the current system is working well and does not have any concerns with the Drug Court acting as the decision making authority in parole matters concerning its Compulsory Drug Treatment Correctional Centre (CDTCC) participants. The Drug Court judge receives comprehensive fortnightly reports for Stage 2 participants (after they have completed three months of Stage 2) and monthly reports for stage 3 participants. This means that the Court is fully appraised of the participant's progress and performance on the program prior to their application for parole. Legal Aid NSW considers that the Drug Court is the most appropriate parole decision maker for these matters because of the longstanding and thorough monitoring of the matters by the Drug Court.