



**Probation and Parole Officers' Association of  
NSW Inc**

**PO Box 1327**

**PARRAMATTA NSW 2124**

**[www.ppoansw.com.au](http://www.ppoansw.com.au)**

**PROBATION AND PAROLE OFFICERS' ASSOCIATION  
SUBMISSION ON PAROLE**

**QUESTION PAPER 5  
BREACH AND REVOCATION**

The Probation and Parole Officers' Association of NSW (referred to in this document as 'the Association') welcomes the opportunity to make a submission in response to the NSW Law Reform Commission's Parole Review Questions Paper 5. The submission begins with some introductory comments before addressing the nominated questions in the papers.

**INTRODUCTORY COMMENTS**

Probation and Parole Officers in NSW, now known as Community Corrections Officers to more accurately reflect the scope of their duties, are responsible for the supervision of offenders subject to a variety of community-based correctional orders. Additionally they provide advice to sentencing and releasing authorities, both in terms of offenders' suitability for community-based orders and in respect of their compliance with the conditions of liberty.

The NSW legislation governing the duties of Community Corrections Officers primarily concerns the Crimes (Sentencing Procedures) Act and the Crimes (Administration of Sentences) Act. Of particular relevance to Question Paper 5 are the responsibilities regarding breach of parole.

The following comments view the issues raised in the Question Paper from the perspective of the practitioner. These comments do not purport to represent Corrective Services NSW (CSNSW), although a copy of this submission will be provided to the relevant Assistant Commissioner.

The comments are referenced to the relevant section of the Question Paper.

## Question Paper 5

### Question 5.1

**(1) What level of discretion should Community Corrections have to manage breaches of parole (or certain types of breaches) without reporting them to SPA?**

The briefing paper articulates the dimension of this question very well. CSNSW policy presently allows no such discretion, unlike the management of other orders. There are many 'breaches', such as missed appointments, changes of employment and changes of address, which are easily remedied through re-scheduling or explanation, and are never reported to SPA. Appointments are frequently re-scheduled for various reasons including additional hours at work, forgetting and errors. If Community Corrections duly reported **every** breach of parole conditions, the SPA workload would increase enormously.

The issue of discretion is best approached by looking at the various events that occur and deciding initially whether they constitute a breach of the conditions of the parole order and secondly the seriousness of the breach. Recognising and responding to breaches in a measured fashion is more important and far more effective than robotically maintaining the duty of reporting. Some events warrant mandatory notification:

- the parolee fails to comply with the approved post release plans without reasonable excuse
- the parolee is arrested and charged with any offence
- the parolee is convicted of a new offence
- a court imposes a full-time custodial sentence for a further offence
- a parolee is no longer in contact
- an officer considers that the parolee represents an unacceptable risk to the community, is likely to re-offend or is unable to adapt to normal community life

Failure to adhere to approved post release plans, particularly address, is a serious concern. Community corrections staff assess these plans carefully and release to parole by SPA is contingent upon them. Flagrant departure usually warrants immediate revocation, but sometimes changes are necessary because of circumstances beyond the parolee's control.

But other events warrant community corrections consideration and action in response, according to a clear policy. Events such as leaving residential drug or alcohol rehabilitation centres can be remedied by admission to another program, or possibly, in some cases, commencing urinalysis and counseling. But decamping from rehabilitation centres followed by refusal to accept alternate treatment certainly warrants revocation. In the former case, under current protocols, SPA would be notified of the breach and, provided an alternate treatment plan was being followed, merely note the situation. Instances such as this could simply be discussed and responded to, without reporting to SPA. The

community corrections response would include informing the parolee that s/he is in breach of parole conditions and issuing a warning.

Similarly, possession or use of illicit substances, usually detected through urinalysis, could be 'case managed' without reporting to SPA. The community corrections response would include informing the parolee that s/he is in breach of parole conditions and issuing a warning.

Address changes without prior approval of the supervision officer do not ordinarily warrant reporting to SPA. Some unsolicited address changes will be regarded as an important breach, but others will not be.

Similarly, employment directions might be given for various reasons and, in some cases, could constitute an important breach of parole conditions, but others might not be.

Community Corrections Officers do not make these decisions in isolation. Case management of each parolee is subject to review by a Unit Leader or Manager, who has generally undertaken specific training around case management reviews, in the pursuit of state-wide consistency of practice.

It is important that Community Corrections staff make a determination of whether a certain act or omission constitutes a breach at all. For instance, standard conditions require parolees to report to the supervising officer as directed, however, a failure occasioned by such contingencies as transport difficulties or being required to work additional hours, would not ordinarily be considered a breach.

CSNSW has recently undergone a major re-structure, with unplanned outcomes including a significant loss of experience and the appointment of staff to supervisory positions for which they have yet to be trained. In that climate, the devolution of discretion to the organisation may present a risk. Clearly the legislation cannot be drafted to accommodate the vagaries prevailing in an organisation at any given time, however it needs to be sufficiently robust to operate independently of operational capacity.

Another feature which merits consideration in this regard is that Community Corrections Officers are not always privy to *all* of the material upon which the State Parole Authority (SPA) relies in making its decision. Moreover, what constitutes an important or 'material' breach will vary from case to case. For example, an unplanned change of accommodation without prior approval is unavoidable if the parolee is evicted for reasons beyond his/her control - unless the parolee may be considered to have orchestrated such action for his or her own purpose. Such variation cannot possibly be addressed in the legislation without making it so unwieldy as to be impractical.

The maintenance of roles with SPA as the decision-maker and Community Corrections reporting on compliance is recommended. Although SPA generally adopts the recommendations of the supervising officer, counter-signed by the senior officer, it is not always the case and variance occurs in both directions.

Perhaps the more salient point raised in the Question Paper is the number of warnings issued by SPA. The Question Paper explores this feature in paragraph 5.9 and those following. In practice, warning letters may be issued in response to further offending, failures to report, unflagged change of address, decamping from drug and alcohol rehabilitation centres, positive urine testing results, or many other circumstances, which, on balance, do not ordinarily suggest that parole should be revoked.

It is conceivable that certain breaches of parole conditions, other than those nominated above, could be determined by community corrections staff and result in a warning letter issued. The Association supports this possibility, because it merely changes the issuer of the warning, rather than removing the requirement to respond to every breach. However, it would have workload implications for SPA and Community Corrections and there are some questionable or controversial aspects.

The present arrangements clearly separate the functions of order administration and decisions on breaches between community corrections and SPA, respectively. To permit community corrections to issue warnings in relation to breaches of conditions does blur the distinction and separation of functions. SPA might argue that its resources should be deployed on more substantial matters, but there are advantages in its workload having broad rather than narrow scope.

SPA members often express the view that use of illicit drugs needs to be case managed, rather than simply reported as a failure to comply. This Association concurs with that sentiment and argues that any breach of parole conditions must be responded to, but only important or 'material' breaches reported to SPA. Alternatively, a triage method is proposed, such that breaches of a minor nature can be dealt with by a SPA delegate, rather than a full meeting.

In any event, the power to revoke parole should remain with SPA and, for rare and extraordinary circumstances, the Commissioner for Corrective Services.

**(2) What formal framework could there be to filter breaches before they are reported to SPA?**

As noted above, the Association argues that all breaches require a response, but only a limited instances warrant mandatory reporting to SPA. SPA's main functions are to grant and revoke parole. Consequently, minor breaches of parole conditions, where SPA would not contemplate revocation should be dealt with by community corrections in the manner outlined above.

It is also feasible that breach notifications be subject to triage within the SPA secretariat, by a suitably qualified officer, such as a SPA member. Legislation could provide for assessment of individual breach reports and referral thereafter to either SPA constituted as a board, or, in less serious matters, to a board member, preferably a member of the panel which originally granted parole and thus has prior knowledge of the case, or alternatively, one of the community corrections members of the board, who are full-time staff. It is conceivable that they could exercise delegated authority to decide that some breaches result in a

warning letter or no action taken. Alternatively, their recommendations for such action could be endorsed by the judicial member, or otherwise.

**(3) What lower level responses should be available to SPA? What lower level responses should be included in the CAS Act?**

A number of lower level responses are presently used to warn and manage parolees. Community Corrections Officers can and do issue oral or written directions formally, such that lack of compliance with the direction amounts to a breach of the parole order. Community Corrections Officers can and do warn and admonish parolees about lack of compliance with parole conditions. They can and do issue letters pertaining to non-compliance. SPA can issue warning letters, or convey its concerns through letters.

There is a risk that legislation which is heavily prescriptive becomes impractical and causes more difficulties than may be anticipated. On the other hand, lack of prescription promotes other problems. The Question Paper presents no information concerning the frequency or incidence of challenges to revocation and experience suggests this is not a major issue.

Encoding warnings in statute is a rather moot point. Legislation typically prescribes, defines or limits powers and procedures. Warnings are not so much the exercise of a power as the discretion to not exercise that power.

**Question 5.2**

**(1) Should there be any changes to the way SPA deals with non-re-offending breaches?**

As indicated in the Association's submissions regarding Question 5.1, non re-offending breaches could be dealt with by a delegate and/or judicial member, rather than the full board meeting.

Case management of parolees is focused on the risks and needs of each individual, within the context of the safety of the community. There are material differences in every case, as with all questions of justice, where the application of the law must take into account all the circumstances of the individual. Policy requires that breach reports include a recommendation and these should be based upon the case management objectives. SPA is therefore provided with the strategies which could be applied for the individual.

SPA members have often expressed the view that they prefer to hear about non-compliance (as contrasted to re-offending) only after case management strategies to address the problems have been exhausted. This Association respects this view, but determines to hold a different position. As outlined earlier, Community Corrections have roles in administering parole and case managing parolees. They inform the courts and other statutory bodies of breaches and case management strategies. At this time they have no desire to expand and confuse their roles through delaying the notification of breaches or issuing warning letters on behalf of others.

**(2) What intermediate sanctions short of revocation should SPA have available to respond to non-reoffending breaches?**

SPA currently has the power to vary the conditions of the order so as to impose curfews, electronic monitoring, residence at drug and alcohol rehabilitation centers, etc. These are not so much sanctions as measures to promote the purposes of parole or protect community safety. The Association holds that sanctions which involve custody, albeit for short periods, should remain as a consequence of revocation.

Further, non-reoffending breaches should not immediately attract a differing range of consequences or sanctions. Failure to adhere to post-release plans or failure to report, are serious breaches nonetheless. For some offenders, failures such as these can have greater social consequences than minor offences.

The Association does not support the South Australian model whereby the parole authority can impose community service work hours as a sanction.

**(3) Should SPA be able to revoke parole for short periods as a way of dealing with non-reoffending breaches?**

The Association initially notes the established body of research which indicates that short-term incarceration promotes a number of adverse consequences and rarely produces positive outcomes. Thus it should be avoided wherever possible. The general public and other institutional interests may find such measures as popular, but, like 'shock incarceration', the literature on the its ineffectiveness is well established.

Particularly for female offenders, incarceration is most disruptive to family, home and child-care compared to other sentencing options. Stability of accommodation and employment are fundamental to reducing re-offending and return to custody for a brief period is damaging in terms of loss of these pro-social aspects.

Of course there are cases where a short term in custody provides an *hiatus* within which assessments can be conducted, referrals to rehabilitation completed or conflicts addressed and resolved. At this time, the SPA revocation reviews frequently present such cases and SPA is often persuaded to rescind revocation when obstacles to prior parole performance are removed.

The Association does not support the present limitation of the 'twelve month rule' whereby an inmate whose parole is revoked cannot be re-considered for parole release within twelve months. This is further addressed below.

**Question 5.3**

**(1) What changes should be made to improve the way SPA deals with parolees' re-offending?**

The current provisions allow for SPA to consider each case on its merit and that flexibility should remain. In simple terms, SPA has the powers to revoke parole and to vary the conditions of the parole order. Upon revocation, a commitment

warrant is authorised by the judicial member of the board. SPA can also communicate with the offender through the issue of warning letters. Revocation of parole results in a return to custody to serve the balance of the parole period. SPA determines and specifies the date the conditions were breached. This date forms the length of the balance of sentence to be served. A review of the revocation is conducted within four weeks of the parolee's return to custody. If the revocation is confirmed, the inmate cannot be considered for parole release within twelve months. This is referred to as the 'twelve month rule'. In effect, once parole is revoked, SPA has two primary options, namely to rescind revocation or confirm and re-consider in one year's time if the balance to be served exceeds twelve months. In practice, it can adjourn the review hearing to another date, provided there are grounds to do so.

The commission of an offence while subject to parole supervision presents aggravating features that make bail harder to obtain and a custodial penalty more likely. SPA has to balance a number of features in circumstances of re-arrest, particularly the granting or refusing of bail, the seriousness of the charges, response to parole otherwise, etc.

Proposals for automatic revocation upon arrest require comment. Arrest does not constitute a breach of parole conditions, nor does the laying of a charge. Parolees are afforded the presumption of innocence and due legal process. Conviction of a criminal offence does constitute a breach of parole conditions, but the seriousness of the offence, particularly when contrasted to the index offence and prior criminal history, is an important indicator as to whether parole should be revoked or not. The range of offences and the variation of parolees' circumstances is considerable. Simplistic decision rules are thus prone to broad errors.

Consistent with this, the other comment that should be made in discussing this area, is that the 'twelve month rule' has the potential to influence the revocation decision and hinders more than assists in most cases.

**(2) What provision, if any, should be made in the CAS Act to confine SPA's discretion not to revoke parole?**

No changes should be made to the CAS Act, other than the removal of the 'twelve month rule', as discussed below. As it stands, the 'twelve month rule' has the potential to influence the revocation decision, which should stand independently.

It would be tempting to posit a list of serious circumstances which would constrain SPA's discretion to not revoke parole. But such a path amounts to highly prescriptive decision-making in a varying context, the same principle that underpins mandatory sentencing. It is considered better to let the justice system consider and resolve these issues, to revoke parole only when the circumstances warrant that course of action. If anything, SPA should remain unfettered from political and media influences.

### **Question 5.4**

**(1) What further restrictions should be included in the CAS Act on selecting the revocation date?**

The effective revocation date should always relate to the date of the act or omission which constituted the breach. For various reasons, the submission of breach reports may be delayed and offenders should neither benefit nor be penalised from a lapse in adherence to this policy. Effective dates for revocation should relate to events that constitute the breach of conditions, not the timing of reports.

The existing constraint, that the revocation date selected by SPA cannot be earlier than the date of the first known breach of the parole order is a sound and secure foundation. Revocation of parole for any reason other than a breach of the parole order should not be countenanced, apart from circumstances that prompt revocation prior to release.

**(2) What changes, if any, should be made to the operation of street time?**

The Association concurs with the views of the Aboriginal Legal Service in its preliminary submission. When an offender is sentenced to imprisonment in NSW it is a matter for the Court as to the concurrency or otherwise of the new sentence. SPA does not influence that decision and the Court is aware of the impact of the sentences. Offenders held in custody interstate are not at liberty, the interstate Courts would be similarly made aware of the impact of the sentences. Therefore, any time in custody, whether sentenced or on remand, should be deducted from the balance to be served. This proposal addresses the anomaly between custody interstate and custody in NSW.

### **Question 5.5**

**Should reviews of revocation decisions only be available if SPA considers that a hearing is warranted? If so, why?**

The systematic review of rescission is one of the strengths in the NSW system. Though resource intensive, it ensures that decisions are re-examined and provides for the parolee to provide his/her account of events. Some jurisdictions interview inmates prior to granting parole release, but NSW does not, reserving appearance rights only for those cases where SPA initially forms a view not to grant release. The quoted 15% incidence of rescission demonstrates a significant need for automatic review hearings, despite the attendant workload.

From the practitioners' perspective, the procedures following rescission merit some attention, to allow reasonable time for Community Corrections to make the necessary arrangements for release. This appears to be a procedural issue not covered by the legislation.



### **Question 5.6**

**What provision should be made in the CAS Act in relation to how SPA's decision-making should interact with rehabilitative dispositions in response to fresh offending?**

As noted, SPA generally defers consideration of revocation in such cases and the Association supports this practice. It stays abreast of bail decisions and particularly bail conditions such as residence and treatment. It is worth noting that SPA and the Courts have different sets of information pertaining to an offender. In the case of fresh offending, the charge case file is limited to the current charges, a criminal history and other documents tendered. The SPA file will contain all reports pertaining to the index offence and some information pertaining to the fresh offending. Thus the Court knows less about the offending history and index offence, while SPA knows less about the fresh offending, though often police will provide considerable material.

In those cases where parole has already been revoked, the review schedule allows for early determination in regard to rescission and the Community Corrections Officer often gives evidence at review hearings, particularly in regard to the feasibility of release to rehabilitation programs.

### **Question 5.7**

**Should there be any changes to the mechanisms for appeal or judicial review of SPA's revocation decisions?**

Section 185 of the CAS Act ensures that SPA has regard to any submissions by the Commissioner for Corrective Services and the Review Council. In combination with the provisions of the Supreme Court Act, this is considered adequate. The current provisions allow the Supreme Court to correct errors, while preventing excessive political and media influence bordering on interference.

### **Question 5.8**

**What changes could be made to the manner or extent to which SPA provides reasons for its decisions in revocation matters?**

No changes are recommended. The potential damage from escalating media and public debate about decisions is of greater concern.

### **Question 5.9**

**What improvements could be made to SPA's power to suspend parole?**

Technically, the power to suspend lies with the judicial member(s) and not SPA as an executive function. No changes are recommended at this time. The

provisions are appropriately limited. The fact that these powers have not been used in at least two years suggests their removal, but they should be retained as emergency powers.

**Question 5.10**

**Should SPA use s 169 inquiries more regularly? If yes, how could this be achieved?**

S169 enquiries are specifically to determine whether a breach has occurred and what action to take. The Association concurs in principle with the proposal in 5.49, recommending the use of s 169 and limiting the use of subsequent review hearings upon revocation, thus limiting the impact upon workload and resources. In advance of determining this change to the CAS Act, it may be useful to consider the statistical evidence surrounding the outcomes of 169 inquiries and review hearings.

**Question 5.11**

**What changes should be made to improve the way that agencies in NSW share information about breaches of parole?**

The flow of information between justice agencies within NSW appears to be quite different to that in Victoria, though the complexity of breach, warrant and arrest processes provide many opportunities for inefficiency and delays. Local arrangements exist between police and community corrections in addition to electronic data exchange between justice agencies.

The custodial branch of CSNSW has electronic access to all case notes, case plans and other information pertaining to each offender so that a custodial officer can readily identify the salient issues.

**Question 5.12**

**What role could SORC have when SPA decides to revoke or rescind parole for serious offenders?**

The CSNSW officers appointed to SORC by the Commissioner could access all electronic records maintained by Community Corrections, including breach reports, to assist in briefing SORC upon return to custody of a serious offender. Alternatively, SPA secretariat could forward relevant documents to SORC for ongoing case management.

There appears to be no legislative barrier to SPA consulting SORC in relation to revocation decisions although it may add significantly to the workload of each body.

### ***Question 5.13***

#### **Should breach of parole be an offence in itself? If breach of parole were to be an offence, what should the maximum penalty be?**

The Association does not support 'penalty stacking' and agrees that creating an offence of breach of parole would amount to 'penalty stacking'. There is very little value in this. During the 1980s and 1990s, breach of community service order was an offence. The legislative review of sentencing and administration removed this provision.

While breach of parole is conduct which should be denounced, the Association is not persuaded by arguments about general or specific deterrence. Breach of parole conditions results in its own consequences and creating an offence for such actions complicates, rather than clarifies matters. The impact of determining that breach of parole is an additional offence may serve to create injustice where the sentence ultimately served is longer than the period prescribed for the original offence.

### ***Question 5.14***

#### **How should the twelve month rule as it applies after parole revocations be changed?**

As repeatedly noted earlier, the twelve month rule severely impacts upon offenders and influences SPA decisions. The introduction of a system, such as that proposed by Callinan, has just as many flaws. Under that proposed system, a person serving a 15 year sentence, who is released to parole after ten years, and after twelve months commits a further, albeit far less serious offence, would have to spend a further two years before consideration for re-parole.

The application of any formula, whether fixed term, proportion or percentage, should be avoided. SPA should recover the flexibility to consider the individual circumstances in each case. Practical considerations of whether an inmate should be released to supervision or not, or what minimum period of supervision should apply, are highly relevant to the setting of parole review dates for possible parole release. Often completion of programs

### ***Question 5.15***

#### **What changes should be made to the breach and revocation processes for ICOs and home detention?**

CSNSW has recently amended the breach and revocation procedures for ICOs, but not Home Detention. Like parole and home detention, ICO breaches are now forwarded to the State Parole Authority, rather than to an ICO Management Committee. While this aligns the processes, it also raises the question as to

whether ICOs should be administered in the same manner as custodial sentences, or by the issuing Court, since it is a community based order.

While home detention is a penalty option served in the community, a custodial sentence must be imposed for the home detention order to be made. Revocation of the home detention order results in the sentence being served in custody. Neither of these features apply to ICOs, nor can a non-parole period be made for an ICO.

An ICO can be made if the court determines that other community based penalties (fine, bond and community service order) are inadequate or not appropriate. The courts presently deal with applications to revoke bonds and community service orders. An ICO is effectively both a bond and a community service order, appointing the courts to deal with breach and revocation seems more consistent. At the present time, curfew and electronic monitoring can become conditions of the ICO, in the event of non-compliance. However, such impositions, effectively change the nature of the penalty and are therefore regarded as inconsistent with Truth in Sentencing principles. As a consequence, those provisions should be removed, in order to maintain the separation of penalties.

The NSW Law Reform Commission's Sentencing Review proposed changes to the ICO and home detention penalties and further recommendations to improve and strengthen ICOs and home detention as they presently exist. The Association favours the option of a single community detention order. It recommends that the Law Reform Commission consider that the courts should deal with breaches and revocations. But should SPA continue to exercise jurisdiction over breach and revocation, it concurs an offender should be able to apply to SPA to have the order re-instated and that SPA should have that power and the power to re-consider re-instatement at another time.

The CSNSW provision of home detention policy for dealing with various cases and severity of breach is akin to parole. It maintains a distinction between reportable breaches and non-reportable breaches. The following breaches must be reported to the State Parole Authority:

- arrest or conviction for a new offence;
- change of residence without approval;
- absconding;
- removal/disabling electronic monitoring equipment; and
- possession of firearms or offensive weapons.

Other breaches require a response, but not necessarily notification to SPA. Such breaches may include, but are not limited to:

- refusal to comply with a direction from the supervising officer;
- alcohol or drug use;
- refusal or failure to submit to alcohol or drug screening;
- refusal to admit CSNSW staff into the home;

- failure to attend a scheduled activity;
- deviation from approved activity schedule;
- failure to seek approval for or notify of a change in circumstances; and
- associating with prohibited persons.

Given that home detention is a form of custody, this regime is considered adequate and sensible. The 'notifiable' breaches relate to residence and security. It is noted that the purposes and circumstances of parole and home detention are distinct in a number of areas. A person serving home detention is either in 'home custody' or not, whereas a parolee is released from imprisonment for rehabilitative and other purposes. Hence differential criteria for breach notification are not unexpected or inconsistent.