NSW GOVERNMENT

New South Wales
Law Reform Commission

Parole
Question paper 3

Discretionary parole decision making

September 2013
www.lawreform.lawlink.nsw.gov.au

Make a submission

We seek your responses to this Question Paper for our reference on parole. To tell us your views you can send your submission by:

Post: GPO Box 5199, Sydney NSW 2001

DX: DX 1227 Sydney

Email: nsw_lrc@agd.nsw.gov.au

It would assist us if you could provide an electronic version of your submission.

If you have questions about the process please email or call (02) 8061 9334.

The closing date for submissions on Question Paper 3 is:
Friday, 1 November 2013.

Use of submissions and confidentiality

We generally publish submissions on our website and refer to them in our publications.

Please let us know if you do not want us to publish your submission, or if you want us to treat all or part of it as confidential.

We will endeavour to respect your request, but the law provides some cases where we are required or authorised to disclose information. In particular we may be required to disclose your information under the *Government Information (Public Access) Act 2009* (NSW).

In other words, we will do our best to keep your information confidential if you ask us to do so, but we cannot promise to do so, and sometimes the law or the public interest says we must disclose your information to someone else.

About the NSW Law Reform Commission

The Law Reform Commission is an independent statutory body that provides advice to the NSW Government on law reform in response to terms of reference given to us by the Attorney General. We undertake research, consult broadly, and report to the Attorney General with recommendations.

For more information about us, and our processes, see our website:

www.lawreform.lawlink.nsw.gov.au

ISBN 978-0-7347-2690-2 (electronic)

Question Paper 3:
Discretionary parole decision making

3.1 This Question Paper discusses the parole decision making of the NSW State Parole Authority (SPA). It looks at SPA's initial decision to grant or refuse parole for an offender, and the avenues for review, appeal or reconsideration of that initial decision.

Outline of NSW parole decision making process

3.2 SPA is responsible for granting or refusing parole to offenders who have reached the end of their non-parole period and are serving a head sentence of more than three years.[1] In general, offenders do not need to apply for parole, as SPA is automatically required to consider parole for all offenders shortly before the end of their non-parole periods.[2] SPA has different decision making procedures depending on whether the offender is a "serious offender" or a non-serious offender as defined in the *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act) (see definition below at 3.81).

SPA's decisions must be within framework of the sentence

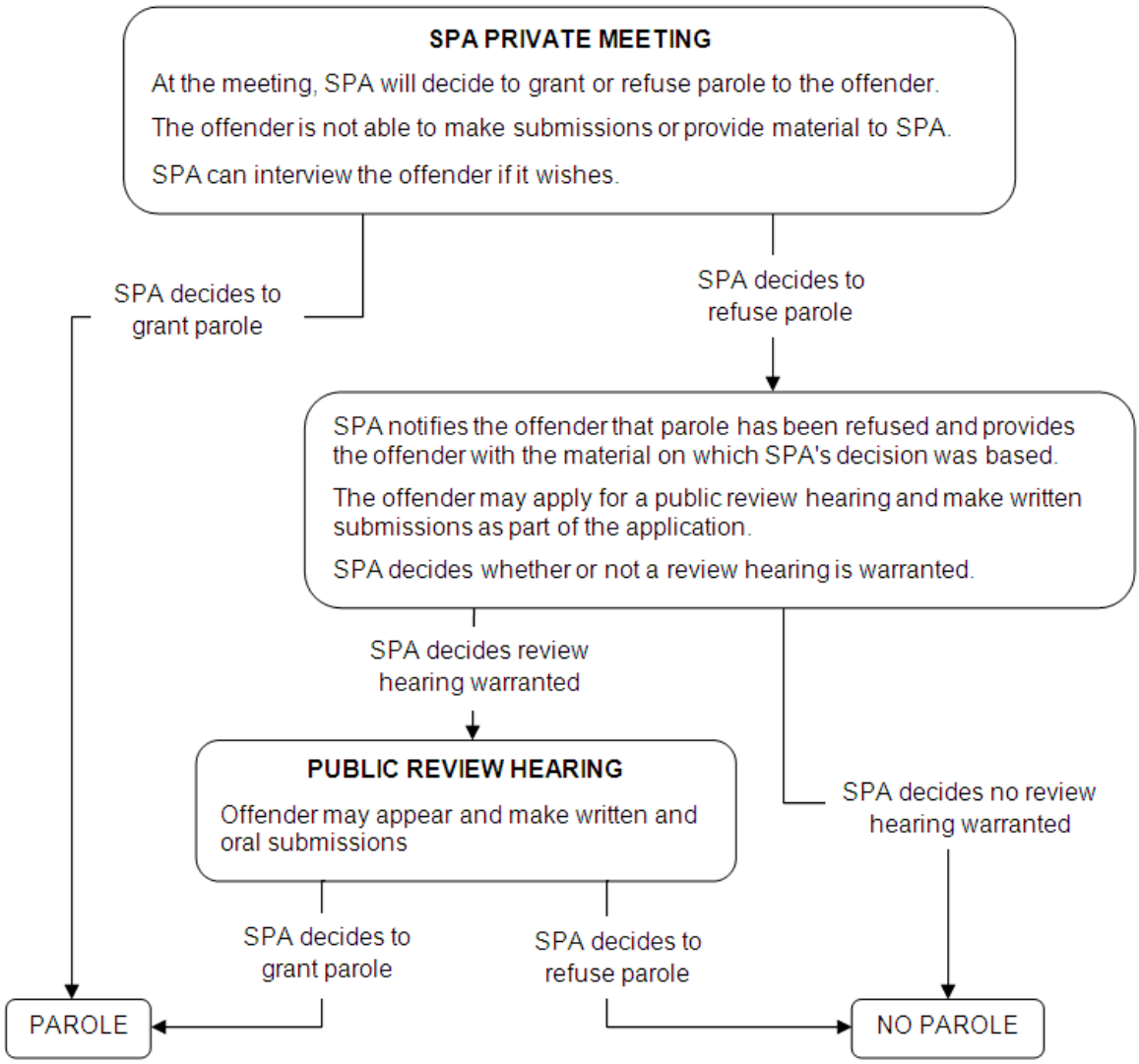
3.3 For both serious offenders and other offenders, SPA must make the parole decision in accordance with a statutory test and list of relevant factors set out in s 135 of the CAS Act. This statutory framework is quite complex and is discussed later in this Question Paper. However, it is important to keep in mind that SPA's parole decision making for any one offender must always take place within the structure of the sentence imposed by the court. For all offenders except those serving life sentences, SPA makes the parole decision within a zone of discretion between the expiry of the non-parole period and the expiry of the head sentence. If not released during this zone, the offender must be released on expiry of the head sentence.[3] Thus, by necessity, SPA's parole decision making is not focused on if an offender should be released but rather when an offender should be released.

Decision making process for non-serious offenders

3.4 Figure 3.1 outlines the decision making process for non-serious offenders.

1. Offenders serving sentences of three years or less are released automatically at the end of their non-parole period on a court-made parole order. SPA is able to revoke these court-made parole orders in some circumstances and, in these cases, will then be responsible for making the parole decision for the offender: see Question Paper 1.
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137, s 143.
3. Unless the offender is subject to a continuing detention order. For more information about continuing detention orders made under the *Crimes (High Risk Offenders) Act 2006* (NSW), see later in this paper at 3.100.

Figure 3.1: SPA's decision making process for non-serious offenders



3.5 In a private meeting, SPA will decide whether to grant the offender parole. The offender has no opportunity to make written submissions or provide material to SPA before this private meeting, although SPA may interview the offender at this stage if it wishes.[4]

3.6 If SPA determines that parole should be granted, it will make a parole order specifying when the offender is to be released and the offender must be released in accordance with the order unless it is revoked. If SPA decides that parole should be refused, it must notify the offender of this decision. The offender is then entitled to apply for the decision to be reconsidered and SPA must provide the offender with the documents and reports used to reach its decision. The offender may request that a public review hearing be held to reconsider the case, but a review hearing will only be held if SPA is satisfied that a hearing is warranted.[5]

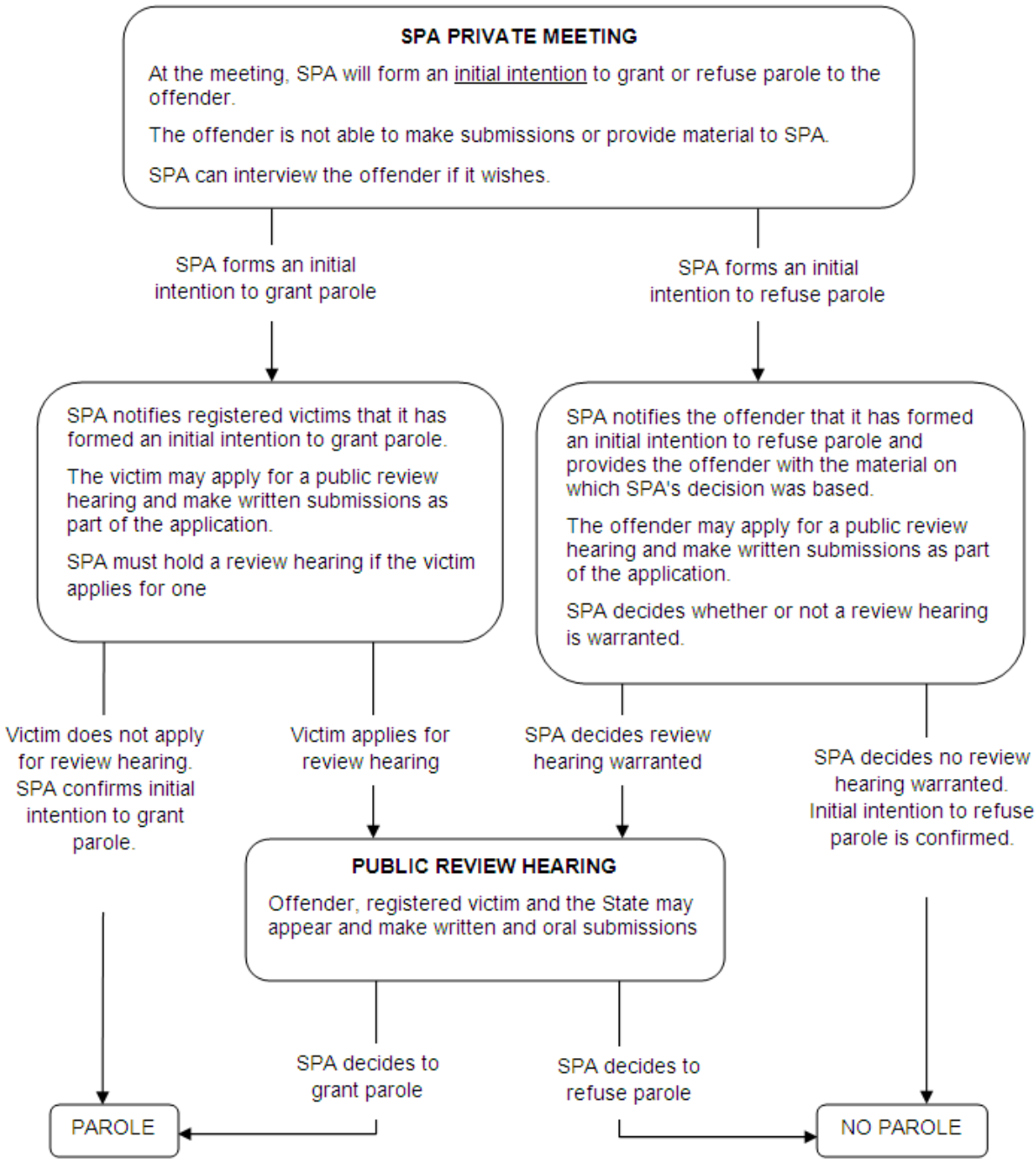
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137C.
5. *Crimes (Administration of Sentences) Act 1999* (NSW) s 139.

3.7 At any point during the process, the Commissioner for Corrective Services may make submissions to SPA concerning parole for the offender. Even if it has already reached a decision, SPA must consider the Commissioner's submissions.[6]

Decision making process for serious offenders

3.8 For serious offenders, SPA's decision making always takes place in two stages: an initial intention and then a confirmed decision (see Figure 3.2).

Figure 3.2: SPA's decision making for serious offenders



6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A.

3.9 In the private meeting, SPA will form an initial intention (but not a final decision) either to grant or refuse parole.[7] Again, the offender is not able to make submissions at this stage but SPA may interview the offender if it wishes.[8] If SPA's initial intention is to grant parole to a serious offender, it must notify any relevant victim on the Victims Register of this intention. The victim may apply for a public hearing at which SPA will review its initial intention to grant parole. The victim may also make written submissions as part of the application for a hearing. A review hearing must be held if the victim applies for one.[9]

3.10 If SPA's initial intention is to refuse parole, it must notify the serious offender of this intention and provide the offender with any documents or reports upon which the decision is based. As with non-serious offenders, the offender may apply for a public review hearing and may make written submissions as part of the application but a review hearing will only be held if SPA is satisfied that a hearing is warranted.[10]

3.11 If no public review hearing is held, SPA must confirm its initial intention either to grant or refuse parole.[11] If a review hearing is held, both the offender and any victim may make written or oral submissions.[12] The State (or the Commissioner for Corrective Services representing the State) may also make submissions at the hearing or at any other time.[13] After the review hearing, SPA will make a final decision either to grant or refuse parole.[14]

The public interest test and matters to be considered: s 135

3.12 Section 135(1) of the CAS Act stipulates that SPA "must not make a parole order for an offender unless it is satisfied on the balance of probabilities that the release of the offender is appropriate in the public interest". When considering the public interest, SPA must have regard to the 12 matters listed in s 135(2), which are:

- the need to protect the safety of the community
- the need to maintain public confidence in the administration of justice
- the nature and circumstances of the offence to which the offender's sentence relates
- any relevant comments made by the sentencing court
- the offender's criminal history

7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 144.
8. *Crimes (Administration of Sentences) Act 1999* (NSW) s 143C.
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 145.
10. *Crimes (Administration of Sentences) Act 1999* (NSW) s 146.
11. *Crimes (Administration of Sentences) Act 1999* (NSW) s 150.
12. *Crimes (Administration of Sentences) Act 1999* (NSW) s 147.
13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 153.
14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 149.

- the likelihood of the offender being able to adapt to normal lawful community life
- the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole
- any report in relation to the granting of parole to the offender that has been prepared by Community Corrections
- any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Serious Offenders Review Council (SORC), the Commissioner for Corrective Services or any other authority of the State
- if the Drug Court has refused to admit the offender to compulsory drug treatment detention because the offender may damage the compulsory drug treatment program or another offender's participation in it, the circumstances that led the Drug Court to that decision
- any guidelines that are in force, and
- any other matters SPA considers relevant.

The public interest test

3.13 We examined the overall test for parole decisions in 1996 and made a number of recommendations that were not implemented. Our view was that the concept of the "public interest" is open ended and offers limited guidance to a decision maker. We preferred a test based on "the ability of the prisoner, if released from custody, to remain law abiding, bearing in mind the protection of the public which is paramount".[15] We argued that this phrasing captured the nature of the "public interest" relevant to the parole decision and also made clear that the safety of the community should be the overriding consideration. SPA's *Operating Guidelines* give content to the public interest test in a similar way, stating that "the highest priority for the Parole Authority should be the safety of the community and the need to maintain confidence in the administration of justice".[16]

3.14 We also recommended in 1996 that the matters to be considered should be a list of types or sources of information (for example, remarks of the sentencing court) and should not include extra principles or criteria (for example, "the need to protect the safety of the community").[17] If this approach was applied to the current s 135, the result would be a single overall test that incorporated the "need to protect the safety of the community"; "the likelihood of the offender being able to adapt to normal lawful community life"; and "the need to maintain public confidence in the administration of justice"; which could be removed from s 135(2) of the CAS Act. The resulting s 135(2) would contain only the sources or types of information to which SPA would have regard in making the decision.

15. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 64.
16. State Parole Authority, *Operating Guidelines* (2012) [1.1], though note that these Operating Guidelines are not formal guidelines to which SPA must have regard under s 135(2)(j): *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223 [64].
17. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 277.

3.15 Other Australian jurisdictions vary in terms of the overall test that the parole decision maker must apply. The ACT also uses the public interest as the overriding consideration. The ACT parole decision maker may only make a parole order if it considers that parole is appropriate for the offender, having regard to the principle that the public interest is of primary importance.[18]

3.16 The NT has no statutory test, except in the case of offenders serving life imprisonment for murder. In those cases, the parole decision maker must have regard to the principle that the public interest is of primary importance.19 Tasmania also does not use a statutory test, although the legislation does contain a list of five "guiding principles" that apply to parole decisions.20 In SA and WA, the decision maker must regard the safety of the community as the paramount consideration when making parole decisions.[21]

3.17 The "highest priority" for the Queensland decision maker is the safety of the community.[22] In terms of the safety of the community, the decision maker must consider whether there is an unacceptable risk to the community if the offender is released, and whether risk to the community would be greater if the offender does not spend time on parole.[23] Victoria does not currently have a statutory test but the Victorian Adult Parole Board has adopted the Queensland test on the recommendation of the Victorian Sentencing Advisory Council.[24] The recent Callinan review of the Victorian parole system recommended that the test be specified in legislation.[25]

3.18 The Queensland test is somewhat similar to the one we proposed in 1996 except that it explicitly includes the concept of "risk". The Queensland test also includes the important balancing consideration of the risk to the community if the offender is not released on parole and is instead released without supervision at the end of the head sentence. SPA's *Operating Guidelines* recognise the importance of this consideration, stating:

> In cases where an inmate has been consistently refused parole for poor performance and/or refusal to address offending behaviour etc and is nearing the completion of the sentence, the interests of the community can sometimes be better served by releasing the inmate on parole for the balance of the sentence to monitor the offender's behaviour and provide assistance with reintegration into the community.[26]

---

18. *Crimes (Sentence Administration) Act 2005* (ACT) s 120(1).
19. *Parole of Prisoners Act* (NT) s 3GB(3).
20. *Corrections Act 1997* (Tas) s 4.
21. *Correctional Services Act 1982* (SA) s 67; *Sentence Administration Act 2003* (WA) s 5A, 5B, 20.
22. Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) guideline 1.2.
23. Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) guideline 1.3.
24. Victorian Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) rec 1; Adult Parole Board of Victoria, *Questions for Discussion with Adult Parole Board Members*, <http://media.heraldsun.com.au/crime_online_pdfs/parole_board_answers_to_herald_sun_in_full.pdf>.
25. I Callinan, *Review of the Parole System in Victoria* (2013) 91.
26. State Parole Authority, *Operating Guidelines* (2012) [2.7].

3.19 This consideration reflects the reality that SPA is (in almost all cases) not deciding if an offender should be released, but is instead deciding when an offender should be released. In some cases SPA may choose to grant parole to an offender nearing the end of the head sentence so there is at least some period of supervision where the offender's whereabouts are known and the offender's behaviour is monitored by Community Corrections. The Victorian Adult Parole Board also recognises this reality, writing:

> The Board must consider not only what is the risk of releasing a particular offender on parole, but also will the risk to the community be higher if the offender is released at the end of the full sentence…The Board must consider whether the risk will be reduced by a properly implemented parole with ongoing supervision and rehabilitation.[27]

3.20 At the same time, SPA's *Operating Guidelines* caution:

> Where an inmate is considered a high risk of reoffending, is a high risk offender (particularly sex offenders and violent offenders) and is unlikely to accept assistance and comply with supervision requirements, the interests of the community are unlikely to be served by release on parole, even for a short period of time. Release to parole in these circumstances could render the Authority liable to justified community concern.[28]

3.21 In these cases, SPA must decide which alternative is likely to result in the lowest risk: incapacitation in prison until the end of the head sentence; or release to at least some period of parole supervision and support.[29] How a parole decision maker deals with this issue is likely to depend on its views about the effectiveness of parole in reducing reoffending, a matter which is currently debated (the literature on this question is summarised in Question Paper 1). Taking the view that the evidence that parole reduces reoffending is unconvincing, the Callinan review of the Victorian parole system recommended that, for serious offenders at least, the test should require an offender to present only a "negligible" risk of further reoffending before being granted parole.[30] Later in this Question Paper at 3.90 we examine the idea of a different statutory test for serious offenders.

Question 3.1: The public interest test

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?

27. Adult Parole Board of Victoria, *Questions for Discussion with Adult Parole Board Members*, <http://media.heraldsun.com.au/crime_online_pdfs/parole_board_answers_to_herald_sun_in_full.pdf>.
28. State Parole Authority, *Operating Guidelines* (2012) [2.7].
29. Unless the offender is in the highest category of violent or sex offender, in which case their continuing detention or supervision may be possible under the *Crimes (High Risk Offenders) Act 2006* (NSW): see more on this later at 3.100.
30. I Callinan, *Review of the Parole System in Victoria* (2013) 90; see also Police Association of NSW, *Preliminary submission PPA7*, 9.

The matters that SPA must consider

3.22 SPA must have regard to the 12 matters listed in s 135(2) of the CAS Act (summarised at 3.12) when applying the public interest test. One of these matters is the report from Community Corrections, which under s 135A must address a further nine issues, including:

- an assessment of the risk of reoffending and measures to be taken to reduce the risk
- the assistance that will be provided to the offender on parole
- the offender's attitude to the offence, to rehabilitation programs and to the victim, and
- offences committed by the offender in custody and likelihood of compliance with parole conditions.[31]

3.23 Annexure A to this Question Paper summarises the matters that the parole decision maker must consider in other Australian jurisdictions. Each jurisdiction uses a fairly similar list of matters. One matter which is included in most jurisdictions but not covered in NSW in s 135(2) or s 135A is the offender's behaviour during any previous period on parole, period of leave or community-based sentence. This matter is broader than the offender's criminal history (currently covered in s 135(2)(e)) or behaviour in custody (s 135A(g)) and would specifically direct SPA's attention to previous breaches of parole conditions or the conditions of other sentences and programs. Other matters that are mentioned in other jurisdictions and in SPA's own *Operating Guidelines* but not included in the legislation are the offender's security classification and participation while in custody in work and external leave arrangements.[32]

3.24 As SPA is able to consider any matters it thinks relevant under s 135(2)(k), it is not necessary to list all such matters in the CAS Act. However, SPA's decision making may be more transparent if there is a clear and comprehensive statutory list of the matters and material which influence its decisions.

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?

SPA's decision making in practice

3.25 In this section of the Question Paper we turn from the legislative basis for SPA's decisions to discussion of SPA's decision making in practice.

31. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135A.
32. See State Parole Authority, *Operating Guidelines* (2012) [2.3].

Specific issues given weight by SPA

3.26 Some of the practical factors that are given most weight in SPA's decision making are set out in its *Operating Guidelines*:

> While there will be exceptions, in principle an inmate should achieve the following before being granted parole:
>
> (a) a recommendation for release by [Community Corrections]
>
> (b) a low level security classification indicating acceptable behaviour and progress in custody and a satisfactory record of conduct in custody, particularly with regard to violence and substance abuse
>
> (c) satisfactory completion of programs and courses aimed at reducing their offending behaviour
>
> (d) suitable post release plans which relate to their assessed requirements on parole, including family or other support, employment, suitable accommodation and access to necessary programs in the community
>
> (e) a willingness and demonstrated ability and/or a realistic prospect of compliance with the conditions of parole
>
> (f) be assessed as a low risk of committing serious offences on parole, particularly sexual or violent offences, and have good prospects of successfully completing the parole supervision period
>
> (g) in the case of serious offenders and other long term inmates, participation in the external leave programs…[33]

Completion of and access to in-custody rehabilitation programs

3.27 SPA considers the in-custody programs that are recommended for the offender in the report from Community Corrections and generally refuses parole if the offender has not satisfactorily completed these programs. SPA expects most offenders to complete at least some kind of in-custody program to ensure that the offender has made progress in addressing his or her offending behaviour.

3.28 Stakeholders have informed us that there can be problems with the availability of in-custody programs.[34] Offenders may be on a waiting list for a program for some time and may reach the end of the non-parole period without being able to get onto the program. Availability of certain in-custody programs may be dependent on the particular correctional facility where an offender is held and also the offender's security classification. There are also limited in-custody programs that are tailored for particular groups, like Aboriginal and Torres Strait Islander offenders or female offenders.

---

33. State Parole Authority, *Operating Guidelines* (2012) [2.3], though note that these Operating Guidelines are not formal guidelines to which SPA must have regard under s 135(2)(j): *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223 [64].
34. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3*; Serious Offenders Review Council, *Preliminary consultation PPAC4*; N Beddoe, *Preliminary Submission PPA1*, 5; A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 170-171.

3.29 Stakeholders interviewed by the Law and Justice Foundation of NSW in 2008 reported that offenders with cognitive or mental health impairments were often found ineligible or unable to participate in relevant programs and were consistently refused parole as a result.[35] There may be a subpopulation of offenders who have great difficulty with their eligibility for any in-custody programs, due to some combination of:

- cognitive impairment
- mental health impairments
- nature of the offence or the offending
- risk rating (low risk offenders are not eligible for many programs), or
- placement in a particular correctional facility, or particular security classification, or particular status like protective custody.

NSW Young Lawyers have also submitted that physical disability may prevent offenders from accessing some programs.[36]

3.30 It is clearly undesirable for an offender who is willing to address his or her offending behaviour to be denied parole because the offender has been unable to access a relevant in-custody program. NSW Young Lawyers has also pointed out that inability to access programs can have a cascading effect as it can prevent offenders from accessing external leave or being able to demonstrate they would be compliant with the conditions of parole.[37] SPA does take into account an offender's circumstances where the offender has been unable to access a program, although the *Operating Guidelines* state:

> An inmate's inability to access programs because of prison location, protection status, gaps in service provision or any other reason may not solely be used to justify release to parole. In such situations, parole should only be granted where relevant factors [summarised above at 3.26] are met and the Authority is of the view that having regard to Section 135 of the *Crimes (Administration of Sentences) Act 1999* it is appropriate to make a parole order.[38]

3.31 One stakeholder has also expressed reservations about the weight that SPA places on offender's completion of courses and in-custody programs, raising concerns that these programs may not be evaluated for evidence that they are effective in reducing reoffending.[39]

3.32 A comprehensive evaluation of the quality or effectiveness of the in-custody programs offered by Corrective Services NSW is beyond the scope of this reference, although it is clearly important that programs are effective and are an efficient use of resources. Corrective Services NSW runs a Program Accreditation

35. A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 132-133.
36. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PPA10*, 3.
37. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PPA10*, 3.
38. State Parole Authority, *Operating Guidelines* (2012) [2.6].
39. N Beddoe, *Preliminary submission PPA1*, 5.

Panel to ensure that rehabilitation programs are systematically assessed and reviewed for quality and effectiveness. Each program is accredited at one of four levels depending on the range of evidence available to demonstrate its effectiveness and accreditation status is regularly reviewed.[40] The *Compendium of Correctional Programs in NSW* is publicly available and lists all the programs provided by Corrective Services NSW along with their accreditation status and relevant empirical research.[41]

3.33 Wide ranging international meta-analyses have shown that in-custody programs can be effective in reducing reoffending,[42] particularly well implemented programs that use cognitive behavioural therapy techniques.[43] Question Paper 4 discusses the role of in-custody programs in preparing offenders for parole and their relationship with community based programs. As this Question Paper focuses on SPA's parole decision making, the relevant question here is whether SPA should change the way it considers completion of in-custody programs and possible entry into community based programs when making the parole decision.

Security classification

3.34 SPA considers an offender's security classification history in the context of the offender's overall behaviour in custody and uses it as one marker of the risk that the offender may pose to the community.

3.35 An offender's security classification depends on a mix of factors, including behaviour in custody, criminal history, assessed risks and length of sentence.[44] Security classification and correctional centre placement decisions are made by the Commissioner for Corrective Services.[45] During their sentences, offenders can be progressed from higher security classifications through to a lower security classification. Offenders may be regressed back to a higher security classification in response to unsatisfactory behaviour.

3.36 In preliminary consultations, we were told that some offenders serving short or medium term sentences may have difficulty achieving a low security classification.[46] Security classifications are reviewed every 12 months.[47] As there are currently nine different classification levels for male offenders and seven different classification levels for female offenders, plus additional security "designations",[48] it may take some time for an offender to achieve a low level security classification.

---

40. Corrective Services NSW, *Program Accreditation Framework* (version 5.2, 2012) 11.
41. Corrective Services NSW, *Compendium of Correctional Programs in NSW* (2012).
42. S Aos, M Miller and E Drake, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates* (Washington State Institute for Public Policy, 2006) 9.
43. M Lipsey, N Landenberger and S Wilson, "Effects of Cognitive-Behavioral Programs for Criminal Offenders" (2007) 6 *Campbell Systematic Reviews*.
44. State Parole Authority, *Members' Handbook* (2012) appendix 3.
45. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 21A.
46. State Parole Authority, *Preliminary consultation PPAC1*.
47. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 21A(2).
48. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 22-25.

3.37 Failure to achieve a low security classification may also deny offenders a chance to prepare for parole through unescorted external leave programs, as eligibility for such programs depends on achieving the lowest security classification.[49] Unescorted leave may be granted to allow an offender to undertake work, participate in education and training, have weekend leave, reside in a transitional centre or undertake a range of other activities.[50] Leave can thus be both an important test that an offender should pass before being considered ready for parole, and also an important way of preparing offenders for parole.

3.38 If parole is refused on the basis of the security classification or lack of leave participation until the expiry of the head sentence, the offender will lose the benefits of parole supervision and reintegration assistance to reduce the risk of reoffending. A less complex classification system may help more offenders access external leave in order to prepare for parole and demonstrate preparedness for parole. In preliminary consultations, Corrective Services NSW expressed interest in streamlining the current classification system.[51]

Accommodation and homelessness

3.39 Community Corrections may discover a lack of suitable post-release accommodation when preparing the pre-release report on the offender. Lack of suitable accommodation is a key factor that can cause SPA to refuse parole.[52] SPA is understandably reluctant to release an offender who has nowhere to go and who cannot be reliably supervised. SPA will also refuse parole to an offender where the only accommodation option identified by the offender is likely to increase the risk of reoffending, for example because of association with previous co-offenders.

3.40 Offenders who have lost support from friends or family will have difficulty in identifying suitable accommodation. If an offender has no accommodation, Community Corrections will attempt to arrange somewhere suitable but may not be able to confirm an appropriate placement far enough in advance.[53] Community Corrections can have particular difficulties in finding suitable accommodation in regional areas.[54]

3.41 Corrective Services NSW established Community Offender Support Program centres (COSPs) as a source of transitional housing for offenders with no other accommodation. However, stakeholders have reported that eligibility for COSP places is limited and some offenders, for example those with mental health or cognitive impairments, may not be accepted.[55] Stakeholders have also suggested that the COSP environment may be too similar to the custodial environment to be a

49. State Parole Authority, *Preliminary consultation PPAC1*.
50. *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.
51. Corrective Services NSW, *Preliminary consultation PPAC5.*
52. Or cause SPA to revoke a court-made parole order before the offender is released: see Question Paper 1.
53. A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 62.
54. A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 62.
55. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*

good option for some parolees.[56] Corrective Services NSW recently announced that most COSP centres would be closed and instead more resources would be directed at ensuring non-government organisations and community groups can provide accommodation for offenders.[57]

3.42 Some see SPA's insistence on suitable post-release accommodation as unfairly penalising those offenders with no community support.[58] However, the alternative—releasing parolees to homelessness—is difficult to accept. Corrective Services NSW's efforts to arrange services to replace the COSPs will be essential to the wider availability of suitable post-release accommodation. The problems parolees may experience with housing while on parole are discussed further in Question Paper 4.

Recommendation from Community Corrections and risk assessment

3.43 Sections 135 and 135A of the CAS Act do not specifically require the Community Corrections pre-release report to recommend for or against parole. However, Community Corrections reports do in practice contain such recommendations and SPA gives them significant weight.

3.44 When preparing the report, Community Corrections uses the results from the Level of Service Inventory-Revised (LSI-R) actuarial risk assessment tool. The LSI-R scores the offender's risk of reoffending as low, medium-low, medium, medium-high, or high based on the offender's static and dynamic risk factors. It also identifies the offender's criminogenic needs to establish the level of supervision and service provision that the offender requires and whether the offender's risk factors can be adequately addressed.[59] The LSI-R has been found to have predictive validity for the reoffending of NSW offenders[60] and Corrective Services NSW uses it for many purposes, including security classification decisions and to determine an offender's treatment needs and eligibility for programs.[61]

3.45 Although the LSI-R provides a measure of an offender's risk of reoffending, it does not differentiate between types of reoffending. Offenders likely to commit a serious violent offence may have a similar LSI-R result to offenders that are likely to commit burglary. Corrective Services NSW has recently developed the Community Impact

56. State Parole Authority, *Preliminary consultation PPAC1*; Justice Action, *Prisoners Set Free Into Prison? Community Offender Support Program (COSP) Centres* (2009).

57. Corrective Services NSW, *Media Release: New Community Support to Reduce Reoffending* (9 August 2013).

58. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*

59. See I Watkins, *The Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments*, Research Bulletin No 29 (Corrective Services NSW, 2011) 2.

60. C Hsu, P Caputi and M Byrne, "The Level of Service Inventory-Revised (LSI-R): A Useful Risk Assessment Measure for Australian Offenders" (2009) 36(7) *Criminal Justice and Behavior* 728; C Hsu, P Caputi and M Byrne, "The Level of Service Inventory-Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity and Specificity" (2011) 38(6) *Criminal Justice and Behavior* 600; See also I Watkins, *The Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments*, Research Bulletin No 29 (Corrective Services NSW, 2011).

61. Corrective Services NSW, *Fact Sheet: Offender Risk Profile,* <http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0011/442577/Fact-sheet-Risk.pdf>. See also Corrective Services NSW, *Fact Sheet: Criminogenic Needs*, <http://www.correctiveservices.nsw.gov.au/__data/assets/pdf_file/0004/442579/Fact-sheet-Needs.pdf>.

Assessment tool to complement the LSI-R by providing a measure of the consequences of the reoffending of a particular offender. The two scores can be put together to make a combined result. Corrective Services NSW is only in the initial stages of implementing the Community Impact Assessment and the tool has not yet been validated.[62]

3.46 SPA always has access to the LSI-R results in the pre-release report from Community Corrections. For certain offenders, SPA may also have access to the results of other actuarial risk assessment instruments completed by psychologists like the Static-99R, which is designed specifically for sex offenders.[63] However, SPA tends not to focus on the results from actuarial risk assessment instruments in isolation, although these results do inform Community Corrections' recommendation for or against parole. Instead, SPA formulates 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.[64]

3.47 Risk assessment in the parole context is a very difficult and complex task.[65] In international jurisdictions, parole decision makers have been criticised for paying insufficient attention to the risk of reoffending scores generated through actuarial risk assessment instruments.[66] Meta-analyses have found that actuarial risk assessment instruments predict reoffending more accurately than unstructured clinical assessments.[67] Corrections Victoria has also been criticised for relying on an unvalidated actuarial risk assessment instrument (not the LSI-R)[68] and the Callinan review recommended that the Victorian parole decision maker should be required to have regard to the results of a validated tool such as the LSI-R when making the parole decision.[69]

---

62. Information provided by Corrective Services NSW (11 September 2013); Corrective Services NSW, *Community Impact Assessment – Scoring Guide* (2013) 4.
63. Corrective Services NSW, *Compendium of Assessments* (2012) describes all the risk assessment instruments accredited for use with offenders by Corrective Services NSW's Assessment Management Committee, including the LSI-R and the Static-99R.
64. Information provided by the State Parole Authority (3 September 2013).
65. Adult Parole Board of Victoria, *Questions for Discussion with Adult Parole Board Members*, <http://media.heraldsun.com.au/crime_online_pdfs/parole_board_answers_to_herald_sun_in_full.pdf>.
66. Home Office, *The Parole System in England and Wales: Report of the Review Committee*, Cm 532 (1988) [330]; S Shute, "Parole and Risk Assessment" in N Padfield, *Who to Release? Parole, Fairness and Criminal Justice* (Willan Publishing, 2007) 21, 32-34; S Shute, "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2 *Ohio State Journal of Criminology* 315, 328-330; HM Prison Service, *Comprehensive Review of Parole and Lifer Processes* (2000) 87-88.
67. S Gottfredson and L Moriarty, "Clinical Versus Actuarial Judgements in Criminal Justice Decisions: Should One Replace the Other?" (2006) 70(2) *Federal Probation* 15; WM Grove and others, "Clinical Versus Mechanical Prediction: A Meta-Analysis" (2000) 12 *Psychological Assessment*, 19; J Ogloff and M Davis, "Assessing Risk for Violence in the Australian Context" in D Chappell and P Wilson (ed) Issues in Australian Crime and Criminal Justice (LexisNexis Butterworths, 2005) 294, 306-307; P Harris, "What Community Supervision Officers Need to Know About Actuarial Risk Assessment and Clinical Judgement" (2006) 70(2) Federal Probation 8-14.
68. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (Department of Justice Victoria, 2011) 24-26; I Callinan, *Review of the Parole System in Victoria* (2013) 76-79.
69. I Callinan, *Review of the Parole System in Victoria* (2013) 95.

3.48 As at 2012, the parole decision makers of 24 US states as well as the national US Parole Commission and the Parole Board of Canada had direct regard to a risk assessment instrument in their decision making.[70] The legislation of one US state required the parole decision maker to rely exclusively on a risk assessment instrument.[71] The UK Parole Board must currently have regard to "the indication of predicted risk as determined by a validated actuarial risk predictor".[72]

3.49 A recent evaluation of the actuarial risk assessment instrument used by the parole decision maker in Connecticut stated:

> The use of parole risk instruments that impartially assess factors that are known to be related to recidivism has created more uniformity as well as helping to reduce disparity in parole decisions. Parole risk instruments assist parole boards with making rational, consistent and unbiased decisions. Parole boards still have the discretion to consider mitigating or aggravating factors that may not be accounted for by the risk instruments themselves however risk instruments provide an objective assessment as a starting point.[73]

3.50 At the same time, some clinicians have criticised decision makers' use of the reoffending risk scores generated by actuarial risk assessment tools on the basis that the results can be misleading and create an illusion of certainty.[74] The score from these instruments predicts the likelihood of an offender reoffending based on the previously observed reoffending rates of offenders that share similar characteristics. In a sense, then, the results are not particular to the individual offender in question.[75]

3.51 Scotland is a leader in offender risk assessment. It has created an independent Risk Management Authority (RMA) that accredits specialised clinicians to assess the reoffending risks posed by the limited group of serious violent or sex offenders who are being considered by courts for an Order for Lifelong Restriction. The RMA mandates the structured professional judgement (SPJ) approach to risk assessment.[76] The approach may use the results of actuarial risk assessments but also incorporates other clinical factors. The SPJ approach is carried out according to an SPJ tool that ensures that the resulting risk assessment and synthesis of risk

---

70. A Robinson-Oost, "Evaluation as the Proper Function of the Parole Board: An Analysis of New York State's Proposed SAFE Parole Act" (2012) 16 *CUNY Law Review* 129, 144; S Ratansi and S Cox, *Assessment and Validation of Connecticut's Salient Factor Score* (Connecticut Statistical Analysis Center, 2007) 10-11.
71. A Robinson-Oost, "Evaluation as the Proper Function of the Parole Board: An Analysis of New York State's Proposed SAFE Parole Act" (2012) 16 *CUNY Law Review* 129, 144.
72. *Secretary of State's Directions to the Parole Board 2011* (UK).
73. S Ratansi and S Cox, *Assessment and Validation of Connecticut's Salient Factor Score* (Connecticut Statistical Analysis Center, 2007) 18.
74. D Cooke and C Michie, "Violence Risk Assessment: Challenging the Illusion of Certainty" in B McSherry and P Keyzer (ed) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 147.
75. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) 22-23.
76. Risk Management Authority, *Standards and Guidelines for Risk Assessment* (2006) 7; see also NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) 22-23.

factors into a risk rating is structured and transparent rather than instinctive.[77] The RMA also publishes a directory of the available actuarial and SPJ tools with information about their reliability and validity.[78]

3.52 It might be ideal for SPA to have a risk of reoffending score for every offender generated from an SPJ approach and be required to consider this score when making the parole decision. This would avoid the problems raised by detractors of the actuarial risk assessment tools but also ensure that SPA's judgements about risk are impartial, consistent and evidence-based. However, the expertise required for SPJ assessments means that they are time consuming and expensive,[79] particularly compared to the LSI-R which can be completed by Corrective Services NSW officers. Scotland only uses SPJ assessments for a small group of serious offenders.

3.53 A possible option for NSW would be for an SPJ assessment and resulting risk score to be generated and considered by SPA only for a confined category of the most serious offenders. For other offenders, SPA could give more weight to the results of the LSI-R. This may be desirable particularly because some of the factors given weight by SPA, such as security classification, are in a sense used as markers for other matters that go to risk of reoffending. The LSI-R may be a more robust and transparent measure of this risk. On the other hand, commentators have noted that the scoring of the LSI-R itself involves some exercise of clinical judgment by Community Corrections officers[80] and some studies have raised concerns about its inter-rater reliability (that is, its ability to be used and scored by different officers in a way that is consistent).[81]

3.54 It is worth noting in this discussion about risk scores that UK research has found that parole decision makers' unstructured instinctive risk assessment tends to greatly overestimate offenders' risk of reoffending compared to the risk rating produced by a validated actuarial instrument.[82] The appropriate level of caution or risk aversion for a parole decision maker is obviously up for debate. If NSW parole decision makers do rely on more cautious instinctive assessments of risk and refuse parole to low risk offenders, many offenders may be kept in custody to prevent a

77. See J Ogloff and M Davis, "Assessing Risk for Violence in the Australian Context" in D Chappell and P Wilson (ed) Issues in Australian Crime and Criminal Justice (LexisNexis Butterworths, 2005) 294, 315-317.

78. Risk Management Authority, *RATED: Risk Assessment Tools Evaluation Directory* (version 2, 2007).

79. R Darjee and K Russell, "The Assessment and Sentencing of High-Risk Offenders in Scotland" in B McSherry and P Keyzer (ed) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011) 217, 231.

80. J Byrne and A Pattavina, "Assessing the Role of Clinical and Actuarial Risk Assessment in an Evidence-Based Community Corrections System: Issues to Consider" (2006) 70(2) *Federal Probation* 64, 65-6.

81. J Austin, "How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections" (2006) 70(2) *Federal Probation* 58; J Byrne and A Pattavina, "Assessing the Role of Clinical and Actuarial Risk Assessment in an Evidence-Based Community Corrections System: Issues to Consider" (2006) 70(2) *Federal Probation* 64, 65; J Austin and others, *Reliability and Validity Study of the LSI-R Risk Assessment Instrument* (Institute on Crime, Justice and Corrections, 2003).

82. R Hood and S Shute, *The Parole System At Work: A Study of Risk Based Decision-Making*, Research Study 202 (Home Office, 2000); R Hood and others, "Sex Offenders Emerging from Long-Term Imprisonment" (2002) 42 *British Journal of Criminology* 371.

relatively small number of likely further offences.[83] This could also have negative consequences if it results in many (serious) offenders being refused parole and being released at the end of the head sentence with no supervision. On the other hand, if SPA relied entirely on the scores produced by actuarial assessments there may be more incidents of reoffending by parolees.

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?

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

(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?

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

Relevance of deportation

3.55 SPA may sometimes need to make a parole decision for an offender who is very likely to be deported upon release from custody.[84] This can be a difficult situation because there may be no parole supervision in the country to which the offender will be deported. Even if such supervision exists, SPA will have no mechanism to monitor the offender's performance on parole or to revoke the parole order in case of breach. The community may see a grant of parole in these circumstances as effectively granting the offender a discounted sentence.[85] Paroling these offenders may also reduce the deterrent of imprisonment for those who come to Australia for the sole purpose of committing an offence, such as drug importation.

3.56 When this situation arises, SPA considers each case on its merits. SPA takes into account:

(a) whether a definite decision has been made by the Department of Immigration

(b) whether the offender has adequately addressed the offending behaviour

(c) whether the offender would otherwise be released to parole in Australia if not subject to deportation

(d) the seriousness of the offence

83. R Hood and S Shute, *The Parole System At Work: A Study of Risk Based Decision-Making*, Research Study 202 (Home Office, 2000) 60-61.

84. N Beddoe, *Preliminary submission PPA1*, 6. See also *R v Shrestha* [1991] HCA 26, where the High Court found that the likelihood that an offender would be deported upon release to parole should not preclude the sentencing court from structuring the sentence as a head sentence and non-parole period rather than a fixed term.

85. See *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223.

(e) the risk to the community in the country of deportation

(f) the post release plans in the country to which the offender is to be deported

(g) the duration of the period to be served on parole

(h) the fact that supervision of the parole order is highly unlikely to occur

(i) whether or not the offender entered the country specifically to commit the crime for which he/she has been sentenced, and

(j) whether or not the court knew at the time of sentencing the offender would be deported and took this into account at the time of sentencing.[86]

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?

Caseload and resources

3.57 Some stakeholders have expressed concerns about SPA's large caseload and the limitations this places on members' ability to meaningfully assess and discuss the relevant material.[87] Limited time to consider each case may restrict SPA's ability to make decisions or parole conditions that are tailored to individual circumstances.[88] Similar concerns have also been raised about Victoria's Adult Parole Board, with commentators alleging that decision makers are only able to spend a few minutes on each case.[89]

3.58 Although each matter may only be given brief consideration in SPA's private meetings, members have extensively and thoroughly prepared beforehand. Each member receives the relevant documentation (including the pre-release report from Community Corrections, sentencing remarks, the offender's criminal history, history in custody, any treatment reports and the outcomes of any previous interactions with SPA) in advance of the meeting.[90] Unlike the situation in Victoria,[91] there do not seem to be any problems with SPA members having access to all the relevant material in advance of the meeting.

3.59 SPA members take approximately one to one and a half days to assess this material and in effect arrive at a provisional view in each case before the day of the private meeting. At the private meeting, SPA tends to discuss only those cases where members have reached different provisional views about the appropriate

86. State Parole Authority, *Operating Guidelines* (2012) [2.8].
87. N Beddoe, *Preliminary submission PPA1*, 2-3.
88. N Beddoe, *Preliminary submission PPA1*, 3.
89. I Callinan, *Review of the Parole System in Victoria* (2013) 64, 87; A Freiberg and H de Kretser, "Strong Parole System Will Benefit Community", *Herald Sun* (Melbourne) 30 July 2013; O Milman, "Victoria Parole System Under Fire After Jill Meagher Case", *The Guardian*, 19 June 2013.
90. Information provided by the State Parole Authority (3 September 2013).
91. I Callinan, *Review of the Parole System in Victoria* (2013) 94.

outcome. If a public review hearing occurs (see Figures 3.1 and 3.2), the decision from the private meeting will be tested in open court.[92]

3.60 Some have suggested that, in order to cut down the workload of parole decision makers, offenders should have to apply for parole rather than being automatically considered as is currently the case.[93] This suggestion may stem from an understanding of parole as privilege or concession to the offender, rather than as a mechanism that can be in the community interest (see Question Paper 1). In any case, the majority of SPA's caseload at both the private meetings and public review hearings comes from revocation matters, not decisions about initial grant or refusal of parole. We will discuss SPA's powers to revoke parole orders and possible ways to reduce this burden of revocation matters in Question Paper 5.

Question 3.5: SPA's caseload and resources

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

Planning for parole and assistance with parole readiness

3.61 In preliminary consultations, Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) were concerned that offenders may sometimes not be fully informed about the matters they need to address in order to be granted parole.[94] Unless offenders know that they need to complete certain programs, have organised accommodation and have progressed to a low security classification ideally having participated in external leave, they may be unprepared for the expectations of Community Corrections and SPA. Given the length of some programs, the long waiting lists and the need in some cases to be transferred to a different correctional facility (see earlier at 3.28), offenders need significant advance notice of SPA's expectations if they are to be able to ready themselves for parole by the expiry of their non-parole period. The issue is important not just in the context of an offender's eligibility for parole but also for his or her likely success in the community once released. In Question Paper 4 we will discuss further the extent to which offenders are well prepared during their time in custody to succeed on parole.

3.62 Other stakeholders have maintained that all offenders are clearly aware of SPA's expectations in terms of programs, leave and security classification. Instead, it is said that the key problem is access to the relevant programs or progression to a lower security classification (as described earlier at 3.36), mainly due to the resource constraints under which Corrective Services NSW must operate.

3.63 It seems logical for parole planning to start early in an offender's sentence. Currently, soon after a convicted offender's entry into custody, Corrective Services

92. See also State Parole Authority, *Media Statement: Five Minute Parole Consideration Claims Rejected* (22 June 2013), <http://www.paroleauthority.nsw.gov.au/publications/media-releases>.

93. I Callinan, *Review of the Parole System in Victoria* (2013) 88.

94. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*

NSW custodial officers create a case plan for the offender.[95] The case plan is reviewed at least every 12 months and contains details of the programs and services in which it is recommended that the offender participate.[96] However, an initial case plan and early reviews may not always include the activities that are relevant for later in an offender's sentence, like external leave, or recommend specific therapeutic programs that require an expert assessment before eligibility can be determined. An offender's need for these programs is determined by the Serious Offenders Assessment Unit of Corrective Services NSW in a process separate from the case plan.

3.64 Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) have suggested that there may be a disjunction between in-custody staff (and the activities that they advise an offender to do as part of the case plan) and Community Corrections (and the activities that they expect of an offender before making a recommendation for parole).[97] In practice, Community Corrections has input into the case plan process but this may not involve clearly communicating SPA's parole criteria to an offender. It also seems that the case plans are not always fully implemented in practice.

3.65 It may be desirable for a Community Corrections officer to be formally involved in an early parole readiness planning process to inform the offender about exactly what will be expected towards the end of the sentence. Such early parole planning could help to streamline the provision of in-custody programs,[98] give more lead time to finding suitable accommodation and also allow time to plan other ways that an offender, with no community support or access to external leave, can demonstrate parole readiness. Another alternative would be for SPA (with the support and advice of Community Corrections) to be involved in approving a treatment and parole readiness plan for an offender. The plan could set out clearly the programs, activities and treatments in which the offender must engage (and which must be provided to the offender) if the offender is to demonstrate suitability for parole.[99] The Victorian Adult Parole Board has reported that it often meets with offenders early in their sentences "to ensure that offenders undertake appropriate programs designed to assist them to re-enter society successfully".[100]

3.66 On the other hand, program offerings change over time and it could be difficult for Corrective Services NSW to guarantee the provision of the particular programs identified in such a plan. An offender's criminogenic needs and attitude may also change over the course of a sentence, which can affect the programs that an offender must undertake.

3.67 In North Carolina, some offenders are offered the opportunity to participate in the Mutual Agreement Parole Program. Selected offenders who agree to participate are

---

95. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 13-14. Offenders who are on remand are not subject to these clauses.
96. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 13A.
97. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*
98. Corrective Services NSW, *Preliminary consultation PPAC5*.
99. K Marslew, *Preliminary submission PPA5*.
100. Adult Parole Board of Victoria, *Questions for Discussion with Adult Parole Board Members*, <http://media.heraldsun.com.au/crime_online_pdfs/parole_board_answers_to_herald_sun_in_full.pdf>.

assessed and then a negotiated agreement is signed by the offender, the parole decision maker, a designated officer at the offender's correctional centre and the program director. The agreement sets out the actions the offender must take and the programs that he or she must complete over a set period in order to be considered for parole. In turn, the parole decision maker agrees to consider granting parole if the agreement is fulfilled. A recent evaluation of the program stated that it is "an effective management tool that encourages behavioral change, rewards appropriate behavior, evaluates an offender's readiness for release and prepares an offender for successful re-entry into society".[101] In 2012, about 10% of eligible offenders participated in the program.[102] A similar program could be developed in NSW to target offenders a few years before the expiry of their non-parole periods.

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?

Involvement of victims and victim submissions

3.68 Corrective Services NSW notifies victims of both serious and non-serious offenders who have joined the Victims Register when the offender is due to be considered for parole.[103] This allows the registered victims of all offenders to be involved in the parole decision making process by writing to SPA when the offender's parole is being considered. SPA must consider the impact on the victim when making all parole decisions.[104]

3.69 Registered victims of serious offenders can also be formally involved in the parole decision, as they will be notified if SPA forms an initial intention to grant parole to the offender. The victim is then able to make an application to SPA for a public review hearing, make written submissions and make oral submissions at the review hearing (see earlier, Figure 3.2).[105]

3.70 Amendments in 2002 gave victims of serious offenders the right to make an oral submission,[106] which had previously been at the discretion of SPA. It was thought that victims would welcome the change, as "making a personal approach can often

101. Post-Release Supervision and Parole Commission, *Report on the Status of the Mutual Agreement Parole Program* (2013) 2.
102. Post-Release Supervision and Parole Commission, *Report on the Status of the Mutual Agreement Parole Program* (2013) 3.
103. Corrective Services NSW, *Victims Register: Registration Form & Information Guide* (2010). Registered victims are also notified when changes to a serious offender's classification are being considered, or an offender is being considered for a reduction in security classification that would allow leave from the correctional centre.
104. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(2).
105. *Crimes (Administration of Sentences) Act 1999* (NSW) s 145.
106. *Crimes (Administration of Sentences) Amendment Act 2002* (NSW), commenced on 21 February 2003.

demonstrate a victim's concerns far more clearly than written submission".[107] This right had deliberately not been included in the 1996 amendments because SPA's discretion was considered valuable in balancing the competing interests of family members of victims, and for fear that it would make parole review an adversarial process.[108] We have been informed that, in practice, SPA usually grants a victim of a non-serious offender leave to make oral submissions at a review hearing if the victim wishes to do so.

3.71 In WA, Queensland, Victoria and Tasmania, a registered victim is informed when an offender is being considered for parole and can make written submissions to the parole decision maker.[109] There is no provision in these jurisdictions for victims to make oral submissions. In SA, registered victims are also notified by the parole decision maker when parole is being considered for an offender. Registered victims are able to make written submissions, to which Parole Board of SA must have regard, and are also able to make oral submissions with the agreement of the Parole Board.[110]

3.72 In the NT, victims can register and be notified when an offender is being considered for parole. In addition, when the Parole Officer is preparing a report for the parole decision maker, the Officer will attempt to contact both registered and unregistered victims of the offender in order to include in the report information about the victim's concerns.[111] In the ACT, registered victims must be notified that parole is being considered. The ACT Sentence Administration Board may also notify any non-registered victim if it chooses to do so, and any notified victim may make written submissions.[112]

3.73 The parole decision maker in Victoria has been criticised for not giving victims notice of the decision.[113] This does not seem to be a problem in NSW, as once a decision has been made, SPA will write to any victim who has made a submission informing them of the outcome.

Purpose and nature of victim submissions

3.74 Although victim submissions are a common feature of Australian parole systems, the purpose of victim submissions in the parole decision making process is not clear. A 2005 review of victim submissions by the NSW Ombudsman found that stakeholders had different ideas about the purposes of victim submissions, with some of the suggested purposes being to:

---

107. See the second reading speech to the *Crimes (Administration of Sentences) Amendment Act 2002* (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 8 May 2002, 1805.
108. See the second reading speech to the *Sentencing Amendment (Parole) Act 1996* (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 30 October 1996, 5535.
109. *Sentence Administration Act 2003* (WA) s 5A(d), 5C; WA Department of Corrective Services, *Victim Notification Register* (2010); *Corrective Services Act 2006* (Qld) s 188, 320; *Corrections Act 1986* (Vic) s 74A; *Corrections Act 1997* (Tas) s 72.
110. *Correctional Services Act 1982* (SA) s 67, 77.
111. NT Parole Board, *Victims* (23 July 2013) <http://www.paroleboard.nt.gov.au/Victims/Pages /default.aspx>.
112. *Crimes (Sentence Administration) Act 2005* (ACT) s 123-124.
113. I Callinan, *Review of the Parole System in Victoria* (2013) 82.

- emphasise to the parole decision maker the nature and seriousness of the offence
- draw attention to any fears the victim may have for his or her safety or fears about unwanted contact with the offender
- inform the victim about the offender's efforts to rehabilitate
- assist the victim to "move on"
- suggest appropriate parole conditions if the offender is released to parole to ensure the victim is protected from violence or harassment
- emphasise the ongoing impact of the offence on the victim, and
- allow the victim to express his or her feelings and have input into the parole decision.[114]

3.75 All of these matters may be legitimate purposes of victim submissions. However, the content of victim submissions may vary greatly depending on which purposes are given greatest weight. Some content is likely to focus on information that was available at the time of sentencing, like the victim's injuries, feelings and desire for retribution and punishment of the offender. Other content may go to circumstances that have arisen since sentencing, such as threatening correspondence from the offender to the victim.

3.76 It may not be appropriate for the parole decision maker to take into account some content.[115] It is generally agreed that the parole decision making process should not reopen the sentencing exercise and that questions of the "severity" or "leniency" of the period of time spent in custody cannot be relevant to the parole decision. As one preliminary submission stated:

> What is not reasonable…is to revisit punishment, community condemnation, impact on victims and the like. These matters have been dealt with on sentence, and the sentence is a "given" for parole consideration.[116]

Instead, the parole decision is focused on managing risk and reducing reoffending (see Question Paper 1). Any fears the victim may have for his or her safety would be very relevant to the parole decision but details of the ongoing impact of the offence on the victim may not be.[117]

3.77 There does not appear to be consistency across Australian jurisdictions about the purpose of victim submissions. In WA, for example, submissions may only provide the victim's opinion of the likely effect that parole of the offender would have on the victim, and any suggested conditions that should be imposed on the offender's

114. NSW Ombudsman, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and Summary Offences Amendment (Places of Detention) Act 2002,* (2005) 148-150.
115. J Caplan, "Protecting Parole Board Legitimacy in the Twenty-First Century: The Role of Victims Rights and Influences" (2012) 7 *Victims and Offenders* 53.
116. B Chesser and G Thomas, *Preliminary submission PPA6*, 2.
117. J Caplan, "Protecting Parole Board Legitimacy in the Twenty-First Century: The Role of Victims Rights and Influences" (2012) 7 *Victims and Offenders* 53.

parole order.[118] In Tasmania, victim submissions are limited to describing the initial and ongoing impact of the offence on the victim.[119] Although there are no limits on the content of victim submissions in NSW, SPA has suggested that the chief utility of victim submissions is in drawing attention to any risks to the victim's safety and ensuring that, if parole is granted, the conditions would protect the victim from violence, harassment or additional distress.[120] At the same time, the pre-prepared submission form provided to victims by staff at the Restorative Justice Unit in Corrective Services NSW (which administers the Victims Register) specifically encourages the victim to "provide your views about how the potential release of the offender on parole will affect you", which can be interpreted as a request for information about the victim's emotions and the ongoing impact of the offence on the victim.

3.78 It may be necessary to clarify the purpose and recommended content of victim submissions in NSW to ensure that they are given appropriate weight by SPA and that victims are encouraged to provide the types of information that are most relevant to SPA's decision making.[121] Some US research that focused on violent offenders has found that parole decision makers are more likely to deny parole in cases where victims make submissions compared to ones where there are no victim submissions, after controlling for other factors like offender characteristics and risk assessment scores.[122] Other US research has found that victim submissions seem to have little to no effect on parole decision making.[123]

3.79 The NZ Law Commission recommended in 2006 that, although all written submissions should be received from victims, oral submissions should be confined to circumstances where the parole decision maker feels that the "victim may be able to contribute to a risk-focused discussion about whether the prisoner should be released and, if so, how that person should be managed".[124] This restriction may go too far, as it fails to take into account other legitimate purposes of victim submissions. A better solution may be for SPA to develop clear guidelines about taking into account the different types of information provided in victim submissions.

Assistance to victims

3.80 Notified registered victims can get assistance in deciding whether to make a submission and in drafting a written submission from the Restorative Justice Unit.

118. *Sentence Administration Act 2003* (WA) s 5C(1).
119. *Corrections Act 1997* (Tas) s 72(2B)(b).
120. NSW Ombudsman, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and Summary Offences Amendment (Places of Detention) Act 2002,* (2005) 149-150.
121. Corrective Services NSW, *Preliminary consultation PPAC5*; Police Association of NSW, *Preliminary submission PPA7*, 6.
122. WH Parsonage, FP Bernat and J Helfgott, "Victim Impact Testimony and Pennsylvania's Parole Decision Making Process: A Pilot Study" (1994) 6 *Criminal Justice Policy Review* 187; K Morgan and B Smith, "Victims, Punishment and Parole: The Effect of Victim Participation on Parole Hearings" (2005) 4(2) *Criminology and Public Policy* 333.
123. J Caplan, "Parole Release Decisions: Impact of Victim Input on a Representative Sample of Inmates" (2010) 38 Journal of Criminal Justice 291; J Caplan, "Parole Release Decisions: Impact of Positive and Negative Victim and Nonvictim Input on a Representative Sample of Parole-Eligible Inmates" (2010) 25(2) *Violence and Victims* 224.
124. NZ Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 61.

Victims can also be supported in making written and oral submissions by victim support organisations. The NSW Ombudsman found in 2005 that there was adequate assistance provided to victims throughout their involvement in the parole decision making process.[125] It is not clear, however, whether victims need more assistance in other areas like understanding the parole process or the role of the Victims Register.

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?

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

Serious offenders

3.81 Serious offenders are subject to different parole decision making processes than other offenders serving head sentences of three years or more. For serious offenders, SPA forms an initial intention at a private meeting to grant or refuse parole. This initial intention is then tested at a public review hearing in certain circumstances (see Figure 3.2, above). Serious offenders are those:

- serving sentences of life imprisonment
- convicted of murder
- serving a non-parole period of 12 years or more, or serving several cumulative non-parole periods adding to 12 years or more
- declared to be serious offenders by the sentencing court, SPA or the Commissioner for Corrective Services, or
- classified at the highest level of security classification at any point during their time in custody.[126]

Role of the Serious Offenders Review Council

3.82 When formulating an initial intention and making a final decision for serious offenders, SPA must have regard to a report on the offender prepared by the Serious Offenders Review Council (SORC). SORC is an independent body that has several functions in relation to serious offenders, including providing recommendations about their security classification, their placement in particular correctional centres and their release on parole.[127] SORC also:

125. NSW Ombudsman, *Review of the Crimes (Administration of Sentences) Amendment Act 2002 and Summary Offences Amendment (Places of Detention) Act 2002,* (2005) 153-154.

126. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1); *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 22(3), 23(3).

127. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197.

- reviews segregated and protective custody directions,128
- provides advice to the Commissioner about the designation and management of high security, extreme high security and extreme high risk restricted inmates,129
- provides advice to the Commissioner about escapee security classifications, and
- provides advice to the Commissioner about the progression of public interest inmates to security classifications where they may access external leave.[130]

Question Paper 2 addresses the membership and expertise of SORC in more detail.

3.83 SORC prepares a report to advise SPA whether it is appropriate for a serious offender to be considered for release on parole. In formulating the advice, SORC will consider:

- the public interest
- the offender's security classification history
- the offender's conduct in custody
- the offender's participation in and success in rehabilitation programs
- any relevant reports, and
- any other relevant matter.[131]

3.84 When considering the public interest, the CAS Act specifies that SORC must take into account:

(a) the protection of the public, which is to be paramount

(b) the nature and circumstances of the offence

(c) the reasons and recommendations of the sentencing court

(d) the criminal history and family background of the offender

(e) the time the offender has served in custody and the time the offender has yet to serve in custody

(f) the offender's conduct while in custody, including the offender's conduct during previous imprisonment, if applicable

(g) the attitude of the offender

(h) the position of and consequences to any victim of the offender, including the victim's family

128. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(d).
129. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 320.
130. Serious Offenders Review Council, *Annual Report 2011* (2012).
131. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(2A).

> (i) the need to maintain public confidence in the administration of criminal justice
>
> (j) the need to reassure the community that serious offenders are in secure custody as long as it is appropriate
>
> (k) the rehabilitation of the offender and the re-entry of the offender into the community as a law-abiding citizen
>
> (l) the availability to the offender of family, departmental and other support, and
>
> (m) such other factors as are prescribed by the regulations.[132]

3.85 If SORC advises that it is not appropriate to consider parole for the serious offender, SPA may only grant parole in "exceptional circumstances".[133] We have been informed that SPA has never granted parole against SORC's advice since this limitation was introduced in 2004.[134] This means that SORC effectively performs a gatekeeper function for the parole of a serious offender.

3.86 There is noticeable similarity between the matters and principles that SORC must consider and those that SPA must consider when making the parole decision (see Annexure B). This results in a level of duplication for serious offenders, particularly in cases where SORC advises that it is appropriate for SPA to consider parole for an offender. NSW is the only Australian jurisdiction to have a second, separate independent body for serious offenders set up by legislation in addition to the parole decision maker, although other jurisdictions may have informal advisory bodies that perform similar functions. In preliminary consultations, some stakeholders suggested that SORC's role be limited to an advisory one and that its effective power to veto parole for a serious offender be removed.[135]

3.87 On the other hand, SORC's other functions give it special knowledge of serious offenders by the time they reach the end of their non-parole periods. Members of SORC will have personally interviewed a serious offender several times over a period of years to inform its recommendations about security classification and placement. SORC will be familiar with the offender's case plan, criminal history, personal background and rehabilitation efforts.[136] In effect, SORC performs a case management role for these offenders and so may be best placed to reach a considered decision about their risks and readiness for parole. If this is the case, a possible alternative model would be to allocate all decision making responsibility to SORC for serious offenders and confine SPA's decision making to non-serious offenders.[137] If this option was adopted, there would need to be provision for public and victim involvement in SORC's decision making as there is for SPA.

---

132. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(3).
133. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(3).
134. Serious Offenders Review Council, *Preliminary consultation PPAC4*.
135. Legal Aid NSW and the Aboriginal Legal Services (NSW/ACT), *Preliminary consultation PPAC3*.
136. Serious Offenders Review Council, *Preliminary consultation PPAC4*. The SORC Assessment Committee will also have explained the security classification process and SPA's parole expectations in terms of security classification, external leave and programs to the offender.
137. Serious Offenders Review Council, *Preliminary consultation PPAC4*.

3.88 There may be cases where SORC advises that it is appropriate to consider parole for an offender but SPA nevertheless refuses parole. SPA may be influenced by different considerations than SORC, particularly because SPA receives a detailed report on the offender from Community Corrections which is not routinely provided to SORC.[138] SORC has informed us that it would prefer to be better synchronised with Community Corrections.[139]

3.89 Although it does involve some duplication, "double" consideration of both SORC and SPA for serious offenders may be an appropriate decision making model, as these offenders are likely to be the ones posing the highest risk to the community.

Question 3.8: Role of the Serious Offenders Review Council

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

(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?

A different test for serious offenders?

3.90 The Callinan review of the parole system in Victoria recommended that a stricter test should be applied to parole decision making for serious offenders. The report proposed that, while non-serious offenders could be paroled as long as they did not pose an "unacceptable risk" to the community, serious offenders should only be granted parole if the risk they pose to the community is "negligible".[140] This would create a higher threshold for serious offenders before they will be granted parole.

3.91 It is not clear whether *any* serious offender could ever be said to pose only a "negligible" risk to the community. The value of such a test seems to be premised on the belief that the community will benefit more from the continued incapacitation of serious offenders in prison than from any anti-criminogenic effect of parole supervision. Even though the evidence that parole can reduce reoffending is limited, it may be undesirable to introduce a test that would result in most serious offenders being released only at the end of their sentences without any monitoring, supervision or support in the community. As one preliminary submission stated:

> It is difficult to see how a release after a sentence without the possibility of parole protects the community. In general terms, the more serious the initial offence, the longer the sentence, and consequently the more need for supervision in the community.[141]

3.92 In NSW, serious offenders are effectively already scrutinised more carefully through the double consideration of SPA and SORC. However, it may be possible to design

138. Serious Offenders Review Council, *Preliminary consultation PPAC4*.

139. Serious Offenders Review Council, *Preliminary consultation PPAC4*.

140. I Callinan, *Review of the Parole System in Victoria* (2013) 65, 90-91. Though note that this proposal was aimed at a group of offenders ("potentially dangerous parolees") that would not be the same group as is captured in NSW under the term "serious offender". The intended definition of "potentially dangerous parolees" is not clear from the text.

141. B Chesser and G Thomas, *Preliminary submission PPA7*, 3.

a different test that SPA must apply when making the parole decision for serious offenders that would give greater emphasis to community safety but not go as far as the Victorian proposal.

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?

Security classification and leave for serious offenders

3.93 As well as being important in itself (see 3.26 above at (b)), a serious offender's security classification also controls his or her access to external leave programs. When making the parole decision for serious offenders, SPA is significantly influenced in practice by the extent that the offender has participated in unescorted external leave programs (see 3.26 above at (g)). SORC may recommend changes to serious offenders' security classifications but the Commissioner makes the final decision and is not required to give reasons for deciding not to implement SORC's recommendation. We have been informed that this can become problematic if SORC is convinced of the parole readiness (or at least, leave readiness) of an offender but has been unable to secure a lower security classification for that offender.[142] SORC may then feel unable to recommend that it is appropriate for SPA to consider the offender for release on parole if the person has not participated in any unescorted leave. Alternatively, SPA may feel constrained to refuse parole to a serious offender with no leave experience, despite SORC's recommendation that the offender should have been eligible for unescorted leave and is now ready for parole.

3.94 Because SPA and SORC place considerable importance on external leave and the Commissioner controls access to leave, the Commissioner is able to affect the parole decision for serious offenders.[143] This may be desirable in some circumstances, for example if the Commissioner has access to police intelligence about the offender not available to SORC or SPA. However, the Commissioner's role may be seen as undermining the decision making responsibility of the two bodies—SORC and SPA—specially created through the CAS Act. An alternative approach would be to restrict the Commissioner's power to disregard SORC's recommendation about the security classification of a serious offender. The Commissioner's discretion could be limited to cases where he or she is privy to extra information not available to SORC.

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?

142. State Parole Authority, *Preliminary consultation PPAC1*.

143. This issue has also been raised in other jurisdictions: see, for eg, *Butler v Queensland Community Corrections Board* [2001] QCA 323.

Submissions by the Commissioner and the State

3.95 The CAS Act permits the State to make submissions to SPA concerning the parole of a serious offender at any time during the parole decision making process. The power of the State to make submissions can be exercised by the Commissioner for Corrective Services or any other authority of the State.[144] The Commissioner can also make submissions to SPA in his or her own right about the parole of a non-serious offender, or the parole of an offender in exceptional circumstances (see later at 3.109).[145]

3.96 In practice, SPA informs the Commissioner shortly before it plans to consider the parole of a serious offender either at a private meeting or a public hearing.[146] SPA also provides copies of the documents that it will consider. The Serious Sex Offender and Violent Offender Review Group within Corrective Services NSW will review this information, relevant case notes and any intelligence and make a recommendation to the Commissioner about whether a submission should be made. Corrective Services NSW has advised us that the Commissioner's decision to make a submission will be influenced by a range of matters, including suitability of post-release plans, an offender's progression through the system of security classification, custodial behaviour, program participation and whether suitable referrals to services or programs are in place.[147] SPA also informs the Attorney General when serious offenders are being considered for parole and the Attorney General may occasionally instruct the Commissioner about making submissions in particular cases. Otherwise, the decision to make submissions rests with the Commissioner.[148]

3.97 In preliminary consultations, some stakeholders were concerned that when the Commissioner makes submissions to SPA, the submissions can contradict the advice provided to SPA by Community Corrections, a division of the Commissioner's own organisation.[149] They suggested that it would be more appropriate for this power to be reserved entirely to the State in the case of serious offenders.

3.98 Corrective Services NSW advised us that submissions contradicting the recommendation from Community Corrections may sometimes be made due to internal communication problems, or because the Commissioner has access to information not available to Community Corrections. The Commissioner may access intelligence through the Corrections Intelligence Group, which has memoranda of understanding with law enforcement agencies including the NSW Police Force.[150]

3.99 Contradictory submissions may help to safeguard transparency by ensuring that the arguments for or against parole are fully ventilated. Corrective Services NSW plans

144. *Crimes (Administration of Sentences) Act 1999* (NSW) s 153.
145. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A, 160AA.
146. Information provided by the State Parole Authority (3 September 2013).
147. Information provided by Corrective Services NSW (11 September 2013).
148. Information provided by Corrective Services NSW (11 September 2013).
149. State Parole Authority, *Preliminary consultation PPAC2*; Serious Offenders Review Council, *Preliminary consultation PPAC4*.
150. Information provided by Corrective Services NSW (11 September 2013).

to work on minimising contradictory submissions, but on the whole report that the power to make submissions is a valuable way to ensure that robust decisions are made.[151]

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?

Crimes (High Risk Offenders) Act 2006 (NSW)

3.100 As we discussed at the beginning of this Question Paper, SPA's parole decision making takes place within the framework of the sentence imposed by the court. SPA cannot release an offender on parole before the expiry of the non-parole period. It makes the parole decision within the zone of discretion between the expiry of the non-parole period and the expiry of the head sentence. If not released during this zone, the offender must be released on expiry of the head sentence. As noted at 3.19, SPA might sometimes choose the release of an offender on parole as a better alternative than release of that offender with no supervision on expiry of the head sentence.

3.101 The only exception to the rule that an offender will be released with no supervision at the end of the head sentence arises through the provisions of the *Crimes (High Risk Offenders) Act 2006* (NSW) (the HRO Act). Under the HRO Act, the State (through the Attorney General) may apply to the Supreme Court for a continuing detention order or extended supervision order for a high risk violent or sex offender.[152] An application can only be made during the last six months of the offender's sentence.[153] The Supreme Court will make an order if it is satisfied that there is a high degree of probability that the offender poses an unacceptable risk to the safety of the community.[154] Continuing detention orders and extended supervision orders can be made for up to five years and offenders can be subject to multiple consecutive orders.[155] Continuing orders under the HRO Act are not often imposed.

3.102 The interface between parole decisions and applications for continuing orders may need to be improved. Whether a high risk offender is likely to be placed on a continuing order may be extremely relevant to SPA's assessment of the risks of not releasing that offender to at least some period of parole supervision.

3.103 One possible improvement might be bringing forward the date at which the State may apply for a continuing order to, for example, 18 months before the expiry of the offender's head sentence instead of the current six months. Alternatively, there

151. Corrective Services NSW, *Preliminary consultation PPAC5*.

152. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5H, 13A. Offenders must have committed a violent offence that resulted in the death or grievous bodily harm of a person recklessly or with intent, or committed a serious sex offence.

153. *Crimes (High Risk Offenders) Act 2006* (NSW) s 6, 13C(3).

154. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B, 5E.

155. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10, 18.

could be a mechanism to require the State to formally indicate to SPA or SORC at an earlier stage that an application under the HRO Act will be made.

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)?

The definition of "serious offender"

3.104 Another way that the relationship between parole decision making and the HRO Act could be improved would be to align the definitions of "serious offender" and "high risk offender", so that those offenders managed by SORC are those offenders who may be eligible for an order under the HRO Act. This could streamline the process for identifying relevant offenders and linking parole decision making with decisions about applications under the HRO Act, perhaps by SORC having the responsibility for recommending offenders for HRO Act applications (currently a separate committee has this responsibility).

3.105 The definition of "serious offender" (that is, those offenders subject to SORC management) is outlined above at 3.81. It mainly focuses on sentence length, capturing those offenders who have been sentenced to life imprisonment or sentenced to a non-parole period of 12 years or more. However, the definition is flexible as the sentencing court, SPA or the Commissioner for Corrective Services can at any time declare an offender to be a "serious offender" and so move that person into SORC management.

3.106 By contrast, the definition of "high risk offender" for the purposes of the HRO Act is entirely offence based. High risk offenders potentially subject to the HRO Act are those offenders who have been sentenced for:

- an offence involving the offender intentionally or recklessly causing the death of or grievous bodily harm to the victim
- a serious sex offence against an adult or child with a maximum penalty of more than seven years imprisonment, or
- a serious sex offence against an adult committed in circumstances of aggravation.[156]

3.107 There may be a significant subgroup of offenders that meet the current definition of "high risk offender" but are not "serious offenders" unless they are classified as such by the sentencing court, SPA or the Commissioner. There may also be offenders who are currently "serious offenders" but not "high risk offenders" under the HRO Act, such as offenders sentenced to lengthy terms for armed robbery or serious drug trafficking offences.

156. *Crimes (High Risk Offenders) Act 2006* (NSW) 5, 5A.

3.108 Sentence length and offence type may both be imprecise markers of risk. If the true purpose of SORC is to provide an extra layer of case management and consideration for those offenders most likely to pose a high risk to community safety, it may be beneficial for the definition of "serious offender" to be amended to capture all those who are assessed as high risk under the LSI-R. Alternatively, it could be changed to include the offenders who meet the definition of "high risk offender" for the purposes of the HRO Act. Another option would be to lower the sentence length threshold in the definition of "serious offender" to include some offenders serving non-parole periods of less than 12 years, as offenders serving non-parole periods of eight or 10 years must still have committed serious offences.

Question 3.13: The definition of "serious offender"

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

Parole in exceptional circumstances

3.109 In addition to the normal parole processes for serious and non-serious offenders outlined earlier in this Question Paper, SPA has the power to release an offender on parole in exceptional circumstances. The public interest test does not apply to these parole decisions but the offender must be dying or there must be "exceptional extenuating circumstances" before the power can be used. Offenders serving life sentences are not eligible for release through this mechanism.[157] We recommended in 1996 that the power should be expanded to apply to offenders serving life sentences but this recommendation was not adopted.[158]

3.110 SPA has always made only limited use of the power to order parole in exceptional circumstances. SPA's annual reports show that no more than five offenders were released under this power each year between 2005 and 2011.[159]

3.111 Although SPA's power to parole offenders in exceptional circumstances has been interpreted narrowly and rarely used, there are other mechanisms available where an offender has a particular need and is not eligible for regular parole. For example, the Commissioner for Corrective Services may order that an offender be transferred to a hospital to receive medical treatment.[160] The Commissioner may also grant a leave permit to allow an offender to attend an event of special family significance or visit a family member suffering serious illness or disability.[161] In addition, the prerogative of mercy may operate to release an offender (including an offender subject to a life sentence) from custody in exceptional circumstances.[162]

157. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160.
158. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 67.
159. State Parole Authority, *Annual Report 2005-2011*.
160. *Crimes (Administration of Sentences) Act 1999* (NSW) s 24.
161. *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.
162. *Crimes (Administration of Sentences) Act 1999* (NSW) s 270.

Question 3.14: Parole in exceptional circumstances

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

Procedural fairness, transparency, review and appeal

3.112 In general, the NSW parole decision making process is considered one of the most robust and transparent in Australia.[163] Few other jurisdictions make any provision for public hearings or reasons for decisions. NSW is also unusual in that the rules of natural justice and procedural fairness apply to SPA's exercise of its powers under the CAS Act.[164] In several other Australian jurisdictions, the legislation specifies that the rules of natural justice do not apply to parole decision making.[165]

3.113 However, there were some areas of concern raised by stakeholders in preliminary submissions and consultations and our terms of reference explicitly ask us to have regard to the "need to provide for a process of fair, robust and independent decision making".

3.114 Some commentators have argued that the process and procedures for parole decision making should be as fair as possible, as this will lead both to better decisions and greater faith in the decision making process.[166] Naylor and Schmidt argue that a fair parole decision making process involves three key features:

- the offender being able to access the material on which the decision is based
- the provision of reasons, and
- a right of review or appeal.[167]

3.115 The Victorian Sentencing Advisory Council identified an expanded list of five key components of a procedurally fair parole decision making process:

- the offender being able to access the material on which the decision is based
- the offender being able to make submissions and challenge the decision maker's information
- access to legal representation for offenders
- the provision of reasons, and

163. R Barson, "The Case for a Fair Parole Hearing" (2011) 2 *Balance* 50; State Parole Authority, *Preliminary consultation PPAC1*; State Parole Authority, *Preliminary consultation PPAC2*; Corrective Services NSW, *Preliminary consultation PPAC5.*
164. *Baba v Parole Board of NSW* (1986) 5 NSWLR 338.
165. Corrections Act 1986 (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115; *Parole of Prisoners Act* (NT) s 3HA.
166. B Naylor and J Schmidt, "Do Prisoners Have a Right to Fairness Before the Parole Board?" (2010) 32 *Sydney Law Review* 437.
167. B Naylor and J Schmidt, "Do Prisoners Have a Right to Fairness Before the Parole Board?" (2010) 32 *Sydney Law Review* 437, 438.

- a right of review or appeal.[168]

We will consider these five components in the context of SPA's parole decision making in the next sections of this Question Paper.

3.116 Other commentators have contended that, as parole decision making is an inherently executive (rather than judicial) function, any consideration of "fairness" is unnecessary and the principles of natural justice or procedural fairness should not apply.[169] Although parole decision making is certainly an exercise of executive power, it seems difficult to argue that this removes any need to consider the fairness of the decision making process. At the least, it seems to us that all the current aspects of SPA's decision making that support fairness and transparency should be retained, unless these can be shown to be causing significant problems.

Offender involvement, access to material and access to merits review

Involvement in the first stage of decision making

3.117 Offenders do not need to apply for an initial consideration of parole. Instead, SPA is required to consider all offenders for parole shortly before the expiry of the non-parole period. One flow-on effect of this system of automatic consideration is that offenders are not able to contribute to the formulation of SPA's decision or initial intention unless SPA decides to interview them. One preliminary submission that we received asked:

> Is it appropriate that decisions concerning the liberty or continuation of incarceration of some of our citizens be conducted in settings in which those inmates cannot appear, cannot challenge evidence given by, for example, [Community Corrections] officers, cannot give explanations of matters referred to in reports considered, cannot be represented?[170]

3.118 Other Australian jurisdictions vary in terms of the involvement permitted for offenders when the parole decision maker first considers their case. In the ACT, offenders must apply for parole and they are able to make written submissions with the application or at a later time before the ACT Sentence Administration Board first considers their case.[171] In SA, offenders must apply for parole and can make submissions in writing.[172]

3.119 In Queensland and Tasmania, there is no provision for an offender to make written submissions but the offender can, with leave, appear before the parole decision maker to make representations at the time of the parole decision.[173] The NT is similar to NSW as there is no provision for the offender to make written submissions but the parole decision maker may interview the offender if it chooses to do so.[174]

168. Victorian Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) ch 4.
169. I Callinan, *Review of the Parole System in Victoria* (2013) 46, 69-70, 91.
170. N Beddoe, *Preliminary submission PPA1*, 2.
171. *Crimes (Sentence Administration) Act 2005* (ACT) s 121, 125.
172. *Correctional Services Act 1982* (SA) s 67, 77(2)(c).
173. *Corrective Services Act 2006* (Qld) s 180, 189; *Corrections Act 1997* (Tas) s 72.
174. *Parole of Prisoners Act* (NT) s 3G.

WA makes no provision for the offender to make submissions before the parole decision maker considers the case.

3.120 By way of contrast, UK offenders are provided with all the material which will be presented to the parole decision maker before their cases are considered. This gives them the opportunity to make specific written submissions to the parole decision maker in response to the material that will be relied on.[175] At the same time, commentary on this system has noted that offenders may need significant assistance to understand the material and make relevant and persuasive submissions.[176]

Access to merits review through review hearings

3.121 If SPA decides to refuse parole, or forms an initial intention to refuse parole, offenders are given access to the material on which SPA relied and are able to make written submissions as part of an application for a review hearing. A review hearing reopens the decision in full and reconsiders it on its merits. However, a review hearing is only held if SPA considers that a hearing is warranted.

3.122 Until 2005, all offenders were entitled to a review hearing if SPA decided to refuse parole.[177] This automatic right to a hearing was removed from the legislation on the basis that SPA is well placed to determine whether a review hearing is necessary and that "SPA has finite resources that should not be wasted on offenders who have made no attempt to address their offending behaviour".[178] The second reading speech to the amending legislation acknowledged that it may be difficult for some offenders to make a persuasive written application for a review hearing but promised that offenders would have access to application assistance.[179]

3.123 In providing an avenue for merits review through a public review hearing in at least some circumstances, the NSW parole decision making process does better on a key criterion for procedural fairness than most other Australian jurisdictions.[180] Some stakeholders suggested in our preliminary consultations that reverting to the pre-2005 position where all offenders were entitled to a review hearing would improve the procedural fairness of the NSW parole decision making process.[181]

---

175. *Parole Board Rules 2011* (UK) SI 2011/2947, r 7.
176. R Hood and S Shute, *The Parole System At Work: A Study of Risk Based Decision Making*, Research Study 202 (Home Office, 2000) 15.
177. The *Crimes (Administration of Sentences) Act 1999* (NSW) was amended by the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW), commenced October 2005.
178. 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.
179. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12102.
180. In the ACT, all offenders have a right to a public review hearing after a parole refusal: *Crimes (Sentence Administration) Act 2005* (ACT) s 126. In Queensland, all offenders have a right to a review of parole refusal but there is no public hearing: *Corrective Services Act 2006* (Qld) s 196. In WA, offenders have a right to a review but only on the grounds that there was an error of law or important information was not considered: *Sentence Administration Act 2003* (WA) s 115A. There is no statutory provision for a merits review in Tasmania, Victoria, SA or the NT.
181. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3*.

They pointed out that the review hearing also allows a parole refused offender to hear personally from SPA about what they must do before parole will be granted.[182]

3.124 The Callinan review of the Victorian parole system rejected any need for review hearings, on the basis that they are:

- unnecessary
- expensive, and
- exercises in futility in many cases,

and that arguments for their availability:

- mischaracterise the executive function of parole decision making as a judicial function, and
- assume a "right" to parole that does not exist.[183]

3.125 It is certainly true that review hearings are resource intensive. They may also be futile in some cases, for example where SORC has recommended that it is not appropriate for the offender to be considered for parole. It is for this type of case that it can be important for SPA to exercise its current power to refuse a review hearing.

3.126 Overall, unless there are significant problems with the cost or conduct of review hearings, it seems undesirable to retreat from a feature of NSW's parole system that sets it apart in terms of procedural fairness and transparency, though it may not be desirable to revert to the pre-2005 position. Review hearings are also an important mechanism for victims to contribute to parole decision making.

3.127 Given the prevalence of low educational attainment and illiteracy among offenders, access to legal representation may be crucial in order to allow an offender the full benefits of a review hearing. Legal Aid NSW's specialist Prisoners Legal Service provides a duty solicitor for inmates at all public review hearings who request representation[184] and the Aboriginal Legal Service can also represent offenders. Alternatively, offenders can choose to be represented by a private legal practitioner.

3.128 A 2008 report of the Law and Justice Foundation of NSW set out in detail the difficulties that inmates may have in contacting and maintaining contact with their legal representation.[185] In addition, offenders are generally not able to access legal assistance in preparing an application to SPA for a review hearing due to the resource constraints on the Prisoners Legal Service and the Aboriginal Legal Service, although offenders may be assisted by a Welfare Officer at their correctional centre. Offenders may need more explanation of proceedings and a focus on plain English in the conduct of the review hearings, even though SPA is

182. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3*.

183. I Callinan, *Review of the Parole System in Victoria* (2013) 46.

184. 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) 22.

185. A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 101-103.

already required to conduct its hearings with as little formality and technicality as possible.[186]

Access to material on which the decision is based

3.129 We were informed in preliminary consultations that there may also be an issue with another criterion for a fair decision making process, as offenders are not always provided with all the material on which SPA has based its decision.[187] Under s 194 of the CAS Act, SPA may withhold documents from the offender if it considers that providing the documents may:

- adversely affect the discipline or security of a correctional centre
- endanger any person
- jeopardise an investigation
- prejudice the public interest, or
- adversely affect the supervision of any offender on parole.[188]

However, SPA must use its powers under this section in a way that is, as far as possible, consistent with the principles of procedural fairness. This may involve briefly indicating the nature of the withheld material.[189]

3.130 Some stakeholders have raised concerns that the requirement for procedural fairness is not always followed.[190] SPA has told us that it must exercise particular care in cases where there are written victim submissions. SPA commonly uses s 194 of the CAS Act to withhold written victim submissions from the offender and may not inform the offender that material has been withheld, as the victim may not wish the offender to know that a victim submission has been made or even that there is an interested victim. In these cases, SPA has understandably decided to withhold submissions under s 194 and not notify the offender.

3.131 The UK Parole Board has a similar power to withhold documents from offenders but is generally required to disclose such documents to the offender's legal representative. The legal representative is required not to disclose the information to the offender.[191] It may be possible for SPA to adopt a similar practice for victim submissions, although offenders generally only obtain legal representation if a public review hearing is held.

186. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 11(4)(c).
187. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*
188. *Crimes (Administration of Sentences) Act 1999* (NSW) s 194(1).
189. *Dib v Parole Authority of NSW* [2009] NSWSC 575.
190. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*
191. *Parole Board Rules 2011* (UK) SI 2011/2947, r 8.

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)?

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

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

Reasons for decisions

3.132 Under the CAS Act, SPA is required to record in its minutes the reasons for any decision to grant or refuse parole. These reasons must be based on the matters that SPA is required to take into account under s 135 and must be provided to the Attorney General, the Commissioner and Community Corrections on request.[192]

3.133 There is no legislative requirement for SPA to notify an offender of the reasons for its decision or to make its reasons public. In practice, however, where SPA has decided to refuse parole, it provides the offender with a brief summary of its reasons. In cases where a victim has made submissions, SPA will advise the victim in writing of the decision and this correspondence may include brief reasons for the decision to grant or refuse parole.

3.134 Where a decision to grant or refuse parole is made after a public review hearing and the case has elicited considerable community interest and/or submissions from the State, SPA may prepare extensive detailed reasons for its decision and publish these on its website. SPA has published detailed reasons of this kind on only five occasions since 2008.[193]

3.135 Some other Australian parole decision makers are subject to a legislative requirement to give an offender written reasons for refusing parole.[194] In SA, the legislation also specifies that the reasons must include details of "any matters that might assist the prisoner in making a further application for parole".[195] The reasons provided to offenders by the SA parole decision maker are quite lengthy and are reportedly almost akin to the reasons for decision handed down by courts.[196]

192. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C.

193. State Parole Authority, *Parole Determinations*, <http://www.paroleauthority.nsw.gov.au/publications/media-releases/parole-determinations>.

194. *Corrective Services Act 2006* (Qld) s 193(5)(a); *Corrections Act 1997* (Tas) s 72(8); *Correctional Services Act 1982* (SA) s 67(9).

195. *Correctional Services Act 1982* (SA) s 67(9)(b).

196. Victorian Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) 71.

3.136 The parole decision makers in Tasmania and WA publish detailed reasons online in all cases where parole was granted.[197] The reasons are de-identified in some cases and are commonly one half page to two pages long. Like SPA, the NZ Parole Board publishes detailed reasons on its website for cases of public interest. The NZ Parole Board publishes reasons in a greater proportion of cases compared to SPA, with detailed reasons published in 39 cases in 2011, 18 cases in 2012 and 9 cases in the first half of 2013.[198]

3.137 Some have argued that the provision of reasons is unnecessary, increases the workload of the parole decision maker and increases the likelihood of applications for review.[199] Although the provision of reasons does have resource implications, it is an important mechanism for ensuring that decisions are consistent and robust. Reasons are currently provided to offenders in NSW and in at least three other Australian parole systems, seemingly without an undue burden.

3.138 SPA has reported that the parole system and parole decision making seem to be only poorly understood by the general public.[200] A key way for SPA to increase transparency and public confidence in its decisions would be to publish reasons for a greater range of decisions online, particularly the decisions which result in release on parole, as in WA and Tasmania. Although this may have significant resource implications beyond the resources already required to give reasons to offenders, such decisions are of significant community interest. NSW Young Lawyers has submitted that publication of reasons in a greater number of cases would also assist practitioners and self-represented offenders to make more relevant submissions to SPA.[201]

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?

Appeals and judicial review

3.139 There is no true appeal available from SPA decisions.[202] However, under s 155-156 of the CAS Act, offenders and the State can apply to the Supreme Court on the basis that SPA relied on material that was false, misleading or irrelevant. The Supreme Court does not review the decision but instead considers the material on which the decision was based. If it finds that SPA relied on material that was false,

197. Parole Board of Tasmania, *Parole Board Decisions*, <http://www.justice.tas.gov.au/paroleboard/decisions>; Prisoners Review Board of WA, *Prisoners Review Board Decisions*, <http://www.prisonersreviewboard.wa.gov.au/D/decisions.aspx?uid=4250-2542-6323-4438>.

198. NZ Parole Board, *Decisions of Public Interest* <http://www.paroleboard.govt.nz/decisions-statistics-and-publications/decisions-of-public-interest.html>.

199. I Callinan, *Review of the Parole System in Victoria* (2013) 74.

200. State Parole Authority, *Preliminary consultation PPAC1*; see also similar reports in Victoria from the Adult Parole Board of Victoria, *Questions for Discussion with Adult Parole Board Members*, <http://media.heraldsun.com.au/ crime_online_pdfs/parole_board_answers_to_herald_sun_in_full.pdf>.

201. NSW Young Lawyers Criminal Law Committee, *Preliminary submission PPA10*, 3.

202. *McPherson v Offenders Review Board* (1991) 23 NSWLR 61, [69C].

misleading or irrelevant, the Supreme Court can give SPA a "direction" to that effect which may lead SPA to reconsider its decision.

3.140 The Supreme Court has repeatedly emphasised that its role under these provisions is extremely limited.[203] It cannot examine the merits of SPA's decision, the weight SPA gave to various factors, SPA's findings or whether the decision was made lawfully in accordance with the CAS Act.[204] It can only examine whether SPA's decision was based on information that was false, misleading or irrelevant.

3.141 However, at common law in NSW and under s 69 of the *Supreme Court Act 1970* (NSW), decisions of SPA are also subject to judicial review by the Supreme Court on the grounds that there was a jurisdictional error, a denial of natural justice, fraud, or an error of law on the face of the record.[205] The decisions of SORC about its recommendations to SPA and the decisions of the Commissioner about security classification are also reviewable by the Supreme Court on the same grounds.[206]

3.142 In 1996, we recommended that the limited statutory right to apply to the Supreme Court be abolished on the basis that, as it is narrowly drawn and interpreted strictly, it lacks any real utility.[207] Practitioners from Legal Aid NSW have also commented that the statutory right "is relatively useless as it is difficult to prove and it does not mean an inmate will be released". At the same time, Legal Aid practitioners have found the process of applying to the Supreme Court for common law judicial review "complex, expensive and difficult to win".[208]

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?

Reconsideration after refusal of parole

3.143 Although all offenders are automatically considered for parole when they first become eligible, if SPA makes a final decision to refuse parole at the expiry of the non-parole period, the offender must actually apply for parole if he or she wants to be reconsidered for parole in future. The offender must wait 12 months from being

203. *R v Naudi* [2003] NSWCCA 160, [19]; *Lee v State Parole Authority of NSW* [2006] NSWSC 1225; *Sutton v NSW State Parole Authority* [2011] NSWSC 935, [6]-[9].
204. *LMS v Parole Board* (1999) 110 A Crim R 172, [8]; *Radford v Parole Board* [2002] NSWCCA 70, [36]; *McCallum v Parole Board of NSW* [2003] NSWCCA 294, [33]; *DCU v State Parole Authority of NSW* [2006] NSWSC 526, [5]-[7].
205. *Esho v Parole Board Authority of NSW* [2006] NSWSC 304, [30]; see *Attorney General of NSW v Chiew Seng Liew* [2012] NSWSC 1223.
206. See, eg, *Davison v Commissioner for Corrective Services* [2011] NSWSC 699.
207. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) 287.
208. 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) 20.

first refused parole before applying to have parole reconsidered for the first time, and may only reapply thereafter at 12 month intervals (the "12 month rule").[209]

3.144 SPA may only reconsider parole before the 12 month mark if such consideration is necessary to avoid "manifest injustice". Circumstances that constitute manifest injustice are defined as being:

- where it becomes apparent that parole was refused on the basis of false, misleading or irrelevant information
- where parole has been refused because (for reasons beyond the offender's control) the offender has not satisfactorily completed a program or period of external leave and the offender subsequently completes the program or leave
- where parole was refused because the offender did not have access to suitable accommodation or community health services and such accommodation or services subsequently become available
- where parole was refused because (for reasons beyond the offender's control) information, material or reports reasonably required by SPA were not available and these subsequently become available, or
- where parole was refused because the offender was charged with an offence but this charge is subsequently withdrawn or dismissed.[210]

With manifest injustice defined in this way, early parole reconsideration will mainly be an "updating" of SPA's previous decision, rather than a truly fresh reconsideration of the offender's case on the basis of injustice.

3.145 The 12 month rule was introduced in 2005 because early and repeated reconsideration of parole consumes the resources of SPA, Corrective Services NSW and SORC (if the offender is a serious offender), and "may also cause anguish for some victims".[211] However, stakeholders have expressed dissatisfaction with the 12 month rule and the way it applies to offenders refused parole.[212] In particular, Legal Aid and the Aboriginal Legal Service noted that the rule means that offenders serving shorter sentences may have a single chance of being released on parole.[213] If SPA refuses parole at the expiry of the non-parole period, any offender with less than 12 months head sentence remaining will be released on expiry of the head sentence without any period of parole supervision. Offenders with more time remaining may be released on parole but with such a short parole period they are not able to receive the support and supervision they need.[214] In both situations, the

209. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137A, 143A.
210. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 233(1).
211. See the second reading speech to the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12100.
212. State Parole Authority, *Preliminary consultation PPAC1*; State Parole Authority, *Preliminary consultation PPAC2*; Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3*; Corrective Services NSW, *Preliminary consultation PPAC5*; NSW Bar Association, *Preliminary submission PPA4*, 1. And a submission to our now concluded sentencing reference: Legal Aid NSW, *Preliminary submission PSE18*, 8.
213. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*
214. NSW Bar Association, *Preliminary submission PPA4*, 1.

operation of the 12 month rule may have greatly reduced any incentive that the offender has to spend the remainder of his or her time in custody constructively.[215]

3.146 SPA has informed us that the 12 month rule is not necessary from its perspective to conserve resources.[216] As an alternative to the 12 month rule, there could be a shorter set period after which parole may be reconsidered.[217] Another option would be for SPA to specify a reconsideration date.[218] SPA could announce a reconsideration date when it notifies an offender that parole has been refused. Leaving the reconsideration date to SPA's discretion would also allow SPA to take into account the interests of any victim. SPA has also suggested the alternative of retaining the 12 month rule but removing the definition of "manifest injustice", giving SPA wider scope to reconsider an offender's case.[219]

3.147 Before 2005, offenders were also automatically reconsidered for parole without having to apply to SPA. The change to reconsideration by application was intended to reduce the number of cases considered by SPA "where all parties to the proceedings know that, given the circumstances, the offender will not be granted parole".[220] It was also intended to reflect the principle that "parole is a privilege, not a right".[221] However, the change raises the issue of whether offenders receive adequate assistance to prepare persuasive applications when they wish to apply for reconsideration. The Prisoners Legal Service and the Aboriginal Legal Service are generally not able to provide assistance with these applications.

3.148 The 12 month rule also applies to reconsideration of parole after an offender has been returned to custody because parole was revoked. The 12 month rule in this context is discussed further in Question Paper 5, which examines SPA's dealings with breaches and revocations of parole.

Question 3.18: Reconsideration after refusal of parole

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

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

215. Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT), *Preliminary consultation PPAC3.*

216. State Parole Authority, *Preliminary consultation PPAC1*.

217. Suggested in a submission to our now concluded sentencing reference: Legal Aid NSW, *Preliminary submission PSE18*, 8.

218. State Parole Authority, *Preliminary consultation PPAC2.*

219. State Parole Authority, *Preliminary consultation PPAC1*.

220. See the second reading speech to the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12101.

221. See the second reading speech to the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW): NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12099.

The Drug Court as parole decision maker

3.149 Offenders may be referred to the Drug Court of NSW after being sentenced to imprisonment in a Local or District Court.[222] In these situations, the Drug Court may make a Compulsory Drug Treatment Order (CDTO), and the offender will serve the sentence in compulsory drug treatment detention.[223] The Drug Court is the parole decision maker for offenders in compulsory drug treatment detention.[224] The Drug Court must apply the general law in the CAS Act, including the overall test of whether releasing the offender on parole is appropriate in the public interest.[225] All offenders under a CDTO "are expected to complete their total sentence by way of CDTO, however parole will be considered if circumstances suggest parole is appropriate."[226]

Offenders with sentences of three years or less

3.150 For offenders with sentences of three years or less, a CDTO cancels the court based parole order,[227] after which the Drug Court becomes the parole decision maker.[228]

3.151 It is possible for the offender to apply for parole by completing a written application and filing the application with the Registrar of the Drug Court. A Drug Court judge will consider the application and either refuse it outright or seek a short pre-release report from its multi-disciplinary team.[229] If the latter, a date will be set for the consideration of parole. The Drug Court judge usually makes a decision in chambers, but the judge may set a hearing date if he or she believes the hearing of evidence or oral submissions would assist in making a decision.[230]

Offenders with sentences greater than three years

3.152 For offenders who have sentences of more than three years, the Drug Court becomes the parole decision maker after an offender receives a CDTO.[231] The Drug Court is required to consider parole at least 60 days before the end of the offender's non-parole period.[232]

---

222. *Drug Court Act 1998* (NSW) s 18B.
223. *Drug Court Act 1998* (NSW) pt 2A.
224. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.
225. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.
226. Drug Court of NSW, *Policy 14: Parole for Participants of the Compulsory Drug Treatment Correctional Centre* (2010) [1.4].
227. *Drug Court Act 1998* (NSW) s 19G(b).
228. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.
229. The Multi-Disciplinary Team is the Director of the Compulsory Drug Treatment Correctional Centre, a Community Corrections officer and an appointee of Justice Health: NSW Drug Court, *Policy 14: Parole for Participants of the Compulsory Drug Treatment Correctional Centre* (2010).
230. Drug Court of NSW, *Policy 14: Parole for Participants of the Compulsory Drug Treatment Correctional Centre* (2010) [3.4]-[3.9].
231. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.
232. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137.

3.153 Leading up to the consideration of parole, the multi-disciplinary team will discuss the issue with the offender. The offender may not seek parole, in which case this will be reported to the Registrar of the Drug Court and no further action will be taken. If the offender wishes to be considered for parole, a Community Corrections officer will prepare a pre-release report including a recommendation from the multi-disciplinary team. This report is provided to the Drug Court ten weeks before the end of the offender's non-parole period.[233] However, as noted above, all offenders are generally expected to complete their sentences by CTDO.[234]

Question 3.19: Drug Court as a parole decision maker

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

233. Drug Court of NSW, *Policy 14: Parole for Participants of the Compulsory Drug Treatment Correctional Centre* (2010) [4.3]-[4.6].

234. Drug Court of NSW, *Policy 14: Parole for Participants of the Compulsory Drug Treatment Correctional Centre* (2010) [3.2], [4.2].

Annexure A: Factors considered by the parole decision maker in other jurisdictions

Victoria

3.154 Relevant matters for the parole decision maker in Victoria include:

- the nature and circumstances of the offence and the offender's criminal history
- the parole assessment and recommendation from Corrections Victoria
- the offender's previous parole history and conduct while in custody
- the parole plan and any special conditions that could be imposed
- remarks of the sentencing court
- the offender's willingness to participate, actual participation and performance in programs
- assessments and recommendations from clinicians
- victim submissions
- the fact that at the expiry of the non-parole period the offender will have served the minimum period which the sentencing court considered the justice of the case required to be served
- the likelihood of effective intervention after release, and
- the proper administration of the system of corrections including the prison system and the parole system.[235]

Queensland

3.155 When deciding the level of risk that an offender poses to the community, the decision maker must have regard to:

- the offender's criminal history, any patterns of offending and whether the offender has been convicted of a sexual offence
- the likelihood of the prisoner committing further offences
- whether the offender has access to supports or services to reduce the risk to the community and whether there are any other circumstances likely to increase the risk
- remarks of the sentencing court
- the offender's behaviour and cooperation with authorities and compliance with any previous release or leave

235. Contained in the Members' Manual of the Adult Parole Board of Victoria, see I Callinan, *Review of the Parole System in Victoria* (2013) 32-24.

- any medical, psychological, behavioural or risk assessment report
- submissions from any registered victim, and
- any recommendations for programs or interventions and the offender's progress in addressing the recommendations.[236]

SA

3.156 When determining an application for parole, the decision maker must have regard to:

- remarks of the sentencing court
- the likelihood of the offender complying with the conditions of parole and the probable circumstances of the offender after release on parole
- the circumstances and gravity of the offence if it was one of violence
- the impact release on parole might have on any registered victim or victim's family
- the behaviour of the offender in custody and any previous release on parole
- any reports on the offender's social background, or medical, psychological or psychiatric conditions, and
- any other relevant matter.[237]

WA

3.157 When deciding whether it is appropriate to release an offender on parole, the decision maker must have regard to:

- the degree of risk (taking into account both the likelihood of reoffending and the likely nature and seriousness of any reoffending) that the release of the offender presents to the community
- the nature and seriousness of the offence
- remarks of the sentencing court
- issues for any victim, including the contents of any victim submission
- the behaviour of the offender in custody and the extent of participation in and performance in available programs
- any report from the CEO of the WA Department of Corrective Services

236. Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) guideline 2.1.

237. *Correctional Services Act 1982* (SA) s 67(4).

- the offender's behaviour during any previous release, the likelihood of reoffending during release and the likelihood of compliance with parole conditions, and
- any other relevant matter.[238]

Tasmania

3.158 In determining whether an offender should be released on parole, the decision maker must take into consideration:

- the likelihood of reoffending, the protection of the public and the rehabilitation of the offender
- remarks of the sentencing court
- the nature and seriousness of the offence
- the likelihood of the offender complying with parole conditions and the probable circumstances of the offender after release
- the behaviour of the offender in custody, during any previous parole period and during any previous community-based sentence
- any reports on the offender's social background, medial, psychological or psychiatric condition, or any other matter
- any victim submission, and
- any other relevant matter.[239]

ACT

3.159 In deciding whether to make a parole order, the decision maker must consider:

- the offender's antecedents
- the offender's conduct in custody and participation in activities in custody
- the likelihood that the offender will comply with the conditions of parole, the likelihood of reoffending on parole and the likelihood that parole will assist the offender adjust to lawful community life
- any report regarding the granting of parole
- remarks of the sentencing court
- any victim submission and the likely effect of the offender being paroled on any victim or victim's family, and
- any special circumstances or matter prescribed by regulation.[240]

238. *Sentence Administration Act 2003* (WA) s 5A, 20(2).
239. *Corrections Act 1997* (Tas) s 72(4).

NT

3.160 When considering parole, the decision maker considers:

- the interests and safety of the community, the rights of victims, the intentions of the sentencing court, the needs of the prisoner and the remorse of the prisoner
- the nature and circumstances of the offence
- remarks of the sentencing court
- the offender's criminal history and patterns of offending
- the likelihood and likely nature of reoffending on parole
- the risk of harm to the community and the victim, the victim's safety and whereabouts and any victim submissions
- submissions from the offender
- any relevant reports
- release plans including accommodation and employment, and
- the offender's behaviour in prison and security classification, and education or rehabilitation courses undertaken.[241]

Commonwealth

3.161 There are no legislative criteria for the Commonwealth parole decision maker, but the decision maker may consider:

- the need to protect the safety of the community
- whether releasing the offender on parole is likely to assist the offender adjust to lawful community life
- the likelihood that the offender will comply with the conditions of parole
- the offender's conduct in custody
- the nature and circumstances of the offence
- remarks of the sentencing court
- the offender's criminal history
- any report from a relevant State or Territory correctional services agency, and
- the offender's behaviour during any previous period of parole.[242]

---

240. *Crimes (Sentence Administration) Act 2005* (ACT) s 120(2).
241. Parole Board of the Northern Territory, *Annual Report 2011*, 28.
242. Commonwealth Attorney-General's Department, *Amendments to Commonwealth Parole – Information Circular* (2012) 3-4.

Annexure B: Matters considered by SPA and SORC

State Parole Authority	Serious Offenders Review Council
Must be satisfied on the balance of probabilities that release of the offender on parole is appropriate in the public interest.	No overall test.
SPA must have regard to: ▪ the need to protect the safety of the community ▪ the need to maintain public confidence in the administration of justice ▪ the nature and circumstances of the offence to which the offender's sentence relates ▪ any relevant comments made by the sentencing court ▪ the offender's criminal history ▪ the likelihood of the offender being able to adapt to normal lawful community life ▪ the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole ▪ any report in relation to the granting of parole to the offender that has been prepared by Community Corrections ▪ any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Serious Offenders Review Council (SORC), the Commissioner for Corrective Services or any other authority of the State ▪ if the Drug Court has refused to admit the offender to compulsory drug treatment detention because the offender may damage the compulsory drug treatment program or another offender's participation in it, the circumstances that led the Drug Court to that decision ▪ any guidelines that are in force, and ▪ any other matters SPA considers relevant. And the report from Community Corrections must include: ▪ the likelihood of the offender being able to adapt to normal lawful community life, ▪ the risk of the offender re-offending while on release on parole, and the measures to be taken to reduce that risk, ▪ the measures to be taken to assist the offender while on release on parole, as set out in a post-release plan prepared by the Probation and Parole Service in relation to the offender, ▪ the offender's attitude to the offence to which his or her sentence relates, ▪ the offender's willingness to participate in rehabilitation programs, and the success or otherwise of his or her participation in such programs, ▪ the offender's attitude to any victim of the offence to which his or her sentence relates, and to the family of any such victim, ▪ any offences committed by the offender while in custody, including in particular any correctional centre offences and any offence involving an escape or attempted escape, ▪ the likelihood of the offender complying with any conditions to which his or her parole may be made subject, ▪ if the Drug Court has refused to admit the offender to compulsory drug treatment detention because the offender may damage the compulsory drug treatment program or another offender's participation in it, the circumstances that led the Drug Court to that decision	SORC must consider: ▪ the public interest, ▪ the offender's classification history, ▪ the offender's conduct while in custody, both in relation to sentences currently being served and in relation to earlier sentences, ▪ the offender's willingness to participate in rehabilitation programs, and the success or otherwise of his or her participation in such programs, ▪ any relevant reports (including any medical, psychiatric or psychological reports) that are available to the Review Council in relation to the offender, ▪ any other matter that it considers to be relevant. When considering the public interest, SORC must also consider: ▪ the protection of the public, which is to be paramount, ▪ the nature and circumstances of the offence, ▪ the reasons and recommendations of the sentencing court, ▪ the criminal history and family background of the offender, ▪ the time the offender has served in custody and the time the offender has yet to serve in custody, ▪ the offender's conduct while in custody, including the offender's conduct during previous imprisonment, if applicable, ▪ the attitude of the offender, ▪ the position of and consequences to any victim of the offender, including the victim's family, ▪ the need to maintain public confidence in the administration of criminal justice, ▪ the need to reassure the community that serious offenders are in secure custody as long as it is appropriate, ▪ the rehabilitation of the offender and the re-entry of the offender into the community as a law-abiding citizen, ▪ the availability to the offender of family, departmental and other support, ▪ such other factors as are prescribed by the regulations.

Law Reform Commission
Justice & Attorney General

NSW Law Reform Commission
Level 13 Swire House
10 Spring Street
Sydney NSW 2000 Australia

GPO Box 5199
Sydney NSW 2001 Australia
DX 1227 Sydney

Phone: 02 8061 9270
Fax: 02 8061 9376
Email: nsw_lrc@agd.nsw.gov.au
Internet: www.lawreform.lawlink.nsw.gov.au

ISBN 978-0-7347-2690-2 (electronic)