NSW GOVERNMENT

New South Wales
Law Reform Commission

Parole
Question paper 5

Breach and revocation

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Question Paper 5: Breach and revocation

5.1 In this Question Paper we examine the powers of the State Parole Authority (SPA) to respond to breaches of parole. SPA deals with breaches of both court made and SPA made parole orders.[1] SPA's power to revoke a parole order before an offender is released (that is, to revoke a parole order for reasons other than breach) is discussed in Question Paper 1. In the last section of the paper, we also discuss SPA's powers in relation to breaches of home detention and intensive correction orders (ICOs).

NSW parole breach and revocation process

5.2 Parole orders always require an offender to be of good behaviour, not commit an offence, and adapt to normal lawful community life.[2] Nearly all parolees are

1. For more information about court made and SPA made parole orders, see Question Paper 1 and Question Paper 3.
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(1)(a); *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 224.

supervised by Community Corrections during their period of parole[3] and must abide by the set requirements of supervision, including residing at an approved address, reporting as directed, receiving home visits, not using prohibited drugs and following all reasonable directions of the supervising officer.[4] Parolees may also be required to abide by additional conditions attached to the parole order by SPA or the sentencing court. Question Paper 4 discusses the selection of parole conditions in more detail.

5.3 A supervising Community Corrections officer will send a breach report to SPA if an offender has failed to comply with the conditions of his or her parole order. As part of the breach report, the officer will recommend that SPA:

- revoke the parole order
- vary the conditions
- issue a warning to the offender, or
- simply note the breach with no further action.[5]

SPA receives the breach report and decides in a private meeting which of these actions it will take, without input from the offender.[6] If SPA revokes an offender's parole order, a warrant is issued for the offender's arrest and he or she is returned to prison. Between two and four weeks from the date of revocation, SPA must hold a review hearing to revisit the revocation decision and allow the offender to make submissions.[7] SPA will either confirm or rescind the revocation after the review hearing. If SPA confirms the revocation, the offender remains in custody, serving the balance of the sentence, subject to any further application for parole. If SPA rescinds the revocation, the offender will be re-released to parole.

Exercise of discretion in reporting breaches

5.4 Corrective Services NSW policy requires Community Corrections to send a breach report to SPA within five working days if any of the following occurs:

- a court imposes a full-time custodial sentence for a further offence
- an offender is no longer able to be contacted
- an officer considers that the offender represents an unacceptable risk to the community, is likely to re-offend or is unable to adapt to normal community life
- the offender is convicted of a new offence
- the offender is arrested and charged with any offence

3. Information provided by Corrective Services NSW (23 October 2013).
4. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 229.
5. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B [3.1.4].
6. For more about SPA's meetings and procedures, see Question Paper 3.
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-174.

- the offender changes their address without the prior approval of their supervising officer
- the offender fails to comply with directions in regard to employment, or
- the offender breaches any other conditions of his or her parole order.[8]

Other breaches of conditions that may be commonly reported to SPA under the final bullet point include an offender's failure to report to the Community Corrections office at a pre-arranged time, breach of alcohol abstention conditions, or urinalysis results that indicate that an offender has been using prohibited drugs. If there has been a "serious breach" or a parolee's behaviour raises serious concerns for community safety, the supervising officer must report the breach immediately to SPA.[9]

5.5 The Corrective Services NSW policy on reporting breaches does not address in detail the extent of the discretion reserved to Community Corrections officers. It does specify that officers may allow offenders some latitude in terms of failures to report but high risk offenders must receive "minimal latitude".[10] We have been informed that, in practice, Community Corrections officers may also exercise a level of discretion in managing other types of breaches and determining whether a particular breach should be reported to SPA.[11] This practice does not appear to be reflected in the policy, which requires any breach of a condition of a parole order to be reported.

5.6 Some level of discretion in reporting breaches is necessary for professional and effective case management. At the same time, recent reviews of the operation of the parole system in Victoria criticised parole officers for failing to notify the Victorian Adult Parole Board of breaches of parole conditions. The 2013 Callinan review stated that:

> I do not doubt that there should remain with Corrections Victoria a discretion in relation to the reporting of breaches of parole to the Board. But I think that discretion should be a much narrower one than in practice seems to be exercised. Failure to comply with the conditions of parole will very often provide an early indication of a likelihood of further offending. Compliance with what on the whole are usually very easily understood conditions, and ones not difficult to satisfy, must form part of the processes of rehabilitation and self-discipline that a parolee must have. If he or she fail to comply, then there is reason to believe that parole will not be taken seriously as a privilege and a discipline, and moreover, will, in many cases be a sign that the parolee is likely to reoffend.[12]

5.7 The 2011 Ogloff report on the administration of parole in Victoria agreed that parole officers need some discretion but noted that "it is the Board which ultimately has

8. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B [3.1.1].
9. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B [3.1.2].
10. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section A [2.17.11].
11. Information provided by the State Parole Authority (9 October 2013).
12. I Callinan, *Review of the Parole System in Victoria* (2013) 68.

responsibility for deciding how to manage breaches of parole conditions".[13] The report recommended that parole officers should contemporaneously report all "material breaches" of parole conditions to the Adult Parole Board.[14] The report defined a "material breach" of conditions as a breach that "materially relates to the individual's history of offending and/or likelihood of reoffending".[15]

5.8 Preliminary submissions to this reference did not raise any similar issues about NSW Community Corrections failing to report significant breaches of parole conditions to SPA. However, it may be desirable for policy to clearly delineate the types of breaches that must always be reported to SPA and those that Community Corrections can exercise some discretion in reporting. US research has found that, where there are only limited rules to govern parole officers' discretion to report breaches, decisions varied unpredictably from one officer to another.[16]

5.9 The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) states that, in response to a breach, SPA may either revoke a parole order or vary its conditions.[17] The CAS Act does not expressly mention warnings or noting the breach as options available to SPA. In practice, breach reports by Community Corrections frequently recommend one of these lower level responses and SPA often uses them.[18] In 2012, SPA issued 2118 warnings, revoked 2261 parole orders and varied 269 orders.[19] SPA's use of warnings has also been increasing in recent years. In 2008, only 936 warnings were issued but this grew to 1117 in 2009, 1277 in 2010, 1829 in 2011 and finally 2118 in 2012.[20] SPA has advised us that this is likely a result of an increase in the proportion of Community Corrections breach reports that recommend a warning rather than a notation with no further action.[21]

5.10 This suggests that a large proportion of the breach matters brought to SPA's attention by Community Corrections are not considered sufficiently serious – either by Community Corrections or SPA – to warrant revocation of parole. These matters make up a significant segment of SPA's workload and are a considerable drain on SPA's time and resources.[22] If Community Corrections had a broader discretion to manage breaches internally, many such minor matters would not need to be raised with SPA. Warnings could come from senior Community Corrections managers. Senior managers could also decide to note breaches rather than issue a warning or refer the matter to SPA. SPA could have the options to warn or note the breach with no further action, but these could then be used sparingly in borderline cases, for example where the Community Corrections breach report recommends revocation but SPA takes a different view.

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13. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 31.
14. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 7, 31-2.
15. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 31-2, rec 7.
16. S Steen and others, "Putting Parolees Back in Prison: Discretion and the Parole Revocation Process" (2013) 38(1) *Criminal Justice Review* 70, 90.
17. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170.
18. State Parole Authority, *Preliminary consultation PPAC2*.
19. State Parole Authority, *Annual Report 2012* (2013) 15-6.
20. State Parole Authority, *Annual Report 2012* (2013) 16.
21. Information provided by the State Parole Authority (9 October 2013).
22. State Parole Authority, *Preliminary consultation PPAC2*.

5.11 On the other hand, the view taken in the Victorian reports is that the parole decision maker is ultimately responsible for managing breaches of parole and for deciding whether or not a particular breach is serious. Increasing the ambit of Community Corrections officers' discretion could place an undue burden on those officers and could also create inconsistency in the way breaches are handled. However, limiting their discretion could lead to further unsustainable increases in the matters referred to SPA that do not warrant revocation.

5.12 SPA has suggested that another option would be for SPA to discontinue the practice of formally warning offenders, as warnings have no basis in the CAS Act. This may cut SPA's workload to only those cases that are likely to warrant revocation. On the other hand, removing the option to warn (and the option to note a breach with no further action, which also has no legislative basis) would severely curtail SPA's ability to flexibly respond to the circumstances of each case. [23] Alternatively, there could be a formal process for filtering the breaches of parole that are reported to SPA.

5.13 It may be desirable for options to warn parolees about conduct which constitutes a breach, or to note the breach but take no action, to be expressed in the legislation. SPA could take prior warnings or notes of breaches into account when dealing with future breaches. Giving these options a statutory basis would guard against challenges to revocation orders where prior warnings and decisions to note breaches were taken into account.

Question 5.1: Exercise of discretion in reporting breaches and SPA's lower level responses

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

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

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

SPA's decision to revoke

5.14 The CAS Act does not require SPA to revoke a parole order in response to a confirmed breach. SPA is able to exercise its discretion as to the appropriate action to take. This section of the Question Paper examines the circumstances in which SPA decides to revoke a parole order.

23. Information provided by the State Parole Authority (9 October 2013).

Breaches of conditions (other than by reoffending)

5.15 Of all parole orders revoked by SPA, about half are revoked solely for breaches of conditions where the parolee has not reoffended and no criminal conduct has taken place.[24] Such breaches may include breaches of the conditions of supervision, such as failing to reside at the approved address or failing to report to the assigned Community Corrections officer, or breaches of specific additional conditions, such as conditions requiring parolees to abstain from alcohol. We will collectively refer to these types of breaches as "non-reoffending breaches".

5.16 The 2013 Callinan review of parole in Victoria criticised the Victorian Adult Parole Board for sometimes deciding not to revoke parole orders in response to non-reoffending breaches. The report stated that "partial compliance with conditions of parole is not good enough" and that "except in very special circumstances a parolee should be returned to prison if he or she is in breach of any substantial condition of parole".[25] The report implied that the Board was too ready to accept parolees' excuses for their failures to comply with parole conditions, particularly when these excuses related to poor or unstable housing.[26] Submissions to the Callinan review from Victoria Police also suggested that the Victorian Adult Parole Board did not revoke parole often enough in response to breaches that related to alcohol and drug use.[27]

5.17 It is obviously important that breaches – even non-reoffending breaches – are taken seriously and responded to appropriately, as the parolee is still serving a term of imprisonment in the community. On the other hand, the reality is that parolees are likely to present with multiple issues including drug and alcohol abuse, cognitive or mental health impairments and unemployment. They may lead chaotic lives that are not well suited to assist them in making the difficult transition between full-time custody and life in the community. It might be unrealistic to expect them to quickly "adapt to normal lawful community life". Substance abuse issues in particular can lead to breaches, both of conditions relating to alcohol and drugs but also conditions relating to residence and reporting. US research has found that parolees with mental health impairments are much more likely to be reported for non-reoffending breaches than other parolees.[28] Under these circumstances, where the parolee's breaches do not amount to criminal conduct, the goals of parole might be better served by lower level responses.

5.18 Perhaps it would be desirable for the CAS Act to explicitly grant SPA a wider range of sanctions to use in response to non-reoffending breaches along the lines of the Drug Court model. Such sanctions could include community service work, curfews or home detention-style conditions. In South Australia, the Parole Board has the option to respond to non-reoffending breaches by imposing a further condition requiring the parolee to perform between 40 and 200 hours of community service

24. State Parole Authority, *Annual Report 2012* (2013) 15.
25. I Callinan, *Review of the Parole System in Victoria* (2013) 61, 68.
26. I Callinan, *Review of the Parole System in Victoria* (2013) 85.
27. I Callinan, *Review of the Parole System in Victoria* (2013) 66.
28. S Steen and others, "Putting Parolees Back in Prison: Discretion and the Parole Revocation Process" (2013) 38(1) *Criminal Justice Review* 70, 88.

work.[29] Attendance at an approved educational course can count towards these hours of community service.[30]

5.19 Another option would be to give SPA the flexibility to revoke parole for a short period of time. SPA already has power to reinstate an ICO on the application of the offender one month after revocation,[31] and to reinstate a home detention order on the application of the offender three months after revocation.[32] In our 2013 sentencing report, where we recommended replacing ICOs and home detention with a community detention order, we also recommended that SPA should have power to revoke community detention orders for set periods.[33] For example, SPA could revoke a parole order for four weeks. After four weeks in custody, the offender's parole order would be automatically reinstated and they would be re-released to parole. At present, an offender whose parole is revoked cannot be re-released on parole until a 12 month period has elapsed, except in circumstances constituting manifest injustice. We discuss the 12 month rule in more detail later at 5.58.

.Question 5.2: Response to non-reoffending breaches

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

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

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

Breaches by reoffending

Unconfirmed reoffending: new charges not yet dealt with by a court

5.20 One stakeholder raised the issue of whether revocation of parole should be permitted solely on the basis of fresh charges before there has been any plea or finding of guilt.[34] There will often be a period of some months between a parolee being charged with a fresh offence (and SPA being notified through a breach report from Community Corrections) and the court date to hear the fresh offence. During this period, the offender may have been granted police or court bail and, if this is the case, SPA will have to decide whether the charges warrant revocation of parole before guilt has been confirmed by a court. A similar issue arises if SPA chooses not to revoke parole and the offender is convicted but is then bailed pending an appeal against the conviction or sentence.[35]

29. *Correctional Services Act 1982* (SA) s 74AA.
30. *Correctional Services Act 1982* (SA) s 74AA(4)(h).
31. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165.
32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 168A.
33. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 11.6.
34. NSW Bar Association, *Preliminary Submission PPA4*, 1.
35. This was the situation in the Bayley case in Victoria.

5.21 SPA can justify any decision to revoke parole due to fresh charges on the basis that the charges, whether or not they result in proved reoffending, demonstrate that the parolee has not been of "good behaviour" or has failed to "adapt to normal lawful community life". It might be argued that this is unfair to the parolee, particularly in circumstances where the charges are withdrawn or dismissed, however, SPA regards fresh charges as a key indicator that the risk the parolee poses to the community has become too great for parole to be continued.

5.22 The issue of community safety is addressed when a court makes a bail determination[36] and it might be argued that SPA is unnecessarily second guessing the court's decision by revoking parole when bail has been granted. However, SPA has to resolve a different question to that facing a bail court, namely, whether the parolee has complied with the conditions of the parole order, such as being of good behaviour and adapting to normal lawful community life. Although a court may be satisfied that it is appropriate to grant bail, there may be circumstances revocation of parole is justified on such grounds.

5.23 Another issue is the potential for unfairness where a parolee receives a custodial sentence of less than 12 months for offending which occurred on parole. A parolee whose parole is revoked is not entitled to apply for parole again for 12 months,[37] which can lead to the result that he or she serves more time in custody than is imposed by the sentencing court for the fresh offence. On the other hand, revocation of parole is not the imposition of a new penalty. Any time served in custody due to revocation of parole is served as part of an existing sentence of imprisonment and the disadvantage experienced by the parolee arises from fresh offending which occurred in breach of the conditions of parole. We address the issue of parolees having to serve 12 months in custody after revocation of parole in more detail from 5.58.

5.24 Victoria has recently legislated to introduce a presumption that parole will be revoked if a parolee who is on parole for a serious violent or sexual offence is charged with a new serious violent or sexual offence. The Victorian Adult Parole Board will still be able to choose not to revoke parole if it considers that there are circumstances that justify the continuation of parole.[38]

5.25 In NSW, where a parolee is charged with a new offence, SPA bases its decision on the apparent seriousness of the alleged reoffending. SPA will generally revoke parole if the nature of the charge (for example, an assault occasioning actual bodily harm) indicates that the parolee may pose a risk to others. If the fresh charge involves a minor offence or a non-violent offence, SPA may decide to continue parole and await the outcome of the court proceedings, at which time it will decide how to respond to the reoffending.[39]

36. *Bail Act 1978* (NSW) s 33(1)
37. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3, s 137A, s 143A.
38. *Corrections Act 1986* (Vic) s 77(3).
39. Information provided by the State Parole Authority (9 October 2013).

Confirmed reoffending: new convictions

5.26 Victoria has also recently changed its legislation so that there is a presumption that parole will be revoked once a parolee is convicted of any new offence.[40] Parole will be *automatically* revoked if a parolee (who is on parole for a serious violent or sexual offence) is convicted of a new serious violent or sexual offence.[41] Queensland, WA, the NT and Tasmania have automatic parole revocation if the parolee reoffends and is sentenced to a new period of full-time imprisonment.[42] SA parolees have their parole automatically revoked if they are sentenced to a new period of full-time imprisonment or breach conditions relating to possession or use of firearms.[43] In the ACT, parole is automatically revoked if a parolee is convicted of any offence punishable by imprisonment.[44] Under Commonwealth law, federal parolees who reoffend and are sentenced to a full-time imprisonment sentence (or aggregate sentence) of three months or more have their parole automatically revoked.[45]

5.27 In NSW, there is no provision for automatic revocation of parole, although in practice SPA will always revoke parole if a parolee commits a fresh offence that results in a new prison sentence. If the fresh offence receives a penalty other than full-time imprisonment, SPA will decide whether or not revocation is warranted. If the fresh offence is minor, such as a fine-only offence, SPA may decide to continue parole and formally warn the offender about his or her offending behaviour.[46]

5.28 There was no suggestion in preliminary consultations or submissions that SPA's decision making in this area is of concern. However, it may be desirable for the CAS Act to provide that parole is automatically revoked if a parolee is sentenced to a new period of full-time imprisonment. This would bring NSW into line with other Australian jurisdictions and ensure that the legislation reflects SPA's current practice.

Question 5.3: Revocation in response to reoffending

(1) What changes should be made to improve the way SPA deals with parolees' reoffending?

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

Date of revocation and street time

5.29 When SPA revokes a parole order, it also selects a date for the revocation to take effect.[47] This date may be the date of a breach of conditions such as a failure to

40. *Corrections Act 1986* (Vic) s 77(4)-(5).
41. *Corrections Act 1986* (Vic) s 77(6).
42. *Corrective Services Act 2006* (Qld) s 209; *Sentence Administration Act 2003* (WA) s 67; *Parole of Prisoners Act* (NT) s 8; *Corrections Act 1997* (Tas) s 79(3)-(4).
43. *Corrective Services Act 1982* (SA) s 75.
44. *Crimes (Sentence Administration) Act 2005* (ACT) s 149.
45. *Crimes Act 1914* (Cth) s 19AQ.
46. Information provided by the State Parole Authority (9 October 2013).
47. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(1).

report, the date of alleged fresh offending, the date of the Community Corrections breach report, the date of SPA's meeting to make the revocation decision, or some other date, although the revocation date selected by SPA cannot be earlier than the date of the first known breach of the parole order.[48] The time that elapses between the selected date of revocation and the offender's re-entry into custody is known as "street time". Street time does not count as time served by an offender. Instead, street time is added at the end of a sentence as the offender is technically considered to be unlawfully at large during this period.[49]

5.30 The operation of street time means that SPA's selection of the revocation date can have a significant impact on an offender and in some cases can add months to an offender's sentence. It may be desirable for there to be some guidance to SPA in the CAS Act about the selection of the revocation date in different types of cases. For example, the CAS Act could provide that the revocation date is always the date of alleged fresh offending unless there is sufficient reason to select another date. In the case of non-reoffending breaches, the default date could be the date of the breach report sent to SPA by Community Corrections.

5.31 Even longer periods can be added to a sentence when an offender is incarcerated for fresh offending in another state or territory. In these cases, SPA may revoke parole due to the reoffending but it could be years before the offender is released from the interstate correctional centre and returned to a NSW prison. These years are considered street time and are not counted towards the offender's NSW sentence. In effect, the two sentences are automatically cumulative because one is being served interstate. By contrast, if the fresh offending occurred in NSW and the street time was limited, the sentencing court would have the discretion to make the new sentence of imprisonment run concurrently to the offender's remaining sentence.[50] Any time that an offender spends in an interstate facility awaiting extradition to NSW is also considered street time. The Aboriginal Legal Service stated in its preliminary submission that time spent in custody interstate should not be added to the end of the sentence "as the person is not 'at liberty' or 'on the street' and such a [change] would ensure fairness in the administration of justice".[51]

Question 5.4: Date of revocation and street time

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

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

48. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(2).
49. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(3).
50. *Callaghan v R* [2006] NSWCCA 58.
51. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PPA2*, 1.

Review hearings, rescissions, appeals and reasons

Merits review through review hearings

5.32 After SPA has revoked an offender's parole order, SPA *must* hold a review hearing within four weeks to reconsider the revocation.[52] A review hearing is only unavailable to an offender if there is less than 30 days left to run on the offender's sentence.[53] This contrasts with the situation for parole refusals, where a review hearing is only held if SPA considers that a hearing is warranted.

5.33 The offender may make written and oral submissions to SPA at the review hearing and must be supplied with the material on which SPA based its decision.[54] At the review hearing, SPA will either confirm the revocation or rescind the revocation. Rescission reactivates the offender's parole order.[55] The date that SPA selected as the revocation date can also be reconsidered at the review hearing.[56]

5.34 The Callinan report was critical of the Victorian Adult Parole Board's practice of always conducting a review of a decision to revoke parole. The report argued that, in many cases, the review hearings generated unnecessary extra work for the Board and also weakened the enforcement of parole conditions. The report stated that "the best way of bringing home to prisoners the necessity of compliance with conditions of parole is to visit non-compliance with serious and automatic consequences".[57]

5.35 Automatic reviews of revocations are certainly resource intensive. On the other hand, they may be an important safeguard to ensure that SPA has not relied on inaccurate information and that it is able to take into account any extenuating circumstances that favour parole being reinstated. If there is no review hearing, an offender would not get an opportunity to make submissions to SPA or provide any information about his or her actions and circumstances. The review hearing is influential in a reasonable proportion of cases: of the 2261 parole orders that SPA revoked in 2012, SPA subsequently rescinded the revocation in 361 cases.[58] Automatic review hearings may also help to protect the safety of the community. Knowing that a review hearing will always be held to fully inquire into the matter, SPA need not hesitate to revoke a parole order if it suspects that the parolee may pose an escalating risk to the safety of the community.

Question 5.5: Review hearings after revocation

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

52. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-174.
53. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175A.
54. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173.
55. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175.
56. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-174.
57. I Callinan, *Review of the Parole System in Victoria* (2013) 63, 87-89.
58. State Parole Authority, *Annual Report 2012* (2013) 15-6.

Rescinding revocation to allow completion of other programs

5.36 The Aboriginal Legal Service's preliminary submission identified a problem that can arise when a parolee is charged with fresh offences and, before sentencing, the court dealing with the fresh offences refers the offender to a rehabilitation program under s 11 of the *Crimes (Sentencing Procedure) Act 1999* (NSW).[59] If SPA has revoked the offender's parole, he or she will be unable to complete the rehabilitation program, frustrating the intention of the court. A similar issue may arise if a parolee is referred to the Drug Court program in response to the fresh offence.

5.37 The Aboriginal Legal Service suggested that, in these circumstances, the CAS Act should require SPA to rescind the revocation of parole to facilitate the offender's participation in the program.[60] It could be argued that completion of such programs is compatible with the overall purposes of parole and it makes little sense to stand in the way of the court's assessment. On the other hand, SPA may reach a different view from that of the court about the best means to protect the safety of the community. SPA has advised us that it will generally stand over a matter for later consideration rather than revoking parole where there are fresh charges and the court dealing with the charges has referred the offender to a program under s 11.[61]

Question 5.6: Rescinding revocations to allow completion of rehabilitations programs after fresh offending

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

Appeals and judicial review of revocation decisions

5.38 As we discussed in Question Paper 3, there is no appeal available from SPA's decisions, although an offender may apply to the Supreme Court for a direction that SPA relied on false, misleading or irrelevant information when making the revocation decision.[62] The Supreme Court is precluded from considering the merits of the decision other than on these grounds. The legislation does not specify the consequences of such a Supreme Court direction but it may lead SPA to reconsider its decision.

5.39 There is no directly corresponding statutory avenue for the State to apply to the Supreme Court for a direction where SPA refuses to revoke a parole order or decides to rescind a revocation. Under s 172, the State may request that SPA revoke a serious offender's parole order on the basis that the *decision to make the parole order* was based on false misleading or irrelevant information.[63] If SPA refuses to revoke the order, the State may then apply to the Supreme Court for a direction that SPA's *decision to make the parole order* was based on false

59. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PPA2*, 1.
60. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PPA2*, 1.
61. Information provided by the State Parole Authority (9 October 2013).
62. *Crimes (Administration of Sentences) Act 1999* (NSW) s 176.
63. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172.

misleading or irrelevant information.[64] However, there is no provision for the State to apply to the Supreme Court for a direction that SPA's decision either not to revoke an order or to rescind a revocation was based on false misleading or irrelevant information.

5.40 At common law in NSW and under s 69 of the *Supreme Court Act 1970* (NSW), SPA's decisions 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.[65]

Question 5.7: Appeals and judicial review of SPA's revocation decisions

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

Reasons

5.41 When SPA decides to revoke a parole order, it identifies the conditions of parole that the offender has breached. As part of a revocation order, SPA is required to include the reasons for which the revocation was made.[66] This order is then supplied to the offender.[67] SPA must also record in its minutes:

- reasons for revoking a parole order
- reasons for refusing to revoke a parole order (in cases where Community Corrections has recommended that the order be revoked or there have been submissions from the Commissioner or the state), and
- reasons for rescinding the revocation of a parole order.[68]

The Attorney General, the Commissioner for Corrective Services and Community Corrections can all access SPA's minutes but they are not available to victims, offenders or the public.[69]

5.42 Although SPA publishes online reasons for a limited number of decisions to grant or deny parole, it does not publish any reasons for decisions related to revocation. The WA Prisoners Review Board publishes online reasons for revocation cases where the Board has decided that parole should be revoked.[70] It does not publish reasons for decisions not to revoke parole. The reasons are brief, simply setting out the conditions of the parole order and the type of breach that led to the revocation decision.

64. *Crimes (Administration of Sentences) Act 1999* (NSW) s 177.
65. *Esho v Parole Board Authority of NSW* [2006] NSWSC 304, [30]; see *Attorney General of NSW v Chiew Seng Liew* [2012] NSWSC 1223.
66. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(3).
67. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(2)(d).
68. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175(5), 193C.
69. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C(3).
70. Prisoners Review Board of WA, "Prisoners Review Board Decisions" (23 August 2013) <http://www.prisonersreviewboard.wa.gov.au/D/decisions.aspx?uid=4250-2542-6323-4438>.

5.43 In fact, the cases where parole has *not* been revoked may be of greater interest to the community. As stated above, SPA is not currently required to generate reasons for deciding not to revoke parole unless Community Corrections has recommended that parole be revoked or the Commissioner or the state has made submissions.

Question 5.8: Reasons for SPA's decision

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

Other issues about breach and revocation of parole

Emergency suspensions

5.44 Under s 172A of the CAS Act, the Commissioner for Corrective Services can apply to a judicial member[71] of SPA to have an offender's parole suspended and a warrant issued for the offender's arrest. Under a parole suspension order, the offender may be committed to custody for up to 28 days. Beyond this period, SPA must revoke an offender's parole for the offender to be kept in custody. A parole suspension order can be revoked at any time by a judicial member of SPA or the Commissioner for Corrective Services. If it is revoked, the offender will be re-released on parole.

5.45 A judicial member can only suspend an offender's parole if he or she is satisfied:

> (a) that the Commissioner has reasonable grounds for believing:
>
> > (i) that the offender has failed to comply with the offender's obligations under the parole order, or
> >
> > (ii) that there is a serious and immediate risk that the offender will leave New South Wales in contravention of the conditions of the parole order, or
> >
> > (iii) that there is a serious and immediate risk that the offender will harm another person, or
> >
> > (iv) that there is a serious and immediate risk that the offender will commit an offence, and
>
> (b) that, because of the urgency of the circumstances, there is insufficient time for a meeting of the Parole Authority to be convened to deal with the matter.[72]

5.46 The power to suspend parole allows SPA to respond quickly to an emerging risk. Similar powers exist in other Australian jurisdictions. In Queensland, suspension periods are limited, as they are in NSW.[73] In WA, however, there are no limits on the length of a possible suspension.[74] SPA rarely uses the power to suspend

71. See Question Paper 2 for information about SPA's membership.
72. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A(3).
73. See *Corrective Services Act 2006* (Qld) s 201(2)-(4).
74. *Sentence Administration Act 2003* (WA) s 39.

parole. SPA has advised us that the power was not used at all in 2012 and so far has not been used in 2013.[75]

Question 5.9: Emergency suspensions

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

SPA's power to hold an inquiry into a breach of parole

5.47 Under s 169 of the CAS Act, if SPA suspects that an offender has breached the conditions of a parole order (whether because of a breach report from Community Corrections or otherwise) it may hold an inquiry to establish whether or not a breach occurred and to decide what action to take. If an inquiry is held, the offender may make written submissions to SPA.[76] SPA has advised us that it held 21 s 169 inquiries in 2012 and 15 so far in 2013.[77]

5.48 One preliminary submission suggested that SPA does not use this power enough in order to establish whether or not a breach has occurred.[78] Instead, SPA generally revokes a parole order and then, if the breach is contested, the issue will be decided as part of the later review hearing. The preliminary submission suggested that a review hearing may not be the most appropriate forum for deciding a contested breach.[79] One reason for this is that, at the time of the review hearing, the offender has already been in custody due to revocation of their parole for some weeks. If the breach is then not established, this is a serious disadvantage to the offender.

5.49 On the other hand, the s 169 process may unfairly disadvantage parolees if it ventures into determining whether fresh alleged offending has been established at least on a prima facie basis. SPA may also be reluctant to regularly expend resources on s 169 inquiries. If it decides to revoke parole, it will still need to review the matter again as part of the review hearing process. It may be desirable for the CAS Act to specify that review hearings are only available if SPA considers a review is warranted in cases where a s 169 inquiry has already been held. This could increase the use of these inquiries and minimise cases where parolees spend weeks in custody as the result of a breach that is then found at a review hearing not to be established or not to warrant revocation.

Question 5.10: SPA's power to hold an inquiry

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

75. Information provided by the State Parole Authority (9 October 2013).
76. *Crimes (Administration of Sentences) Act 1999* (NSW) s 169(2).
77. As at 30 September 2013: information provided by the State Parole Authority (9 October 2013).
78. NSW Bar Association, *Preliminary submission PPA4*, 1.
79. NSW Bar Association, *Preliminary submission PPA4*, 1.

Information sharing

5.50 One of the Ogloff report's key criticisms of the Victorian parole system was the poor sharing of information between Victoria Police, Corrections Victoria and the Victorian Adult Parole Board.[80] The report highlighted instances where parole officers were not informed of police incidents or intelligence involving parolees, with the result that the Adult Parole Board in turn was not informed of relevant reoffending or other matters of concern.[81]

5.51 The report also criticised the fragmented flow of information between the custodial and community branches of Corrections Victoria.[82] In several cases, Victorian parole officers did not have access to key details about a parolee's prison performance which may have affected their response to breaches. If parole was revoked and an offender returned to custody, custodial officers did not have access to details of the offender's progress or behaviour in the community.[83]

5.52 In NSW, the Serious Offenders Review Council (SORC) has responsibility for the case management of serious offenders while they are in custody (see Question Paper 3) but has no involvement with the management of these offenders on parole. SORC has advised us that it would prefer (along with SPA) to receive Community Corrections breach reports for these offenders so it can track their progress in the community.[84] Such information may be important for SORC if a serious offender's parole is revoked and he or she is returned to custody under SORC management.

Question 5.11: Information sharing

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

Role of the Serious Offenders Review Council

5.53 As well as functions relating to the management of serious offenders in custody, SORC performs a gatekeeper role when SPA considers these offenders for parole (see Question Paper 3). However, SORC is not involved in any breach, revocation or rescission matters that may arise during a serious offender's parole.

5.54 As noted in the previous section, if a serious offender is returned to custody SORC will resume responsibility for management of the offender. In order to promote continuity in SORC's management of serious offenders, it may be desirable for SORC to also have a role in revocation and rescission decisions for these offenders. One way to achieve this would be for SORC to receive all Community Corrections breach reports relating to serious offenders and then, if SPA revokes parole, be invited to make a submission to SPA at the subsequent review hearing. Alternatively, if a serious offender's parole is revoked but SPA is considering

80. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 19-21, rec 1.
81. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 21.
82. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 19-21.
83. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 20-21.
84. Serious Offenders Review Council, *Preliminary consultation PPAC4*.

rescinding the revocation after a review hearing, it could be required to seek SORC's advice on the desirability of rescission.

Question 5.12: Role of the Serious Offenders Review Council

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

Making breach of parole an offence

5.55 In NSW, a breach of parole may lead SPA to revoke the parole order and return the offender to full-time custody, where he or she continues to serve the original sentence of imprisonment. If parole has been breached through reoffending, the offender must also serve any new sentence imposed for the fresh offence. The court can order the offender to serve any new term of imprisonment cumulatively on the original sentence. However, the breach of parole in itself is not an offence.

5.56 The Victorian government has recently amended the *Corrections Act 1986* (Vic) to create a new offence of breach of parole.[85] The offence is punishable by up to three months imprisonment or 30 penalty units or both, which must be served cumulatively on the offender's original sentence.[86] No explicit arguments in support of the new offence were put forward at the time of its introduction, although the Victorian Premier said that "the primary purpose of parole should be the protection of the community…this [change] is very much in line with that principle".[87] No other Australian jurisdiction treats breach of parole as an offence in itself, although breach of parole is an offence in NZ punishable by imprisonment for up to one year.[88] In NSW, it is not an offence to breach other community-based sentences like community service orders, good behaviour bonds, home detention or ICOs.[89]

5.57 It is not clear where the advantage lies in making a breach of parole an offence. Currently, if a breach does not amount to criminal conduct, a parolee may still be punished by revocation of parole and a return to full-time custody to continue serving the original sentence. If a breach does constitute reoffending, parole may be revoked and the parolee will also have a new sentence imposed for that fresh offence. In effect, there is already the penalty of a return to full-time imprisonment to deter any type of breach. Making the fact of breach an additional offence with its own penalty would be a form of "penalty stacking" and may not add much to the existing deterrent of return to custody due to revocation of parole. On the other

85. By the *Corrections Amendment (Breach of Parole) Act 2013* (Vic), assented 10 September 2013.
86. *Corrections Act 1986* (Vic) s 78A; *Sentencing Act 1991* (Vic) s 16(3BA).
87. D Napthine, "Legislation Introduced to Make Breach of Parole an Offence" (Media Release, 25 July 2013).
88. *Parole Act 2002* (NZ) s 71.
89. Although there are still sanctions for breach. If an offender breaches a community service order or a good behaviour bond, he or she will be taken to court and may be re-sentenced for the original offence, as well as receiving a new sentence for any fresh offence. If an offender breaches a home detention order or ICO, they may be returned to custody by SPA revoking the order, as well as receiving a new sentence for any fresh offence: see later in this paper from 5.66.

hand, some might argue that an offence of breach of parole acts as an important additional deterrent and signals the seriousness of breaching behaviour.

Question 5.13: Making breach of parole an offence

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

Reconsideration after revocation of parole

5.58 Once SPA has revoked an offender's parole order, the offender must wait 12 months before applying to SPA for re-release on parole and, if refused, may only reapply thereafter at 12 month intervals (the "12 month rule").[90] When the rule was introduced in 2005, the second reading speech commented that reconsideration before 12 months has elapsed is resource intensive for SPA and Corrective Services NSW and may also cause anguish for victims.[91]

5.59 SPA is able to consider an offender for re-release on parole within 12 months only in circumstances of "manifest injustice".[92] 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.[93]

The 12 month rule is inflexible and allows SPA almost no discretion to consider an offender before 12 months has elapsed from the date of the revocation as "manifest injustice" in narrowly defined.

5.60 We highlighted some of the problems with the 12 month rule in our recent report on sentencing.[94] Offenders serving short or medium term sentences have very little

90. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3, s 137A, s 143A. The 12 month rule also applies when SPA refuses to grant parole to an offender at the expiry of the non-parole period (this issue is discussed in Question Paper 3).
91. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12100.
92. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137B, s 143B.
93. *Crimes (Administration of Sentences) Regulation 2008* (NSW) cl 233(1).

chance of being re-released to parole after revocation because their sentences will expire before they have served the 12 month waiting period in custody. These offenders effectively have a single chance to successfully reintegrate into the community on parole. Even for offenders serving longer term sentences, the 12 month rule means that the consequences of revocation may be severe and disproportionate to the offender's conduct. If a parolee commits a minor offence on parole and is sentenced to a short term of imprisonment – for example, one month – he or she must still spend 12 months in custody before parole can be reconsidered. This is a period in custody considerably in excess of that which was considered appropriate by the court imposing the sentence for the minor offence.

5.61 The mandatory 12 month period in custody also severely disrupts a parolee's efforts to reintegrate into the community. Given the period of time involved, employed parolees are likely to lose their employment and parolees living in public housing will lose their accommodation. Other private housing arrangements will likely be disrupted and those parolees participating in transitional or treatment programs will lose their places. Parolees' family support may also be affected.

5.62 There should be serious consequences for breach of parole. Revocation must result in a period in custody, as the offender is still serving a term of imprisonment. However, the current mandatory 12 month waiting period can frustrate the purposes of parole in some cases. SPA has informed us that the 12 month rule is not necessary from its perspective to conserve resources[95] and many stakeholders have expressed dissatisfaction with the rule and its inflexibility.[96] The NSW Bar Association submitted that "there would seem to be little justification for an inflexible rule when the circumstances of individual cases are so varied and the rule can result in many inmates having little or no time under supervision".[97]

5.63 We have already recommended in our 2013 sentencing report that the government consider revising the 12 month rule,[98] although we did not recommend any specific alternative. One option would be a shorter set period, say three or six months, after which SPA may consider an offender's re-release on parole. However, this would not remedy the problem of inflexibility highlighted by the NSW Bar Association.

5.64 The Callinan review of the parole system in Victoria recommended that an offender not be considered for re-parole after revocation unless:

- half the unexpired time of parole has elapsed
- the offender has a prima facie case that he or she was unable to comply with a substantial condition of parole by reason of matters beyond the control of the offender, or

94. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 418-9.
95. State Parole Authority, *Preliminary consultation PPAC1*.
96. 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.
97. NSW Bar Association, *Preliminary submission PPA4*, 1.
98. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 20.2.

- the breach should be excused for other truly exceptional reason.[99]

Compared to the 12 month rule, this option would improve the situation for offenders serving shorter sentences. It would ensure that these offenders are eligible to be considered for re-release to at least some period of parole, after serving half the sentence period remaining at the date of revocation. However, it could significantly extend beyond 12 months the period that offenders serving longer sentences would need to spend in custody before being considered for re-release. Some of these offenders are likely to be institutionalised and in need of a significant period of parole supervision and support.

5.65 A better alternative might be for SPA to set, at the time of revocation, a reconsideration date that is appropriate to the circumstances of the case, taking into account factors like the nature of the breach, the time until the expiry of the offender's head sentence, the interests of any victim, the risk the offender poses to the community and the offender's personal situation.

Question 5.14: Reconsideration after revocation of parole

How should the 12 month rule as it applies after parole revocations be changed?

Home detention and intensive correction orders

5.66 Home detention and ICOs are both court orders that allow offenders to serve their terms of imprisonment in the community. The conditions can include curfews, community service work, reporting requirements, alcohol abstention, participation in certain programs and other additional conditions selected for individual offenders.[100] SPA is responsible for dealing with breaches of both home detention and ICOs. If SPA revokes a home detention order or ICO, the offender is returned to full-time custody to serve the remainder of the sentence unless SPA subsequently rescinds the revocation or reinstates the order.[101]

Current law on breach and revocation

Home detention

5.67 Home detention orders can be made in respect of terms of imprisonment of up to 18 months.[102] The sentencing court can set a non-parole period as part of the sentence. In such a case, the offender is subject to the conditions of home detention during the non-parole period but after its expiry is treated as a regular parolee until the end of the head sentence.

99. I Callinan, *Review of the Parole System in Victoria* (2013) 89.
100. For more information about the conditions of home detention and ICOs, see NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 9.
101. *Crimes (Administration of Sentences) Act 1999* (NSW) s 88-90, s 162-168A.
102. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6.

5.68 If an offender breaches during the non-parole period, SPA can revoke the home detention order.[103] As with parole orders, SPA can also hold an inquiry into any suspected breach of a home detention order.[104] Within two to four weeks of the offender's return to custody following the revocation, SPA must hold a review hearing to reconsider the revocation. The offender can make written and oral submissions as part of the review and is also entitled to access the materials on which SPA based its decision.[105] If SPA rescinds the revocation, the offender is released to serve the remainder of the home detention period in the community.[106] If the revocation is confirmed, the offender can apply to SPA to have the home detention order reinstated but only after spending three months in full-time custody.[107]

5.69 If an offender breaches the order once he or she is serving the parole period of the sentence, the law on breaches and revocation of parole applies as outlined earlier in this Question Paper. This includes the 12 month rule. In practice, this means that offenders who breach their sentence of home detention during the parole period have no further chance of being released to supervision in the community before the expiry of the sentence.

ICOs

5.70 A court that imposes a term of imprisonment of up to two years can order that it be served by way of an intensive correction order (ICO).[108] The court cannot currently set a non-parole period as part of an ICO.[109] An ICO Management Committee was established under s 92 of the CAS Act and is comprised of senior Corrective Services NSW officers appointed by the Commissioner of Corrective Services. Breaches of an ICO have been referred by the Community Corrections officer supervising an offender to the ICO Management Committee, and the Committee has decided whether breaches should be dealt with by:

- noting the breach and taking no further action
- intensifying supervision of the offender
- issuing a formal Committee warning, or
- referring the breach to SPA.[110]

However, Corrective Services NSW advises that from 2 December 2013, breaches of ICOs will no longer be referred to the ICO Management Committee.[111] Instead, as is the case with parole orders, breach reports will be referred by Community Corrections staff directly to SPA.

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103. *Crimes (Administration of Sentences) Act 1999* (NSW) s 167.
104. *Crimes (Administration of Sentences) Act 1999* (NSW) s 166.
105. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-4.
106. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175.
107. *Crimes (Administration of Sentences) Act 1999* (NSW) s 168A(1).
108. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7.
109. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).
110. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 26.
111. Information provided by Corrective Services NSW (12 November 2013)

5.71 If an ICO breach is referred to SPA, SPA can revoke the order and commit the offender either to full-time custody or order that the offender serve the remainder of the sentence in home detention.[112] SPA can also conduct an inquiry into a suspected breach.[113] As with home detention and parole, within two to four weeks of revoking an ICO SPA must hold a review hearing.[114] The offender is entitled to the material on which SPA relied and to make written and oral submissions at the hearing.[115] If SPA rescinds the revocation, the offender is released to serve the remainder of the ICO in the community.[116] If the revocation is confirmed, the offender can apply to SPA to have the ICO reinstated but only after spending one month in full-time custody.[117]

Our recent recommendations

5.72 In our recent report on sentencing, we recommended that home detention and ICOs should be combined into a single hybrid community detention order.[118] In case this recommendation was not adopted, we also made recommendations for the improvement and strengthening of home detention and ICOs as they currently exist. In particular, we recommended that the court should be able to set a non-parole period for both home detention and ICOs, and that both orders should have a maximum length of three years.[119] We also recommended that, whether SPA revokes an offender's ICO or home detention order during the non-parole period or the parole period, an offender should be able to apply to SPA to have the order reinstated after one month.[120]

Previous stakeholder criticisms of the breach and revocation process

5.73 Two submissions to our sentencing reference suggested that the current procedures for dealing with breaches of ICOs are overly restrictive. Legal Aid NSW reported that SPA revokes ICOs without adequate notice to the offender and without allowing the offender a right to be heard. In addition, Legal Aid NSW suggested that the approach to breaches was overly inflexible and too often resulted in revocation.[121] The Probation and Parole Officers' Association of NSW similarly submitted that the breach process was convoluted, overly rigid and overly bureaucratic,[122] although the forthcoming change to breach procedures may address this issue.

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112. *Crimes (Administration of Sentences) Act 1999* (NSW) s 163, s 165A.
113. *Crimes (Administration of Sentences) Act 1999* (NSW) s 162.
114. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173.
115. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-4.
116. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175.
117. *Crimes (Administration of Sentences) Act 1999* (NSW) s 165. It is not clear how this provisions interacts with SPA's power to order than an offender serve the remainder of the sentence in home detention after revocation of an ICO.
118. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 11.1.
119. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 9.3-9.4.
120. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 9.3-9.4.
121. Legal Aid NSW, *Submission PSE31*, 12.
122. Probation and Parole Officers Association of NSW, *Submission PSE38*, 7.

5.74 Stakeholders may feel some dissatisfaction with the ICO and home detention breach process because it is modelled on the parole process; that is, SPA meets privately without input from the offender and decides to revoke the order, the offender is returned to custody and then a review hearing is scheduled within two to four weeks to revisit the matter. However, offenders serving ICOs or home detention may never have been in custody before and may have committed less serious offences than other parolees (as they must have been sentenced to a period of imprisonment of either two years or less in the case of an ICO, or 18 months or less in the case of home detention). The period of two to four weeks in custody before the review hearing is held may severely disrupt the offender's employment, home life and finances.

5.75 In response to a NSW Sentencing Council review of ICOs conducted after they were first introduced, Legal Aid NSW also submitted that SPA revoked orders in response to minor breaches, even where there was a reasonable explanation.[123] Legal Aid NSW suggested that offenders should be notified when SPA is first considering a breach of an ICO and should be able to make any relevant submissions or explanations at this point, rather than at a later post-revocation review hearing. The NSW Sentencing Council noted that stakeholders generally lacked knowledge about the complex procedures for ICO breaches and revocations.[124] The provision of better information or a more straightforward process could allay some stakeholders' concerns.

Question 5.15: Breach processes for ICOs and home detention

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

123. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 35.
124. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 36.

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