NSW GOVERNMENT

New South Wales
Law Reform Commission

Report
142

Parole

June 2015
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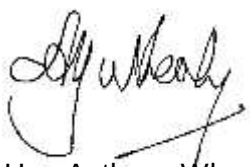
June 2015

The Hon G Upton MP
Attorney General
Level 19, 52 Martin Place
SYDNEY NSW 2000

Dear Attorney

Parole

We make this report pursuant to the reference to this Commission received 1 March 2013.



The Hon Anthony Whealy QC
Commissioner

The Hon Harold Sperling QC
Commissioner

Rhonda Booby
Commissioner

Table of contents

Tables and figures

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The recommendations of this report are the Commission's and do not necessarily reflect the views of the expert advisory panel.

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- NSW Bureau of Crime Statistics and Research
- Corrective Services NSW
- State Parole Authority
- Serious Offenders Review Council
- Juvenile Justice NSW
- Children's Court of NSW

Terms of reference

Refer to the Law Reform Commission an inquiry, pursuant to section 10 of the Law Reform Commission Act 1967, aimed at improving the system of parole in NSW.

Specifically, the Commission is to review the mechanisms and processes for considering and determining parole.

In undertaking this review the Commission should have regard to:

- the desirability of providing for integration into the community following a sentence of imprisonment with adequate support and supervision
- the need to provide for a process of fair, robust and independent decision-making, including consideration of the respective roles of the courts, State Parole Authority, Serious Offenders Review Council and the Commissioner for Corrective Services
- the needs and interest of the community, victims, and offenders
- any related matters the Commission considers appropriate.

[*Reference received 1 March 2013*]

Abbreviations

BOCSAR: New South Wales Bureau of Crime Statistics and Research

CAS Act: *Crimes Administration of Sentences Act 1999* (NSW)

CAS Regulation: *Crimes (Administration of Sentences) Regulation 2014* (NSW)

CCP Act: *Children (Criminal Proceedings) Act 1987* (NSW)

CDC Act: *Children (Detention Centres) Act 1987* (NSW)

CDO: Continuing detention order

CDTCC: Compulsory Drug Treatment Correctional Centre

CDTO: Compulsory drug treatment order

CHRO Act: *Crimes (High Risk Offenders) Act 2006* (NSW)

CRC: Community Restorative Centre

DIBP: Department of Immigration and Border Protection

DRC: Day reporting centre

ERS: Extended Reintegration Service

ESO: Extended supervision order

FACS: NSW Department of Family and Community Services

HDC: Home Detention Curfew

ICO: Intensive correction order

LSI-R: Level of Service Inventory-Revised

MAPPA: Multi-agency public protection arrangements

NGO: Non-government organisation

PRLC: Pre-Release Leave Committee

SORC: Serious Offenders Review Council

SPA: State Parole Authority

SYORP: Serious Young Offenders Review Panel

Executive summary

Context and themes (ch 1)

0.1 A court, when sentencing an offender to imprisonment, usually imposes a non-parole period (the minimum period that the offender must spend in custody) and a head sentence (the maximum period that the offender can be kept in custody). The offender can be released on parole at some point between the end of the non-parole period and the end of the head sentence. When an offender is paroled, the parole period remains part of the sentence. The offender is subject to conditions (usually including supervision) and will be returned to prison if he or she breaches the conditions and parole is revoked.

0.2 In 2013, 5621 offenders were released on parole from Corrective Services NSW correctional centres and 464 offenders were paroled from Juvenile Justice NSW custody. As at 29 June 2014, Corrective Services NSW was supervising 4496 offenders on parole.

0.3 We have been asked to examine the effectiveness of the legal framework governing parole, with a view to making parole work better for the community. At the heart of our review is the goal of improving the parole system to protect community safety, and to reduce reoffending by providing a means for supervised reintegration following imprisonment. In this context, our review aims to:

- simplify the legal framework
- simplify and strengthen the operational policy framework
- improve case management in custody, in the community and in the process of transition, and
- develop more options for swift and certain responses to breaches of parole.

Purpose of parole and design of the parole system (ch 2)

0.4 Parole should be retained. (**Rec 2.1**) Having reviewed the evidence, we conclude that parole works to reduce reoffending and contributes to protecting community safety, and so is in the community's interest. Releasing all offenders without parole at the end of their sentence would not promote community safety.

0.5 The key purpose of parole – promoting community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending – should be stated in the legislation. (**Rec 2.2**)

0.6 NSW currently has a mixed system of parole where, depending on sentence length, the parole order is made either by the sentencing court or by the State Parole Authority (SPA). We recommend retaining the mixed system, so that when a court imposes a sentence of imprisonment with a non-parole period:

- if an offender's head sentence is 3 years or less, the offender is released at the end of any non-parole period unless SPA revokes the parole before release, and

- if an offender's head sentence is more than 3 years, SPA determines whether and, if so, when to release the offender to parole. (**Rec 2.3**)

0.7 This approach best protects the safety of the community and reduces reoffending. It ensures that SPA's and Corrective Services NSW's resources are directed towards more serious offenders and allows a risk management approach, where lower risk offenders are released on parole automatically (if the sentencing court sets a non-parole period) and higher risk offenders may be kept in custody or managed more intensively.

0.8 Making parole discretionary for all sentences of more than 3 years would also encourage offenders to participate in rehabilitation programs and other activities, and to behave well in custody.

Sentences of 3 years or less: Statutory parole (ch 3)

0.9 A number of issues and complexities arise from the current system of court based parole for sentences of 3 years or less, including the unnecessary step of the court making a separate order for release at the end of any non-parole period. Parole conditions that are imposed at the time of sentencing may also prove to be unsuitable when the time comes for release on parole.

0.10 We propose a "statutory parole" model in place of court based orders. The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act), rather than the court, should require release on parole, at the end of any non-parole period, in the case of a head sentence of 3 years or less (or an aggregate sentence or accumulated sentences amounting to an overall head sentence of 3 years or less). (**Rec 3.1(1), 3.3**) Such parole should be subject to the standard conditions of parole by force of law. (**Rec 3.1(2)**; see **Rec 9.2, 9.4**)

0.11 Statutory parole would move the power to impose additional conditions from the court to SPA. At a time shortly before release on parole, SPA would be in a better position than the sentencing court to decide what conditions should be imposed, since it would have advice from Community Corrections and would be able to take into account how the offender had progressed towards rehabilitation while in custody.

0.12 It follows that SPA should be able to impose any necessary additional conditions to statutory parole as it can now do in the case of court based parole. (**Rec 3.1(3)**)

0.13 SPA's ability to revoke a statutory order before the offender is released is an important safeguard and should be retained. The power should only be exercised if:

- SPA is satisfied that the offender's conduct in custody shows that the risk to community safety if the offender is released outweighs any reduction in risk likely to be achieved through parole supervision, or
- the offender, if released, would pose a serious and immediate risk to his or her own safety, or
- the offender requests revocation. (**Rec 3.2**)

0.14 We make a number of recommendations to help overcome difficulties that offenders with statutory parole orders may have in arranging suitable post-release accommodation. (**Rec 3.2**)

Sentences of more than 3 years: Factors guiding State Parole Authority's decisions (ch 4)

0.15 SPA's decisions about parole for sentences of more than 3 years should be clearly focused on risk to community safety. The decision making framework should be clarified and simplified to ensure that community safety is at the forefront.

0.16 SPA should make a parole order if it is satisfied that the order is in the interests of community safety after taking into account:

- the risk to community safety of releasing the offender on parole
- whether parole supervision is likely to aid in reducing the possibility of reoffending
- the risk to community safety if the offender is released with little or no period of parole supervision, and
- the extent to which parole conditions can mitigate any risk to the community during the parole period. (**Rec 4.1**)

0.17 The matters to which SPA must have regard when considering the interests of community safety should be based on the current list in s 135(2) of the CAS Act. We recommend some changes to the list, including removing some considerations that detract from SPA's core assessment of risk to community safety. We also propose that SPA should take into account any submissions from registered victims, there being no direct requirement for SPA to do so currently. (**Rec 4.2**) We also propose some minor changes to what must be included in a Community Corrections pre-release report to ensure that it gives SPA the information it needs to make an informed decision. (**Rec 4.4**)

0.18 Our recommendations will ensure that SPA considers all matters that it takes into account in a way that is focused on an assessment of risk to community safety. Our recommendations aim to:

- ensure that any risk assessments (made using an evidence based risk assessment tool) are included in pre-release reports and that SPA members are trained in evaluating them (**Rec 4.5**), and
- guide SPA about the relevance of:
  - an offender's security classification
  - an offender's participation in in-custody rehabilitation programs and external leave
  - the availability and suitability of an offender's post-release accommodation, and
  - the possibility that an offender may be deported (**Rec 4.6-4.10**)

Parole decision making for serious offenders (ch 5)

0.19 The CAS Act makes special provision for managing "serious offenders". Serious offenders include prisoners who are serving a sentence for murder, a life sentence, or one or more sentences with an effective non-parole period of 12 years or more, who are at the highest level of security classification, or who the sentencing court, SPA or the Commissioner of Corrective Services have referred for management as serious offenders. On 31 December 2013 there were 774 serious offenders in custody (7.6% of the total inmate population).

0.20 The Serious Offenders Review Council (SORC) investigates and makes recommendations to the Commissioner of Corrective Services about the ongoing classification, placement and program participation of serious offenders. SORC's experience in managing serious offenders feeds into the parole process through reports that SPA must take into account when considering whether to release a serious offender on parole. SORC performs a valuable gatekeeping role in parole decision making.

0.21 We recommend giving the Commissioner of Corrective Services (as the person responsible for the day to day management of offenders) the power to refer prisoners for management as serious offenders. (**Rec 5.1**) We also recommend that Corrective Services NSW develop a policy to identify prisoners who are likely candidates for an application under the *Crimes (High Risk Offenders) Act 2006* (NSW) and to declare such prisoners to be serious offenders as early in their sentences as is possible. (**Rec 5.2**)

0.22 When making a parole decision, SPA should continue to use the same test and consideration for serious offenders as for non-serious offenders. The current larger number of grants of parole to non-serious offenders relative to serious offenders indicates that SPA currently distinguishes appropriately between serious and non-serious offenders.

0.23 In preparing advice and reports for SPA, SORC should use the same test and considerations as SPA. This would ensure that SORC's focus is the same as SPA's and that its advice and reports are relevant to SPA's decisions. (**Rec 5.4**)

0.24 There should be no change to the position that, if SORC advises against parole for a serious offender, SPA may still consider parole for the offender but may grant parole only in exceptional circumstances. (**Rec 5.5**)

A new parole decision making process (ch 6)

0.25 SPA's decision making process is too complicated, insufficiently transparent and involves many technical rules that are impractical or difficult to fit together into a coherent scheme. There are also unnecessary separate procedures where an offender is a serious offender. Many provisions impede or obscure rather than assist SPA's decision making. SPA has developed its own processes in some areas where there are gaps in the legislation or a lack of clarity and has given registered victims a broader role in its processes than the CAS Act requires.

0.26 The legislation should be entirely redrafted to ensure that SPA's decision making process is more clearly and fully set out and that unnecessary powers and rules are removed. (**Rec 6.1, 6.2**)

0.27 There should be a single process that applies to both serious and non-serious offenders. However, we do recommend special provision for review hearings in the exceptional circumstances where SPA grants parole to a serious offender against the advice of SORC. (**Rec 6.3**)

0.28 We propose that registered victims have the same procedural rights whether the offender is a serious offender or not. It is important that victims have a voice in parole decision making. There should therefore not be any restriction on the content of victim submissions and SPA should ensure that it gives registered victims sufficient opportunity to make oral submissions. (**Rec 6.4**)

0.29 Problems and inconsistencies arise when SPA considers revoking its own parole order before an offender is released. SPA should have a separate and differently drafted power to ensure that the power is only used in unusual circumstances and that, normally, the regular decision making process fully considers all the relevant issues. SPA should be able to revoke parole where new information is available or the situation has materially changed, and SPA is satisfied that the offender, if released, would pose a serious and immediate risk to his or her own safety, or where the offender has requested that the order be revoked. (**Rec 6.6**)

0.30 Most of the existing time limits and technical rules that constrain SPA's decision making should be dropped. Similarly, powers that SPA does not use and that are unnecessary should be removed. (**Rec 6.7**)

Other issues in the parole decision making process (ch 7)

0.31 All registered victims should have the right to access documents that show the steps an offender has taken towards rehabilitation. (**Rec 7.1**) Registered victims should also be kept informed about the progress of decision making. (**Rec 7.2**) This will help victims to understand and engage with the parole decision making process.

0.32 To ensure that offenders can engage with the parole process, the information, documents and forms provided should be in plain English and all communications with offenders (including explanations of orders and conditions), whether in writing or not, should be as straightforward and easy to understand as possible. (**Rec 7.4**)

0.33 SPA's power to withhold some documents from participants should be clarified and simplified so that SPA can properly balance procedural fairness with any competing public interest in withholding particular information (for example information disclosing police operations). A new provision should expressly forbid the disclosure of a victim's submission unless the victim has consented in writing.

0.34 In all cases, procedural fairness dictates that SPA should notify an offender if a documents has been withheld. SPA should then provide the offender with as much information about the contents of the document as would enable the offender to understand and respond to the substance of the facts, matters and circumstances

which will affect the parole decision, and is, in the opinion of a judicial member of SPA, consistent with the public interest in withholding it. (**Rec 7.3**)

0.35 SPA should provide written reasons for its decisions to grant or refuse parole at private meetings and review hearings. The reasons should be given to offenders and registered victims who have lodged a notice of interest. (**Rec 7.5**) Providing reasons can overcome the sense of grievance parties may feel when they are not told the reasons for a decision that affects them, lead to better and more consistent decision making and allow decisions to be reviewed. In some cases SPA already does this in practice. SPA should also publish online reasons for a greater range of decisions, in particular cases involving serious offenders. (**Rec 7.6**) This would increase transparency and public confidence in its work.

0.36 The CAS Act should set out a simplified procedure for SPA to follow when deciding whether to grant parole to otherwise ineligible offenders in the rare cases where exceptional circumstances apply. (**Rec 7.7**)

Membership of the State Parole Authority and Serious Offenders Review Council (ch 8)

0.37 The provisions about constituting panels and forming quorums for SPA and SORC are unnecessarily complex and difficult to understand. They should be redrafted and simplified. (**Rec 8.1 and 8.2**)

0.38 The membership composition of SPA and SORC should not be changed. However, we recommend that:

- merit based selection processes should be used when appointing members (**Rec 8.3, 8.4**)
- the community members should, as far as is reasonably practicable, reflect diversity in the community (**Rec 8.5**) and have knowledge of, or experience working in, the criminal justice system or related fields such as social work, mental health or other human services (**Rec 8.6**), and
- members should be able to access professional development opportunities and should be subject to peer performance evaluation (**Rec 8.7**).

Parole conditions (ch 9)

0.39 The current three standard conditions of parole are to be of good behaviour, not commit any offence, and adapt to normal lawful community life.

0.40 We consider that the phrase “good behaviour” is unhelpfully vague and that it is impractical and unfair to hold parolees to a standard of “normal lawful community life” that is imprecise and not easily described.

0.41 Parolees should instead be required, as standard parole conditions, not to commit any offence and to accept supervision. The purpose of release on parole is to reduce risk to community safety by managing and supervising an offender’s re-entry into the community. Parole cannot be expected to achieve this unless supervision is

always a condition. The current three year limit on the duration of supervision conditions should be removed. (**Rec 9.1**)

0.42 Having a list of obligations attached to a supervision condition would make clear and transparent how offenders are managed on parole. Such a list should make it clear that the overarching obligation is to obey all reasonable directions of the supervising Community Corrections officer and then expressly indicate the main types of directions that may be given. We propose retaining most of the obligations that currently attach to supervision conditions. We do, however, recommend some changes to:

- achieve greater flexibility surrounding residence requirements;
- require that parolees participate in rehabilitation programs, interventions and treatment as directed
- require that parolees follow reasonable directions about employment, education and training
- require that parolees follow reasonable directions about drug and alcohol use, including directions to cease or reduce use, and submit to drug and alcohol testing as directed, and
- allow Community Corrections officers to impose a curfew. (**Rec 9.2**)

0.43 Any curfew must be for no more than 12 hours in any 24 hour period and there should be a Corrective Services NSW policy requiring a supervising officer to get permission from a manager before imposing a curfew and requiring a manager to review the curfew after each month of operation. (**Rec 9.3**)

0.44 In order to assist in supervising parolees, consideration should be given to drafting a provision authorising Corrective Services NSW to collect information from third parties about compliance with parole requirements, and authorising third parties to disclose such information to Corrective Services NSW. (**Rec 9.5**)

0.45 A plain language summary of the obligations (in English and other relevant languages) should be developed and given to all parolees. (**Rec 9.6**)

0.46 SPA's discretion to impose additional conditions gives it the flexibility to tailor parole orders to the individual circumstances of each offender. Unnecessary and inappropriate conditions should be avoided. SPA should, therefore, be able to add any condition it considers reasonably necessary to:

- manage the risk to community safety of releasing the offender on parole;
- take account of the effect of releasing the offender on parole on any victim or victim's family; or
- respond to breaches of parole. (**Rec 9.7**)

0.47 Community Corrections officers should be able to exempt offenders from complying with non-association, place restriction and curfew conditions. Such exemptions should only be granted for a limited time and for a specified purpose. In order to

avoid unnecessary distress to victims, Corrective Services NSW should inform any registered victims of any such exemption. (**Rec 9.8**)

Breach and revocation (ch 10)

0.48 The goals of a system for dealing with breaches of parole are to manage risk and to ensure the parolee's compliance. To that end, we recommend a system of graduated sanctions. The system should be responsive and flexible in dealing with breaches and the breaches should attract clear and proportionate consequences. The response to breach should be proportionate, swift and certain. (**Rec 10.1**)

0.49 SPA and Community Corrections should have powers that reflect the core functions each body performs in the system.

0.50 In order for Community Corrections to carry out professional and effective case management it must have the discretion to handle minor, non-reoffending breaches internally. Community Corrections officers should, therefore, have a range of responses available to deal with breaches and should only report breaches to SPA if their available responses cannot adequately achieve the system's goals.

0.51 A Community Corrections officer's available responses to a breach (other than reporting it to SPA) should be to:

- impose a curfew on the offender for no more than a maximum of 12 hours in any 24 hour period (subject to approval by a manager and review by a manager at the end of every month of operation)
- give a reasonable direction to the offender about the offender's behaviour
- warn the offender (or request that a more senior officer warn the offender), or
- note the breach and take no further action.

If reporting a breach to SPA, the Community Corrections officer must recommend that SPA do one or more of the following:

- revoke parole
- impose home detention
- impose electronic monitoring, or
- otherwise vary or add to the conditions. (**Rec 10.2(1)**)

0.52 A new Corrective Services NSW policy should list the circumstances in which a breach must trigger a Community Corrections report to SPA, and provide a clear framework for Community Corrections officers to exercise their discretion. (**Rec 10.2(3)**)

0.53 SPA should have a range of sanctions, in addition to revoking parole, to achieve the system's goals. SPA should be able to use low level sanctions of noting breaches and warning the offender and higher level sanctions of varying or adding conditions to the parole order, electronic monitoring and home detention. (**Rec 10.3**)

0.54 SPA should also be able to revoke parole in the absence of breach if it considers that an offender poses a serious and immediate risk to the safety of the community or any individual, or there is a serious and immediate risk that the offender will leave NSW, and these risks cannot be mitigated through reasonable directions from the supervising officer or by adding or varying parole conditions. A Community Corrections officer should be able to report to SPA in such circumstances, if the risk cannot be mitigated through reasonable directions from the officer. (**Rec 10.4**)

0.55 The current consequences of breach of parole are sufficient. Breach of parole should not also be an offence. (**Rec 10.5**)

Breach and revocation: Procedural issues (ch 11)

0.56 Having reviewed the procedures surrounding SPA's revocation powers, we recommend amendments and additions to the CAS Act to achieve flexibility, consistency, clarity, certainty and eliminate unnecessary procedures. (**Rec 11.1-11.5**)

0.57 The grounds on which a judicial member of SPA may suspend parole in emergency situations should be revised to align more with the grounds for refusing or revoking parole, namely that the offender poses a serious and immediate risk to the safety of the community or of any individual, or there is a serious and immediate risk that the offender will leave NSW in contravention of parole conditions. (**Rec 11.6**)

0.58 It is important that an offender understand the reasons for SPA's decision to revoke parole. SPA should therefore review the form of the explanatory letter and revocation notification it sends to offenders to ensure that the information is as straightforward and easy to understand as possible. (**Rec 11.7**) It is also desirable for SPA to publish its decisions in revocation matters. However, in light of the resource implications, SPA need only work towards publishing online those reasons for revocation decisions that it must already record in its minutes. (**Rec 11.8**)

Further applications for parole (ch 12)

0.59 If SPA refuses or revokes parole, the 12 month rule prevents offenders from applying to SPA for parole for a further 12 months barring exceptional circumstances. There should be more flexibility so that SPA can set either an earlier or a later reconsideration date at the time of the decision to refuse or revoke parole. This would allow some offenders serving short sentences a further opportunity to apply for parole and would prevent distress to victims arising from recurrent applications by offenders serving lengthy sentences. (**Rec 12.1**)

0.60 There should also be a formal avenue for offenders to apply for early parole reconsideration on the basis of manifest injustice. (**Rec 12.2**)

Appeals and judicial review of SPA decisions (ch 13)

0.61 The rights of the offender and the State to apply in certain circumstances to the Supreme Court for a declaration that SPA relied on false, misleading or irrelevant information have little value and should be repealed. (**Rec 13.1**)

0.62 The rights to common law judicial review should remain without the need to extend appeal rights to a merits review.

Case management and support in custody and in the community (ch 14)

0.63 The aims of case management by Corrective Services NSW should be to develop and implement individualised plans for offenders that cover how offenders are prepared for, transitioned to and supported on parole, with the ultimate aim of reducing the risk of reoffending.

0.64 Achieving effective in-custody case management has emerged as an important issue. In our view, the main thrust of Corrective Services NSW case management policy is appropriate but its implementation can be improved.

0.65 Corrective Services NSW should do the following to reform in-custody case management and parole preparation:

- commission an independent review of the implementation of its case management policies
- simplify and streamline relevant policy documents to help staff to deliver more effective case management
- make changes to reduce diffusion of responsibility for the case management of offenders, and
- review the current system of security classification, with the aim of simplifying and streamlining it. (**Rec 14.1**)

0.66 There should be increased proactive support for offenders transitioning from custody to parole and Corrective Services NSW should continue to improve community case management and support for offenders on parole. To assist in this, Corrective Services NSW should evaluate the new Funded Partnership Initiative and other programs aimed at community case management. The Government should also consider establishing working groups to reduce barriers to co-ordinated support among government agencies and improve information sharing and cooperation. (**Rec 14.2 and 14.3**)

0.67 Corrective Services NSW should also ensure that all of its rehabilitation programs are evaluated for their effectiveness in reducing reoffending. (**Rec 14.4**)

Pre-parole programs (ch 15)

0.68 Pre-parole programs are intended to ease the transition from custody to parole and to help reduce rates of parole breach and reoffending. Existing mechanisms include pre-release external leave programs and transitional centres. There is scope for improving these transition options.

0.69 Corrective Services NSW should review its unescorted external leave policy with a view to simplifying it, and providing a policy framework that specifies the purpose and objectives of pre-release unescorted external leave programs and the criteria for assessing whether or not a prisoner requires leave before release on parole. For

those offenders not requiring leave, failure to participate should not be a barrier to parole. (**Rec 15.1**) There is also merit in Corrective Services NSW developing partnerships with non-government organisations to provide volunteer sponsors for day leave. (**Rec 15.2**)

0.70 Transitional centres are currently limited in availability – there being only two in NSW, both of them female-only. These centres may offer a cost effective transition process that could lower recidivism. The existing centres should be evaluated for their effectiveness at reducing reoffending and improving outcomes for offenders as a basis for considering expanding them for both female and male prisoners. (**Rec 15.3**)

"Back end" home detention

0.71 There is value in introducing a new transition option: a back end home detention scheme that involves transferring some offenders from full time custody to home detention for the final phase of their non-parole period. This would provide a more intensive transition process for appropriate offenders, allowing them to establish strong community supports before they are released on parole. SPA should determine whether an offender can access back end home detention, and it should only be available for a limited period of time. (**Rec 15.4-15.12**)

The problem of short sentences (ch 16)

0.72 A significant number of offenders serve short sentences of imprisonment either with or without parole periods. A lack of pre- and post-release case management and support can contribute to poor post-release outcomes for offenders who serve a short fixed term sentence or only a short period of parole.

0.73 The most effective strategy for dealing with this problem is to reduce the number of offenders serving short prison sentences by strengthening community based custodial sentencing options and increasing awareness of participants in the criminal justice system about the problems caused by short sentences. There may also be benefit in strengthening case planning for offenders serving short sentences, and ensuring that offenders serving short sentences retain links to community based services.

0.74 We, therefore, recommend establishing a working group to investigate the viability of a system for maintaining connections between offenders serving short sentences of imprisonment and community based service providers. (**Rec 16.1**) A program should also be developed to build the awareness of participants in the criminal justice system about sentencing practice and sentence administration, with a particular emphasis on issues associated with short sentences of imprisonment (**Rec 16.2**).

Parole for young offenders (ch 17)

0.75 There is general agreement that young people should be treated differently in the criminal justice system. There should therefore be a separate parole system for young offenders incorporated in the *Children (Criminal Proceedings) Act 1987* (NSW) (CCP Act) that would allow the development of a simpler regime managed

by the Children's Court, with features appropriate to young offenders. (**Rec 17.1, 17.2**)

0.76 The provisions should be drafted in a way that reflects the different focus of the juvenile parole system and that allows the system to be flexible, less formal and technical, more responsive and more transparent and that gives the Children's Court greater discretion. We recommend including an additional principle in the CCP Act that the purpose of parole is to promote community safety, recognising that the rehabilitation and reintegration of children into the community may be a highly relevant consideration in that regard. (**Rec 17.3**)

0.77 Within this general approach, we make some specific recommendations about the content of the juvenile parole system (**Rec 17.6-17.15**), guided by design principles aimed at achieving flexibility, limited technicality, responsiveness, and clarity. (**Rec 17.5**)

0.78 The boundaries between the adult and juvenile parole systems should be clarified by setting a firmer cut-off at 18 years to determine access to the juvenile parole system, including parole decision making, parole supervision and decision making about breach and revocation. (**Rec 17.4**)

Other issues requiring amendment (ch 18)

0.79 Some other issues related to parole arose during our review. In response to them, we recommend:

- amending SPA's breach and revocation process for intensive correction orders and home detention to ensure consistency with the parole breach and revocation process, (**Rec 18.1**) and
- repealing the timeframe exception for parole consideration for offenders with revoked compulsory drug treatment orders, in light of our recommendation to revise parole consideration timeframes. (**Rec 18.2**; see **Rec 6.7**).

Recommendations

2. Purpose of parole and design of the parole system

2.1: Retention of parole **(page 25)**

Parole should be retained.

2.2: Statement of the primary purpose of parole **(page 27)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should include a statement of the purpose of parole along the following lines:

The primary purpose of parole is to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending.

(2) The *Crimes (Administration of Sentences) Act 1999* (NSW) should make clear that parole remains part of the sentence. Such a statement should be located near the new provision that states the purpose of parole.

2.3: A mixed parole system **(page 37)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should retain the current mixed parole system where automatic parole applies to offenders serving head sentences of three years or less that have a non-parole period and discretionary parole applies to offenders serving sentences of more than three years.

3. Statutory parole

3.1: Introducing a statutory parole model **(page 43)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that an offender sentenced to a head sentence of three years or less with a non-parole period must be released on parole at the end of the non-parole period ("statutory parole"), unless the State Parole Authority has revoked parole.

(2) Statutory parole should be subject to the standard conditions of parole set out in Recommendation 9.1.

(3) The Authority should have the same power to impose any additional conditions as it currently has for court based parole orders.

(4) The statutory parole model should replace the court based parole order model in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

3.2: Pre-release revocation of statutory parole **(page 54)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the State Parole Authority may revoke statutory parole (or a court based parole order if court based parole is retained) before an offender is released on parole. This should replace the current cl 222(1) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(2) The Authority may revoke such parole if:

(a) the Authority is satisfied that the offender's conduct in custody indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(b) the Authority is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(c) the Authority is satisfied that satisfactory accommodation or post-release arrangements have not been made or cannot be made and the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(d) the offender requests that the order be revoked.

(3) Corrective Services NSW should develop and publish a robust policy for assessing the suitability of offenders' proposed post-release accommodation. The policy should focus on risk to community safety and be grounded on the available evidence about the extent to which different types of restrictions on the places offenders may live can reduce the risk of reoffending.

(4) When an offender's proposed post-release accommodation is assessed as unsuitable, Community Corrections should clearly communicate the reasons for this assessment to the offender or the offender's legal representative.

(5) Corrective Services NSW should amend its policy to make clear that Community Corrections officers should seek pre-release revocation on the basis of an offender's accommodation situation only if the absence of arrangements for suitable accommodation indicates that the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender.

(6) Corrective Services NSW should evaluate the provision of post-release accommodation under the Funded Partnership Initiative. The evaluation should assess whether the level of post-release accommodation is adequate to meet requirements.

3.3: Parole for accumulated sentences **(page 57)**

(1) When an offender is sentenced for multiple offences, the effective length of the overall head sentence (whether an aggregate sentence or accumulated sentences) should be used to determine whether the offender should be subject to statutory parole (or court based parole, if retained) or discretionary parole.

(2) In the case of accumulated sentences, where the effective length of the overall head sentence is three years or less:

(a) there should be a single date for release on parole that corresponds with the end of the last operative non-parole period (if statutory parole is implemented); or

(b) the court should make a parole order that requires release on parole at the end of the last operative non-parole period (if court based parole is retained).

4. Factors guiding the State Parole Authority's decisions

4.1: Replacing the public interest test **(page 65)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to the following effect:

The State Parole Authority may make a parole order for an offender if it is satisfied that making the order is in the interests of community safety. In doing so, the Authority must take into account:

(a) the risk to community safety of releasing the offender on parole

(b) whether parole supervision is likely to aid in reducing the possibility of the offender reoffending

(c) the risk to community safety if the offender is released at the end of the sentence without a period of parole supervision, or is released at a later date with a shorter period of parole supervision, and

(d) the extent to which parole conditions can mitigate any risk to community safety during the parole period.

4.2: Mandatory considerations **(page 68)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that when the State Parole Authority is making a decision in accordance with Recommendation 4.1 it is required to consider:

(a) the nature and circumstances of the offence to which the offender's sentence relates

(b) any relevant comments made by the sentencing court

(c) the offender's criminal history

(d) the likelihood that the offender, if released, will reoffend, and the likely seriousness of any reoffending

(e) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole

(f) any submissions from any registered victim

(g) any report in relation to the granting of parole to the offender that has been prepared by or on behalf of Community Corrections, as referred to in section 135A

(h) 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, the Commissioner or any other authority of the State

(i) if the Drug Court has notified the Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the *Drug Court Act 1998* (NSW), the circumstances of that decision to decline to make the order, and

(j) such other matters as the Authority considers relevant.

4.3: Clarifying the status of the State Parole Authority's *Operating Guidelines* **(page 69)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove the requirement that guidelines under s 185A be developed "in consultation with the Minister".

4.4: Content of Community Corrections reports **(page 71)**

(1) Section 135A of the *Crimes (Administration of Sentences) Act 1999* (NSW), which relates to the content of Community Corrections reports, should be moved to the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(2) The new clause should require the pre-release report from Community Corrections to recommend for or against parole.

(3) The new clause should not require the report to address the likelihood of the offender adapting to normal lawful community life.

(4) The new clause should require the report to address any established breaches during a previous period on parole, a period of leave or a community based sentence.

(5) The new clause should require the report to address the offender's participation in rehabilitation, education, work or other programs in prison. Where relevant, the report should also address the availability or unavailability of such programs and the offender's willingness or unwillingness to participate.

4.5: The State Parole Authority's use of risk assessment results **(page 79)**

(1) The Community Corrections pre-release report should include the results of any evidence based risk assessment tool used by Corrective Services NSW to assess the offender.

(2) The State Parole Authority members' professional development program should include training in the value, uses and limitations of risk assessment tools, particularly the Level of Service Inventory-Revised (LSI-R).

(3) The requirement in the Authority's *Operating Guidelines* that an offender must generally be assessed as low risk before being granted parole should be removed. Instead, the *Operating Guidelines* should emphasise that risk assessment results should be given weight in accordance with the legislative framework for assessing release on parole set out in Recommendations 4.1-4.4.

4.6: The State Parole Authority's consideration of security classification **(page 82)**

The State Parole Authority's *Operating Guidelines* should provide that if an offender has failed to achieve a low level of prison classification, the Authority should, when considering whether to grant parole, take into account:

(a) any reasons for the failure to achieve a low level of prison classification, and

(b) that an offender with a higher level of prison classification, who otherwise meets the requirements for a grant of parole, could still be regarded as suitable for parole.

4.7: The State Parole Authority's approach to in-custody rehabilitation programs **(page 85)**

The State Parole Authority's *Operating Guidelines* should be amended to the following effect:

(a) Where an offender has not completed a recommended in-custody rehabilitation program for reasons beyond his or her control, the Authority should not take those reasons into account.

(b) The Authority should take into account an offender's participation (or lack of participation) only in those programs likely to reduce that particular offender's reoffending risk, or that prepare offenders to participate in those programs.

(c) The Authority should take program participation into account on a case by case basis when making the parole decision.

(d) The Authority should consider whether the offender could, without increased risk to the community, complete a recommended program in the community.

4.8: The State Parole Authority's consideration of external leave participation **(page 88)**

The State Parole Authority's *Operating Guidelines* about serious offenders or other long term inmates having failed to participate in pre-release external leave should be amended to the following effect:

(a) The presumption that serious offenders and other long term inmates should have undertaken pre-release external leave should be removed.

(b) In deciding what weight to give to the failure, the Authority should take into account:

  (i) whether the failure was for reasons beyond the offender's control, and

  (ii) whether the offender's participation in other preparatory or transitional options would be sufficient to prepare the offender for parole.

4.9: Assessing the necessity and suitability of post-release accommodation **(page 91)**

Where suitable accommodation is not available for an offender:

(1) Corrective Services NSW policy should state that Community Corrections should comment in the pre-release report on whether such accommodation is necessary to supervise the offender adequately and manage any risk to community safety that the offender poses.

(2) The State Parole Authority's *Operating Guidelines* should state that the offender may be released on parole if any risk to community safety can be managed and Community Corrections can provide adequate supervision.

4.10: Parole for offenders likely to be deported **(page 99)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, when considering parole for an offender who may be subject to deportation if released on parole, the State Parole Authority must take into account:

  (a) the likelihood that the offender will be deported when released on parole, and

  (b) the risk to community safety in any country the offender may travel to during the parole period if deported.

(2) The current list in the Authority's *Operating Guidelines* of factors that the Authority must consider in deportation cases should be deleted.

5. Parole decision making for serious offenders

5.1: Power to declare an offender a "serious offender" **(page 103)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should expressly authorise the Commissioner of Corrective Services to declare an offender to be a serious offender and the definition of "serious offender" in s 3(1) of the Act should be amended accordingly.

(2) The definition of "serious offender" in s 3(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended by deleting paragraph (d) which refers to an offender being managed as a serious offender in accordance with a decision of the sentencing court, State Parole Authority or the Commissioner.

5.2: Referring high risk sexual and violent offenders to the Serious Offenders Review Council **(page 106)**

(1) Corrective Services NSW should develop a policy to identify those sexual and violent offenders who are likely candidates for an application under the *Crimes (High Risk Offenders) Act 2006* (NSW).

(2) The Commissioner of Corrective Services should declare such offenders to be serious offenders as early in their sentences as is possible.

5.3: Offenders serving redetermined life sentences – repeal of s 154 and s 199 **(page 109)**

Sections 154 and 199 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.

5.4: Matters the Serious Offenders Review Council should take into account when making recommendations to the State Parole Authority **(page 110)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that, when reporting to and advising the State Parole Authority, the Serious Offenders Review Council must have regard to the considerations that the Authority takes into account when it makes a parole decision.

5.5: The Serious Offenders Review Council's recommendation to the State Parole Authority **(page 111)**

Section 135(3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be redrafted to state that, except in exceptional circumstances, the State Parole Authority must not make a parole order for a serious offender unless the Serious Offenders Review Council advises that the offender should be released on parole.

5.6: Parole and the *Crimes (High Risk Offenders) Act 2006* (NSW) (page 120)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should state:

(a) The State Parole Authority, in deciding whether to:

(i) grant parole to an offender, or

(ii) rescind a revocation of parole

must not take into account the fact that an order under the *Crimes (High Risk Offenders) Act 2006* (NSW) might be made regarding the

offender in future unless the State has made an application for such an order.

(b) If the State has made an application under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, but the application has not yet been determined, the Authority may take the application into account.

(c) If the Supreme Court has imposed an interim continuing detention order or a final continuing detention order under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, the Authority must not make a parole order, or rescind any revocation of the offender's parole.

(d) If the Supreme Court has imposed an interim supervision order or a final extended supervision order under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, the Authority may take the existence of such an order into account.

6. A new parole decision making process

6.1: Redraft procedural provisions **(page 132)**

The provisions of the *Crimes (Administration of Sentences) Act 1999* (NSW) that set out the State Parole Authority's decision making process (Part 6, Division 2, Subdivisions 2 and 3) should be entirely redrafted. The new provisions should more clearly and fully set out the decision making process that the Authority should follow.

6.2: A new parole decision making process **(page 135)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that in deciding whether to grant or refuse parole, the State Parole Authority uses the following process:

(1) The Authority should notify any registered victim of the offender, the Commissioner of Corrective Services and the Attorney General that the offender is due to be considered for parole. The Authority should make arrangements with Corrective Services NSW to achieve this on a day to day basis.

(2) Registered victims, the Commissioner and the Attorney General should be able to lodge a "notice of interest" in the case. Any registered victim should also be invited to make a written submission for the Authority to take into account.

(3) The Authority should then consider the offender's case at a private meeting and decide whether parole should be granted or refused.

(4) If the Authority decides to grant parole and no "notice of interest" has been lodged, it may make a parole order at the private meeting and impose such conditions as it may determine.

(5) If the Authority decides to grant parole and a "notice of interest" has been lodged, it should record its decision and list the case for a public review hearing.

(6) If the Authority decides to refuse parole at a private meeting, it should notify the offender, provide the offender with the documents on which its decision was based, and advise the offender of his or her right to apply for a review hearing. The offender should be able to make written submissions to the Authority as part of the application.

After it has considered the application, the Authority should list the case for a public review hearing only if it considers that a hearing is warranted. If the Authority does not consider that a review hearing is warranted, it should confirm the refusal and notify the offender.

(7) If the case is listed for a review hearing, the Authority should notify the offender and any party who has lodged a "notice of interest" in the case. The offender should be entitled to appear at the hearing, be legally represented, and make written and oral submissions. Any registered victim who has lodged a "notice of interest" should be entitled to appear and make written and oral submissions. If the Commissioner of Corrective Services or the Attorney General has lodged a "notice of interest", the Commissioner or the Attorney General should be entitled to appear, be legally represented and make written and oral submissions.

6.3: The Serious Offenders Review Council's role (page 136)

(1) If the offender is a serious offender and the Serious Offenders Review Council has recommended against parole for the offender, the State Parole Authority should grant parole only in exceptional circumstances.

(2) If the Authority at a private meeting decides to grant parole to a serious offender against the Council's advice:

(a) The Authority should list the case for a public review hearing.

(b) The Authority should provide the Council with reasons for its decision and allow at least 21 days before holding the hearing for the Council to respond in writing to the decision.

(c) The Commissioner and the Attorney General should be notified of the hearing and have the right to appear, be represented and to make submissions, regardless of whether they have previously lodged a notice of interest.

(3) If, at a review hearing held to reconsider a decision to refuse parole, the Authority decides to grant parole to a serious offender against the Council's advice:

(a) The Authority should adjourn the hearing and provide the Council with its reasons for reversing the initial decision to refuse parole.

(b) The Authority should give the Council at least 21 days to respond in writing before resuming the hearing.

(c) The Commissioner and the Attorney General should be notified of the resumed hearing and have the right to appear, be represented and to make submissions, regardless of whether they have previously lodged a notice of interest.

6.4: Victim submissions at hearings (page 139)

The State Parole Authority should ensure that a registered victim who has lodged a notice of interest is given sufficient opportunity to make oral submissions at any hearing, regardless of whether the Commissioner of Corrective Services or the Attorney General makes submissions opposing parole.

6.5: Commissioner and State submissions (page 147)

(1) The Commissioner of Corrective Services and the Attorney General should have the right to make written submissions to the State

Parole Authority at any time when it is considering the parole of any offender until a final decision is made. The Authority must consider any such submission.

(2) A final decision by the Authority may be any of the following:

(a) making a parole order

(b) refusing to hold a review hearing (where parole has been refused at a private meeting)

(c) confirming a refusal of parole because the offender has not applied for a review hearing, or

(d) refusing parole at a review hearing.

(3) Corrective Services NSW should develop and publish a policy about the situations when the Commissioner should make a submission.

6.6: Revoking discretionary parole orders pre-release (page 150)

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that:

(a) the State Parole Authority has the power to revoke its own parole order before the offender is released only if:

(i) since the order was made, new information is available or the situation has materially changed such that the Authority considers it appropriate to revoke the order

(ii) the Authority is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(iii) the offender requests that the order be revoked.

(b) the following procedures apply to proceedings for such a revocation:

(i) the offender, the Commissioner of Corrective Services and the Attorney General may apply to the Authority to exercise this power

(ii) applicants may make written submissions as part of the application

(iii) the Authority should consider the application and decide whether to exercise the power in a private meeting

(iv) if the Authority decides to exercise the power on application from the offender, the Authority should formally record a refusal of parole

(v) if the Authority decides to exercise the power on application from the Commissioner or the Attorney General, the Authority should list the matter for a review hearing and notify the offender, the applicant and any party who has lodged a notice of interest, and

(vi) at the review hearing, the Authority should consider whether to grant or refuse parole without regard to the previous decision.

(2) Section 172 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.

6.7: Minimising technical rules **(page 153)**

(1) The State Parole Authority must consider whether to grant parole at a private meeting at least 21 days before the end of the offender's non-parole period.

(2) The Authority (whether on an initial or subsequent consideration of parole) should be able to defer deciding whether to release an offender on parole:

(a) at a private meeting, to a future private meeting, whenever it considers it necessary, but in any case for not more than one month from the date of the first deferral

(b) at a review hearing, to a future review hearing, whenever it considers it necessary, but in any case for not more than three months from the date of the first deferral.

The separate power to postpone or adjourn a review hearing should no longer be available.

(3) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove the power of the Authority to "examine" an offender.

(4) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, at a review hearing, the Authority must consider whether or not to grant parole without regard to any view taken of the case at the private meeting.

(5) A parole order must authorise the offender's release on a day within 35 days of:

(a) the making of the order, or

(b) the end of the non-parole period,

whichever is the later day.

7. Other issues in the parole decision making process

7.1: Victims' access to documents **(page 157)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that a registered victim of an offender being considered for parole (whether or not the offender is a serious offender) is entitled to access documents indicating the steps that the offender has taken, or is taking, in custody towards his or her rehabilitation.

7.2: Keeping registered victims informed **(page 157)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should require the State Parole Authority to notify a registered victim of an offender that the offender:

(a) has been granted parole, and provide a copy of the offender's parole conditions, or

(b) has been refused parole, and indicate when the offender is likely to be next considered for parole.

7.3: The State Parole Authority's power to withhold documents (page 163)

(1) A new provision should be inserted into the *Crimes (Administration of Sentences) Act 1999* (NSW) to address the disclosure of submissions from registered victims to offenders, stating that:

(a) the State Parole Authority must not disclose such submissions to an offender unless the victim has consented in writing, and

(b) if a victim's submission is withheld from an offender, the Authority must notify the offender or the offender's legal representative that the submission has been withheld.

(2) Section 194 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be substituted by a new provision stating that:

(a) the Authority may withhold any material (including any document or part of a document) if, in the opinion of a judicial member, there is a public interest in withholding the material

(b) there is a public interest in the Authority withholding material if a judicial member considers that providing the material would:

(i) adversely affect the discipline or security of a correctional centre

(ii) endanger any person

(iii) put at risk an ongoing operation by a law enforcement agency or intelligence agency

(iv) adversely affect the supervision of any offender on parole, or

(v) disclose the contents of the offender's medical, psychiatric or psychological reports

(c) if the Authority is considering withholding material from an offender (or the offender's legal representative), the judicial member must be satisfied that the public interest in withholding it outweighs the public interest in procedural fairness for an offender

(d) if the Authority withholds material from any person, the Authority must inform the person from whom it is withholding the material that it has done so

(e) regardless of whether there has been a request for access to material, the Authority must provide an offender from whom such material has been withheld with as much information about the contents of the material as would enable the offender to understand and respond to the substance of the facts, matters and circumstances which may affect the parole decision and is, in the opinion of the judicial member, consistent with the public interest in withholding the material

(f) requires the Authority to withhold the material from any legal representative of any offender, if the Authority withholds, or would withhold, the material from the offender,

(g) applies, subject to the exceptions listed here, where the Authority must, under any law, provide any person with access to a report or other material, or where any person requests access to a report or other material in the Authority's possession

(h) applies notwithstanding any law to the contrary, and

(i) does not apply to registered victims' submissions or to the Minister's entitlement to access all documents held by the Authority under s 193A(1).

7.4: Plain language information for offenders **(page 166)**

(1) The State Parole Authority should develop an information package for offenders about the parole decision making process and the Authority's procedures. The package should be written in plain language and be as simple as possible. It should be available in English and other relevant languages.

(2) The Authority should review the standard forms and notices it provides to offenders to ensure that the forms and notices are as simple and easy to understand as possible.

(3) Corrective Services NSW should consider how to provide offenders with more non-written information about the parole decision making process, for example by discussion with the offender's assigned Community Corrections officer or as part of a pre-release preparation program.

7.5: Providing written reasons for the State Parole Authority's decisions **(page 169)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to require the State Parole Authority to provide to offenders, and any registered victims who have lodged a notice of interest, written reasons for its decisions to grant or refuse parole at a private meeting or review hearing.

7.6: Publishing reasons for State Parole Authority decisions **(page 171)**

Subject to privacy and security considerations, the State Parole Authority should publish reasons online for all of its decisions to grant or refuse parole. The Authority should prioritise publishing reasons in cases involving serious offenders.

7.7: Parole in exceptional circumstances **(page 173)**

Subsections 160(2) and (3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be replaced by new provisions that set out a simplified procedure for s 160 applications that is to operate independently of all other procedures relating to the State Parole Authority's decisions whether to grant parole. The new provisions should provide that:

(a) offenders have a right to apply for parole under s 160

(b) the Authority is not required to consider the application if it is satisfied that the application is frivolous, vexatious or has no prospect of success

(c) the Authority may, in its discretion, consider the application at a private meeting or at a hearing

(d) if the Authority decides to refuse the application at a private meeting, the offender should not be entitled to apply for a hearing to review the decision

(e) if the Authority decides to hold a hearing, the Authority must invite the Commissioner, the Attorney General, any registered victim and the offender to make submissions, and

(f) if the Authority decides, at a private meeting or at a hearing, that the application should be refused, the Authority must notify the offender of its decision and provide reasons.

8. Membership of the State Parole Authority and Serious Offenders Review Council

8.1: Composition and governance of the State Parole Authority (page 180)

The parts of the *Crimes (Administration of Sentences) Act 1999* (NSW) relating to the composition and governance of the State Parole Authority should be redrafted according to the following requirements:

(a) The Authority must have at least 16 members, including at least four judicial members, at least one police member, at least one Community Corrections member, and at least 10 community members.

(b) One judicial member should be appointed as Chairperson of the Authority. Another judicial member should be appointed as Deputy Chairperson of the Authority.

(c) The Chairperson of the Authority should schedule panels to make the decisions of the Authority. Each scheduled panel should consist of five members: one judicial member, one police member, one Community Corrections member and two community members. The judicial member should preside.

(d) If fewer than the 5 members that make up a panel are present at a meeting, the panel may make a decision provided at least one judicial member, one community member and one official member (either a police officer or Community Corrections officer) are present.

(e) Each appointing agency for official members may appoint deputies to act in the place of absent official members.

(f) The Chairperson of the Authority should have the power to determine how meetings are to be conducted, and also to convene meetings of all Authority members for the purposes of training, communication and professional development.

8.2: Composition and governance of the Serious Offenders Review Council (page 181)

The parts of the *Crimes (Administration of Sentences) Act 1999* (NSW) relating to the composition and governance of the Serious Offenders Review Council should be redrafted according to the following requirements:

(a) The Serious Offenders Review Council must have at least eight and no more than 14 members, including at least three judicial members, at least two official members and at least three and no more than nine community members.

(b) One judicial member should be appointed as Chairperson of the Council. Another judicial member should be appointed as Deputy Chairperson of the Council.

(c) The Chairperson of the Council should schedule panels to make the decisions of the Council. Each scheduled panel should consist of six members: two judicial members, two official members (officers of

Corrective Services NSW appointed by the Commissioner) and two community members. The Chairperson (or, if the Chairperson is not present, the Deputy Chairperson) should preside.

(d) If fewer than the five members that make up a panel are present at a meeting, the panel may make a decision provided at least one judicial member, one community member and one official member are present.

(e) The appointing authority for official members should be able to appoint deputies to act in the place of absent official members.

(f) The Chairperson of the Council should have the power to determine how meetings are to be conducted, and also to convene meetings of all Council members for the purposes of training, communication and professional development.

8.3: Merit selection of community members **(page 183)**

(1) Community members of the State Parole Authority and the Serious Offenders Review Council should be appointed following an openly advertised formal merit selection process.

(2) In consultation with the Authority and the Council, the NSW Department of Justice should develop standard selection criteria for assessing potential candidates. The Minister for Corrections should approve these criteria.

(3) The Minister for Corrections should appoint a panel (on which the Authority or the Council should be represented) to select community members. The selection panel should recommend candidates for appointment to the Minister. If the Minister accepts the recommendation, the candidate should, subject to Cabinet consideration, be recommended to the Governor for appointment.

8.4: Merit selection of judicial members **(page 184)**

The judicial members of the State Parole Authority and the Serious Offenders Review Council should be appointed on the basis of standard appointment criteria. The NSW Department of Justice should develop standard appointment criteria in consultation with the Authority and the Council. The Minister for Corrections and the Attorney General should approve the criteria.

8.5: Community members should reflect the diversity in the community **(page 187)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to provide that State Parole Authority and Serious Offenders Review Council community members must, as far as is practicable, reflect diversity in the community.

(2) A competitive selection process for community members should include consideration of a candidate's background and the extent to which the appointment of the candidate would contribute to community members reflecting diversity in the community.

8.6: Criteria for appointing community members **(page 189)**

The standard selection criteria used for selecting community members should require the person to have knowledge of, or experience working in, the criminal justice system or relevant fields such as social work, mental health or other human services.

8.7: Professional development and performance evaluation for State Parole Authority and Serious Offenders Review Council members **(page 191)**

(1) A structured orientation and mentoring process should be developed and implemented for new community members of the State Parole Authority and the Serious Offenders Review Council. The Chairpersons of the Authority and the Council should consider whether a similar or adjusted process would be useful for new judicial and official members.

(2) The Authority should receive adequate funding to hold at a minimum two "policy days" per year for all members' professional development. As well as covering detailed matters of operating policy, policy days should cover issues such as cross cultural awareness, the experience of offenders with cognitive impairments, and the use of actuarial risk assessment tools in correctional contexts.

(3) The Authority and the Council should develop a system of regular (for example, annual) peer performance appraisals to give members feedback on their performance. Such performance appraisals should be considered during any re-appointment process.

9. Parole conditions

9.1: Standard conditions of parole **(page 201)**

(1) The standard condition of parole requiring offenders not to commit any offence should be retained.

(2) Supervision by Community Corrections should be a standard condition of parole. The provisions that deal with the three year limit on the duration of supervision conditions should be removed from cl 218 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(3) The standard condition of parole requiring offenders to "be of good behaviour" should be removed.

(4) The standard condition of parole that offenders must adapt to normal lawful community life should be removed.

9.2: Obligations under the supervision condition **(page 203)**

Under the *Crimes (Administration of Sentences) Regulation 2014* (NSW), the obligations under the supervision condition should be:

(a) to obey all reasonable directions of the supervising Community Corrections officer, including, but not limited to, reasonable directions about:

  (i) reporting to the officer (or the officer's nominee) and being available for interview

  (ii) place of residence

  (iii) participating in programs, interventions and treatment

  (iv) employment, education and training

  (v) consenting to third parties disclosing information relevant to monitoring compliance with the parole order

(vi) not associating with any specified person or persons

(vii) not frequenting or visiting any specified place or district

(viii) observing curfew requirements

(ix) alcohol and drug testing, and

(x) ceasing or reducing alcohol or drug use

(b) to permit the officer to visit the offender at the offender's residential address at any time and, for that purpose, to enter the premises at that address

(c) to notify the officer of any change or intention to change his or her employment:

(i) if practicable, before the change occurs, or

(ii) otherwise, at his or her next interview with the officer

(d) not to leave NSW without the permission of the officer's Community Corrections manager

(e) not to leave Australia without the permission of the State Parole Authority.

9.3: Curfews under the supervision condition **(page 207)**

(1) The *Crimes (Administration of Sentences) Regulation 2014* (NSW) should provide that, if a supervising Community Corrections officer imposes a curfew as an obligation under the supervision condition, the officer may not require a parolee to remain at home for more than 12 hours in any 24 hour period.

(2) Corrective Services NSW should develop a policy about Community Corrections officers imposing a curfew as an obligation under the supervision condition that requires:

(a) a supervising officer to obtain permission from a manager before imposing the curfew, and

(b) a manager to review the curfew after each month of operation.

9.4: Purpose of reasonable directions **(page 209)**

Corrective Services NSW's *Community Corrections Policy and Procedures Manual* should state that, to assist in complying with the requirement that they be reasonable, directions should be given to parolees for the purpose of managing risks to community safety and that directions given for other purposes might not be reasonable.

9.5: Information about compliance with parole requirements **(page 210)**

Consideration should be given to including in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) a provision authorising Corrective Services NSW to collect information from third parties about compliance with parole requirements, and authorising third parties to disclose such information to Corrective Services NSW.

9.6: Plain language summary of obligations **(page 211)**

Corrective Services NSW should provide plain language summaries of supervision obligations in English and other relevant languages to all supervised parolees. Supervising officers should also use plain language to explain obligations to parolees at the start of the parole period.

9.7: Framework for additional conditions **(page 214)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to specify that the State Parole Authority can impose any additional conditions it considers reasonable to:

(a) manage the risk to community safety of releasing the offender on parole, including (but not limited to) any conditions that:

  (i) support participation in rehabilitation programs and assist in managing reintegration, or

  (ii) give effect to the offender's post-release plan prepared by Community Corrections

(b) take account of the effect of the offender being released on parole on any victim of the offender, and on any such victim's family, or

(c) respond to breaches of parole.

9.8: Exemptions from complying with place restriction or curfew conditions **(page 215)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that an offender does not contravene a place restriction or curfew condition that has been imposed by the State Parole Authority if the supervising officer permits the offender to do so. Supervising officers should only grant such permission for a limited time and for a specified purpose.

(2) If a supervising officer grants such permission, Corrective Services NSW should inform any relevant registered victim.

10. Breach and revocation

10.1: A graduated system of sanctions **(page 226)**

The legislative and policy framework for responding to breaches of parole should incorporate a system of graduated sanctions, as detailed in Recommendations 10.2-10.3. Community Corrections and the State Parole Authority should apply these sanctions in a way that ensures a proportionate, swift and certain response.

10.2: Community Corrections responses to breach **(page 231)**

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should outline the breach response options available to Community Corrections officers to the following effect:

  In response to a breach, a Community Corrections officer must do one of the following:

  (a) report the breach to the State Parole Authority with a recommendation that the Authority do one or more of the following:

    (i) revoke parole

    (ii) impose home detention

    (iii) impose electronic monitoring

    (iv) make any other variation or addition to the conditions

  (b) impose a curfew on the offender, for no more than a maximum of 12 hours in any 24 hour period

(c) give a reasonable direction to the offender about the offender's behaviour

(d) request that a more senior Community Corrections officer warn the offender

(e) warn the offender

(f) note the breach and take no further action.

(2) Corrective Services NSW should develop a policy about Community Corrections officers imposing a curfew in response to a breach that requires:

(a) a supervising officer to obtain permission from a manager before imposing the curfew, and

(b) a manager to review the curfew after each month of operation.

(3) Corrective Services NSW should develop a policy that sets out the circumstances in which a breach must trigger a Community Corrections report to the Authority, and provide a clear framework to guide Community Corrections officers in exercising their discretion when they respond to breaches.

10.3: State Parole Authority responses to breach (page 236)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that:

(1) In response to a breach of parole, the State Parole Authority may do one or more of the following:

(a) revoke parole

(b) add a condition to the parole order that requires the offender:

(i) to spend time under home detention conditions, or

(ii) to be subject to electronic monitoring

(c) otherwise vary, add or remove one or more conditions of the order

(d) warn the offender, or

(e) note the breach and take no further action.

(2) The Authority must not require an offender to spend time under home detention conditions unless it has received a suitability assessment from Community Corrections.

(3) The Authority must not require an offender to spend more than 30 days under home detention conditions in response to a particular breach.

(4) The Authority must not revoke parole for the purpose of obtaining a home detention suitability assessment unless no response other than:

(a) an order that the offender spend time under home detention conditions, or

(b) revocation

would be proportionate.

10.4: New powers to revoke parole in the absence of breach (page 241)
The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that:

(a) where there is no breach of parole, the State Parole Authority can revoke parole if it considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk that the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the supervising officer or by adding or varying parole conditions.

(b) a Community Corrections officer can report to the Authority in circumstances where there is no breach with a recommendation that the Authority revoke parole or add or vary parole conditions if the officer considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the officer.

10.5: No offence of breach of parole (page 247)
Breach of parole should not be an offence.

11. Breach and revocation: procedural issues

11.1: Clarifying the street time provision (page 254)
The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to the following effect:

(1) Any days from the date a revocation order takes effect to the date that the parolee is taken into custody in relation to the revocation order must be added to the sentence.

(2) Any extension to the parolee's sentence must not be longer than the time the parolee had left to serve at the date the revocation order took effect.

11.2: Reviews automatic unless a s 169 inquiry has been held (page 259)
Reviews should continue to be held automatically following revocation of parole except that, if a s 169 inquiry has been held and parole has been revoked, the State Parole Authority should have the discretion whether to hold a review or not.

11.3: The State Parole Authority should be able to take into account an offender's behaviour during street time (page 259)
The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the State Parole Authority can, when deciding whether or

not to rescind a revocation of parole, take into account an offender's conduct between the date the revocation order took effect and the offender's return to custody.

11.4 Effect of rescinding a revocation order (page 260)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the effect of rescinding a revocation order is that the grant of parole has effect as if it had not been revoked.

11.5: The State Parole Authority's power to vary or add conditions after rescission (page 261)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to include a provision that confirms that, when the State Parole Authority rescinds a revocation order, it has the power to impose further parole conditions, or vary any existing conditions in accordance with s 128.

11.6: Grounds for emergency suspensions (page 265)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, on application by the Commissioner of Corrective Services, a judicial member of the State Parole Authority can suspend an offender's parole only if he or she has reasonable grounds for believing that:

(a) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

(b) there is a serious and immediate risk that the offender will leave NSW in contravention of the conditions of the parole order.

11.7: Reasons for decisions in revocation matters (page 267)

The State Parole Authority should review the explanatory letter and revocation notification it sends to offenders to make these as straightforward and easy to understand as possible. The explanatory letter should be organised to include the following information:

(a) decision made

(b) reasons for the decision, and

(c) action that the offender may take.

11.8: Publishing reasons for decisions in revocation matters (page 269)

The State Parole Authority should work towards publishing reasons online for revocation decisions that it must already record in its minutes, including decisions to:

(a) revoke a parole order

(b) refuse to revoke a parole order in cases where Community Corrections has recommended that the order be revoked or there has been a submission from the Commissioner or the State, and

(c) rescind a revocation order.

12. Further applications for parole

12.1: Power to override the 12 month rule **(page 278)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that, when the State Parole Authority refuses parole or revokes parole:

(a) the 12 month rule (which limits subsequent applications for parole) remains in place as the general rule but the Authority should have the power to set an earlier date or a later date (up to three years later) at which the offender may apply for release on parole, and

(b) the Authority, when deciding whether to set such another date, must consider:

  (i) the length of time the offender has left to serve

  (ii) the interests of any registered victim

  (iii) the risk that the offender will be released at the expiry of the head sentence without any period of parole supervision, or with a reduced period of parole supervision, and

  (iv) whether the offender is likely to be ready for parole during the next 12 months.

12.2: Process for "manifest injustice" applications **(page 281)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that:

(a) there is a formal avenue for offenders to apply for the State Parole Authority to consider release on parole after an offender becomes eligible for parole, on the basis of manifest injustice

(b) the State Parole Authority must consider any such application at a private meeting but may refuse to consider the application if it is satisfied that the application is frivolous, vexatious or has no prospect of success

(c) if the Authority decides that to deny an early application for parole would not constitute a manifest injustice, it must give the offender brief reasons, and

(d) if the Authority decides that to deny an early application for parole would constitute a manifest injustice, the Authority must determine the offender's application for parole according to the processes that apply to applications for parole in normal circumstances.

13. Appeals and judicial review of State Parole Authority decisions

13.1: No statutory review by the Supreme Court **(page 287)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove statutory review by the Supreme Court of State Parole Authority decisions.

14. Case management and support in custody and in the community

14.1: Changes to in-custody case management **(page 307)**

(1) Corrective Services NSW should commission an independent review of the implementation of its case management policies.

(2) Corrective Services NSW should review its current policy documents that relate to in-custody management, case management and parole preparation with a view to consolidating, clarifying and simplifying these policies.

(3) Any case management framework that Corrective Services NSW implements should aim to reduce the diffusion of responsibility for case management and parole preparation that currently exists among custodial case officers, case management teams, welfare officers, other services and programs officers and Community Corrections officers.

(4) Corrective Services NSW should review the current system of security classification, with the aim of simplifying and streamlining it.

14.2: Increased transition support through non-government organisations **(page 313)**

Corrective Services NSW should evaluate the effectiveness of the Funded Partnership Initiative in assisting offenders with the transition to parole. In particular, the evaluation should consider whether the limited level of "in-reach" and linkage with offenders before they leave custody is sufficient to ensure adequate transition support.

14.3: Improving case management and support for parolees in the community through non-government organisations **(page 319)**

(1) Corrective Services NSW should continue its efforts to improve the quality of interactions between Community Corrections supervisors and individual parolees.

(2) Corrective Services NSW should evaluate the Funded Partnership Initiative to determine:

  (a) whether support is provided for a sufficient period and also the level of unmet demand, and

  (b) the effect that support provided under the Initiative has on rates of reoffending among parolees.

(3) If the new model of interagency cooperation set up under the *Crimes (High Risk Offenders) Act 2006* (NSW) is successful, the Government should consider extending this model to the management of parolees.

(4) The Government should consider establishing local informal re-entry working groups to address the current gaps and difficulties in managing parolees. The aim of the groups would be to coordinate government agencies better and to improve information sharing and cooperation. Relevant government agencies in each location (including agencies covering housing, health, corrections, mental health, and disability services) should participate. Relevant non-government organisations in each location could also participate.

14.4: Evaluating rehabilitation programs **(page 322)**

Corrective Services NSW should ensure that all the rehabilitation programs it offers are evaluated for their effectiveness in reducing reoffending. Evaluation should be embedded in the design and funding of future programs in accordance with the NSW Government's Program Evaluation Framework. An independent individual or agency should be involved in such evaluations, where possible. All evaluations should be published online.

15. Pre-parole programs

15.1: Identify the purpose and objectives of unescorted external leave **(page 332)**

(1) Corrective Services NSW should review its unescorted external leave policy with a view to simplifying it, and providing a policy framework that identifies the purpose and objectives of pre-release unescorted external leave programs and the criteria for assessing whether a prisoner should be granted such leave, or more leave, before release on parole.

(2) From early in an offender's sentence, the need for and timing of unescorted external leave should be considered as part of the case plan, but such leave should only be required if needed to address particular identified issues.

15.2: Volunteer sponsors for day leave **(page 333)**

Corrective Services NSW should develop partnerships with non-government organisations for providing volunteer sponsors for the day leave program.

15.3: Further evaluation of existing transitional centres **(page 336)**

The NSW Department of Justice should evaluate the effectiveness of Bolwara House and the Parramatta Transitional Centre in reducing reoffending and improving outcomes for participating offenders. The evaluation should be used to identify further opportunities for expanding transition centres for female and male prisoners.

15.4: Introduction of a back end home detention scheme **(page 343)**

Subject to a positive cost-benefit assessment, Corrective Services NSW should introduce a back end home detention scheme based on Recommendations 15.5-15.12. The scheme should be evaluated to ensure it is cost effective and reduces reoffending.

15.5: No involvement for the sentencing court **(page 344)**

The sentencing court should not determine the eligibility of offenders for back end home detention at the time of sentencing.

15.6: The State Parole Authority should decide on back end home detention **(page 345)**

The State Parole Authority should determine whether an offender can access back end home detention.

15.7: Limited timeframes for back end home detention **(page 347)**
Back end home detention should be available only when an offender:

(a) is within the final 12 months of the non-parole period, and

(b) has served at least half of the non-parole period.

15.8: No offence based exclusions for back end home detention **(page 348)**
A back end home detention scheme should not include any offence based exclusions.

15.9: Include back end home detention in the case plan **(page 349)**
Corrective Services NSW should initiate consideration of back end home detention through the case plan process.

15.10: Automatic transition to parole for back end home detainees **(page 350)**
(1) Back end home detention should not affect the release date for those offenders subject to statutory (or court based) parole.

(2) For offenders with a head sentence of more than three years, the State Parole Authority should have the power to make a back end home detention order and a parole order at the same time. The parole order should take effect at the end of the offender's non-parole period.

15.11: Breach and revocation of back end home detention **(page 351)**
(1) Back end home detention should be subject to the same standard conditions as are currently prescribed for the sentence of home detention.

(2) In addition to the amendments in Recommendation 3.2, the State Parole Authority's power to revoke statutory parole before an offender is paroled (currently contained in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222) should include a power to revoke statutory parole if it has revoked a back end home detention order.

(3) When the Authority revokes a back end home detention order in respect of an offender with a head sentence of more than three years, the Authority should also be authorised to revoke the existing (but not yet commenced) parole order.

15.12: No restriction on the number of back end home detention considerations **(page 351)**
No statutory restrictions should be placed on the number of times an offender can be considered for, or access, back end home detention within the relevant portion of the non-parole period.

16. The problem of short sentences

16.1: Working group on services for offenders who serve short sentences of imprisonment **(page 358)**
A working group should be established to investigate the viability of a system for maintaining connections between offenders who serve short sentences of imprisonment and service providers in the community. The working group should include representatives of Corrective Services NSW and government and non-government service providers covering housing, health, mental health, and disability services.

16.2: Sentence administration awareness program **(page 358)**

Corrective Services NSW, the State Parole Authority and the Judicial Commission of NSW should develop a program to build the awareness of participants in the criminal justice system about sentencing practice and sentence administration, with a particular emphasis on the issues associated with short sentences of imprisonment.

17. Parole for young offenders

17.1: Separate juvenile parole provisions **(page 366)**

Juvenile parole should be dealt with by separate provisions in the *Children (Criminal Proceedings) Act 1987* (NSW).

17.2: Children's Court as decision maker **(page 367)**

The Children's Court should remain the decision maker in the juvenile parole system.

17.3: Principles for the juvenile parole system **(page 370)**

An additional principle should apply to the new parole provisions in the *Children (Criminal Proceedings) Act 1987* (NSW), namely that the purpose of parole for juveniles is to promote community safety, recognising that the rehabilitation and reintegration of children into the community may be a highly relevant consideration in promoting community safety.

17.4: Structuring the juvenile parole system by age **(page 374)**

(1) Whether an offender is subject to the juvenile parole system or adult parole system should be determined by the offender's age as follows:

(a) **Parole decision making:** Regardless of where an offender is detained or in custody, the Children's Court should deal with offenders under 18 at the time of the parole decision; the State Parole Authority should deal with offenders who are 18 and over at the time of the parole decision.

(b) **Parole supervision:** Administrative arrangements should continue to provide that, as a general rule, Juvenile Justice NSW should supervise offenders on parole who are under 18 and Community Corrections should supervise offenders on parole who are 18 and over. Juvenile Justice NSW and Corrective Services NSW should continue to make practical arrangements to transfer those who turn 18 to Community Corrections supervision.

(c) **Decision making about breach and revocation:** The Children's Court should deal with parole breaches by offenders who are under 18 at the time of the breach; the Authority should deal with parole breaches by offenders who are 18 and over at the time of the breach.

(2) Offenders who turn 18 during the last 8 weeks of their sentence should generally remain in the juvenile system.

17.5: Design principles to govern the juvenile parole system (page 376)

In drafting the parole provisions to be included in the *Children (Criminal Proceedings) Act 1987* (NSW), the following principles should be adopted:

(a) Flexibility in when and for what purpose a hearing may be convened by the Children's Court and in what action the Court can take when considering whether to revoke parole or take alternative action.

(b) Limited technicality in revocation procedures, including the removal of features of the adult parole system that are irrelevant to young offenders.

(c) Responsiveness in how the Children's Court can deal with changed circumstances, so that the young offender spends as little time as possible in custody.

(d) Clarity, ensuring the legislation reflects the current practice of the Children's Court as closely as possible.

17.6: A mixed system of statutory parole and discretionary parole (page 378)

The Children (Criminal Proceedings) Act 1987 (NSW) should provide as follows:

(a) A young offender sentenced to a head sentence of three years or less with a non-parole period must be released on parole at the end of the non-parole period ("statutory parole"), unless the Children's Court has revoked parole.

(b) Such statutory parole should be subject to the standard conditions of parole set out in Recommendation 17.8.

(c) The Children's Court should have the same power to impose any additional conditions as it currently has for court based parole orders.

(d) The Children's Court should continue to consider young offenders with head sentences of more than three years for discretionary parole.

17.7: A test for discretionary parole (page 379)

(1) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the Children's Court may grant parole for a young offender if it is satisfied that making the order is in the interests of community safety. In doing so, the Court must take into account:

  (a) the risk to community safety of releasing the offender on parole

  (b) whether parole supervision is likely to aid in reducing the possibility of the offender reoffending

  (c) the risk to community safety if the offender is released at the end of the sentence without a period of parole supervision, or is released at a later date with a shorter period of parole supervision, and

  (d) the extent to which parole conditions can mitigate any risk to community safety during the parole period.

(2) The proposals in Recommendations 4.2 and 4.4 about the matters to be taken into account when making a parole decision, and the contents of a parole report, should be included in the *Children (Criminal Proceedings) Act 1987* (NSW), subject to consideration

during drafting to any necessary adjustments to reflect Juvenile Justice NSW and Children's Court processes.

17.8: Standard conditions and supervision obligations (page 380)

(1) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that two standard conditions be attached to parole for young offenders:

(a) that they not commit any offence, and

(b) that they submit to supervision by Juvenile Justice NSW.

(2) The obligations under the supervision condition in the juvenile parole system should be the same as those in Recommendation 9.2.

(3) The *Children (Criminal Proceedings) Act 1987* (NSW) should allow the Children's Court to impose any additional conditions it considers reasonable to:

(a) manage the risk to community safety of releasing the offender on parole, including (but not limited to) conditions that:

(i) support participation in rehabilitation programs and assist in managing reintegration, or

(ii) give effect to the offender's post-release plan prepared by Juvenile Justice NSW

(b) take account of the effect on any victim of the offender, and on any such victim's family, of the offender being released on parole, or

(c) respond to breaches of parole.

(4) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that an offender does not contravene a place restriction or curfew condition that has been imposed by the Children's Court if the supervising Juvenile Justice NSW officer permits the offender to do so, on the same basis as Recommendation 9.8.

17.9: Options for response to breach and revocation (page 382)

Bearing in mind Recommendation 17.5, the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the Children's Court:

(a) may respond to a failure to comply with the obligations of parole by doing one or more of the following:

(i) revoke parole and issue a warrant

(ii) revoke parole and issue a notice

(iii) issue a notice

(iv) vary the conditions of parole

(v) warn the offender, or

(vi) note the breach and take no further action.

(b) may revoke parole if:

(i) it is satisfied that an offender has breached parole

(ii) an offender has failed to appear when called upon to do so, or

(iii) an offender has asked for parole to be revoked.

17.10: Accounting for street time when Children's Court revokes parole and issues a notice **(page 383)**

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that when the Children's Court revokes parole and issues a notice but does not rescind the revocation, it can decide that the revocation order takes effect, or is taken to have taken effect, on the date on which the review decision is made or on such earlier date as the Court thinks fit.

17.11: Pre-release revocation of statutory parole **(page 384)**

The *Children (Criminal Proceedings) Act 1987* (NSW) should state that the Children's Court may revoke statutory parole before a young offender is released if:

(a) the Court is satisfied that the offender's conduct in detention indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(b) the Court is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(c) the Court is satisfied that satisfactory accommodation or post-release arrangements have not been made or cannot be made and the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(d) the offender requests that the order be revoked.

17.12: A power to revoke in the absence of breach **(page 385)**

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) where there is no breach of parole, the Children's Court may revoke parole if it considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk that the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the supervising officer or by adding or varying parole conditions.

(b) a Juvenile Justice NSW officer may report to the Children's Court in circumstances where there is no breach with a recommendation that the Children's Court revoke parole or add or vary parole conditions if the officer considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the officer.

17.13: Flexible hearings for Children's Court **(page 386)**

Bearing in mind Recommendation 17.5, the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) The Children's Court may convene a hearing at any time to decide whether to grant parole or to revoke parole. The offender may make submissions at any such hearing.

(b) When the Children's Court revokes parole without having previously convened a hearing:

  (i) The Court must hold a hearing within 28 days of serving the revocation notice on the offender.

  (ii) At this hearing, the Court must reconsider the revocation decision and confirm or rescind it.

  (iii) The offender may make submissions at the hearing.

  (iv) The Court may adjourn the hearing to a later date.

17.14: Reapplying for release on parole **(page 387)**

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) when the Children's Court refuses to grant parole or revokes parole (whether before an offender is released or after an offender has been released) the Court must set either:

  (i) a new parole release date, or

  (ii) a date on or after which the offender may apply to the Court to be reconsidered for parole.

(b) when the Children's Court has set a date after which the offender may apply for reconsideration of parole:

  (i) the offender may apply at an earlier date and the Court may consider the application in the following circumstances:

    (A) where new information has come to light or the situation has materially changed

    (B) where parole was revoked because the offender did not have access to suitable accommodation or community health services and such accommodation or services have subsequently become available, or

    (C) where parole was revoked because the offender was charged with an offence but the charge has subsequently been withdrawn or dismissed.

  (ii) the Court may refuse to consider the application if it considers it is frivolous, vexatious or has no prospect of success.

17.15: Serious offenders in the juvenile parole system **(page 389)**

The juvenile parole system should not distinguish between serious offenders and non-serious offenders.

18. Other issues requiring amendment

18.1: Reviews automatic unless a s 162 or s 166 inquiry has been held **(page 401)**

Reviews should continue to be held automatically following revocation of a home detention order or an intensive correction order, unless a s 162 (intensive correction order) or s 166 (home detention) inquiry has been held and the home detention order or intensive correction order has been revoked. The State Parole Authority should have a discretion whether to hold a review hearing.

18.2: Hearings about revoked Compulsory Drug Treatment Orders **(page 404)**

The *Crimes (Administration of Sentences) Act 1999* (NSW) should not provide for the State Parole Authority to consider parole less than 60 days before the end of the non-parole period where the Drug Court has revoked an offender's Compulsory Drug Treatment Order.

1. Context and themes

1.1 This report responds to terms of reference that ask us to examine the effectiveness of the legal framework governing parole, with a view to making parole work better for the community. We have taken a broad approach to this reference examining how parole works on the ground, and how it might work better to reduce reoffending and improve community safety. We have taken an approach that looks at the whole system in context and how all aspects can be improved. We start in this chapter by setting out the context for our review, and the themes we have identified.

Scope of our review

1.2 We received terms of reference for this review in March 2013. The terms of reference require us to conduct an inquiry:

> aimed at improving the system of parole in NSW. Specifically, the Commission is to review the mechanisms and processes for considering and determining parole.
>
> In undertaking this review the Commission should have regard to:
>
> - the desirability of providing for integration into the community following a sentence of imprisonment with adequate support and supervision
> - the need to provide for a process of fair, robust and independent decision-making, including consideration of the respective roles of the courts, State Parole Authority, Serious Offenders Review Council and the Commissioner for Corrective Services
> - the needs and interest of the community, victims, and offenders, and
> - any related matters the Commission considers appropriate.

1.3 We have interpreted these terms of reference broadly. The mechanisms and process for considering and determining parole are inextricably linked to the way offenders are prepared for parole in custody and managed on parole in the community. Our report covers:

- the purpose of parole
- the design of the parole system
- the way Corrective Services NSW manages offenders in custody and prepares them for parole
- the parole decision making process, in terms of both procedure and the factors influencing State Parole Authority (SPA) decisions to grant or refuse parole
- transition to parole
- parole conditions
- management and supervision of parolees in the community, and
- revocation of parole and other options for dealing with breach.

1.4 Most of this report focuses on adult offenders. Chapter 17 looks specifically at young offenders, Juvenile Justice NSW and the juvenile parole system.

1.5 For the purposes of this report, we look only at the way parole operates for sentences as they are currently imposed. We have not considered the way sentences are formulated or set. We completed a report in July 2013 on sentencing law and practice in NSW.[1]

Our process

1.6 We consulted widely in this reference to draw on the experience of legal practitioners, offenders, victims, government agencies and the courts.

1.7 In July 2013 we released a preliminary Scoping Paper that was designed to encourage input from stakeholders and help us to identify the key issues in the review. We received 11 written preliminary submissions from stakeholders in response to our Scoping Paper.

1.8 Between September and December 2013, we published six Question Papers that examined:

- the design and objectives of the parole system (Question Paper 1)
- membership of SPA and the Serious Offenders Review Council (SORC) (Question Paper 2)
- SPA's discretionary parole decision making (Question Paper 3)

1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013). See also NSW Law Reform Commission, *Sentencing: Patterns and Statistics*, Report 139-A (2013).

- reintegration into the community and management on parole (Question Paper 4)
- breach and revocation (Question Paper 5), and
- parole for young offenders (Question Paper 6).

1.9 These Question Papers discussed issues, options and the state of play in other jurisdictions, asking stakeholders questions to guide the development of our project. We received 56 written submissions in response to the Question Papers. The full list of submissions is in Appendix A.

1.10 Throughout the course of this reference, we also engaged stakeholders in face to face consultations. We held 7 preliminary consultations and 30 consultations with stakeholders between July 2013 and October 2014 (see Appendix B). Five of these consultations were with government agencies, legal practitioners and non-government organisations in Wagga Wagga, to ensure that our report reflects the experience of stakeholders in non-metropolitan areas.

1.11 Towards the end of our project, we began consulting intensively with key stakeholders on options for reform. We held "options workshops" in March, April, and July 2014 to test specific proposals for reform. These workshops were invaluable for us in determining and refining our recommendations.

Context of this report

Incidence of release on parole

1.12 The parole system is an integral part of the criminal justice system. Most sentenced prisoners who are released from prison are released on parole rather than being released unconditionally at the end of their term of imprisonment. In 2013, 5621 offenders were released on parole from Corrective Services NSW correctional centres and 464 offenders were paroled from Juvenile Justice NSW custody. Overall, more than 6000 NSW offenders were released on parole in a single year.[2]

1.13 Despite the number of offenders moving through the parole system each year, parole remains controversial.

Relationship to size of prison population

1.14 On the available data, it is difficult to get a sense of the extent to which parole refusal and revocation contribute to the size of the prison population. On 30 June 2014, 6347 (82.9%) of the sentenced prisoners were subject to a sentence with a parole period.[3] We do not know how many of this group continued in prison after the end of their non-parole period either because of pre-release revocation, refusal of

2. NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics Quarterly Update: December 2013* (2014) 26, 28. Sentenced prisoners stay in custody until being unconditionally released at the end of their term of imprisonment either because they have been repeatedly refused parole or because they are serving a fixed term with no possibility of parole.
3. The remaining 17.1%were subject to fixed terms of imprisonment.

parole, or revocation for breach of parole after release.[4] In the course of 2013, 8788 sentenced prisoners were received into prison in NSW. In the same period 5621 were released on parole and 2041 were released at the end of their term. We do not know how many of the latter group served the whole of their sentence in custody because parole was refused.[5]

1.15 According to SPA, of the 5574 prisoners it has recorded as being released on parole during 2013, 971 were released under a SPA order, and 4603 were released under court ordered parole. In the same period, 340 prisoners (25% of all of SPA's parole decisions) were refused parole, and 2334 parolees had their parole revoked.[6] Of this latter group, 235 had their parole revoked before release (92.3% were court based parole orders).[7]

1.16 We have examined whether, without compromising community safety, NSW could reduce the number of people in prison who have had parole refused or revoked by taking a more organised approach to case management, by ensuring offenders receive treatment and access to programs while in prison, and by improving management of parolees in the community.

Improvements to reoffending rates

1.17 About 40% of the prisoners released from NSW prisons return to prison under sentence within two years. Almost 50% of prisoners released from NSW prisons return to correctional management (either prison or a community based sentence) within two years. These NSW rates are only slightly higher than rates in most other Australian states and territories.[8]

1.18 The NSW Bureau of Crime Statistics and Research (BOCSAR) has looked more broadly at reoffending by released prisoners (that is, commission of any offence punished by any sentence, not just those offences that resulted in a new sentence of imprisonment or a new sentence that required correctional supervision).

1.19 One study found that about 65% of offenders released from a NSW adult prison in 2002 were either convicted of another offence or had their parole revoked within two years.[9] Another study specifically of reoffending by NSW parolees found that 64% of offenders released on parole supervision in the 2001-02 financial year had reoffended by September 2004.[10]

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4. Corrective Services NSW, *NSW Inmate Census* (2014) 5.
5. NSW, Bureau of Crime Statistics and Research, *New South Wales Custody Statistics Quarterly Update* (March 2013) 23-24.
6. NSW, State Parole Authority, *Annual Report 2013* (2014) 14.
7. Information supplied by NSW, State Parole Authority (4 September 2014).
8. Productivity Commission, *Report on Government Services 2014* (2014) table C.4.
9. N Smith and C Jones, *Monitoring Trends In Reoffending Among Offenders Released From Prison*, Crime and Justice Bulletin No 117 (NSW Bureau of Crime Statistics and Research, 2008). This study's results were affected by including revocation of parole, because parole can be revoked for reasons other than an offence being committed.
10. C Jones and others, *Risk Of Reoffending Among Parolees*, Crime and Justice Bulletin No 91 (NSW Bureau of Crime Statistics and Research, 2006).

1.20 However more recent research has shown that re-offending on parole is much lower than previously thought. This more recent research makes the distinction (not made in the research outlined above) between re-offending by parolees (past and present) and re-offending while on parole. In this research BOCSAR found that

- Only 28.4% re-offended while on parole and only 7.1% were found guilty of having committed a violent offence while on parole.
- A further 10.8% were re-imprisoned for breaching the conditions of their parole.
- The majority of parolees (60.8%) did not re-offend on parole and were not re-imprisoned for breaching parole.[11]

1.21 A separate new BOCSAR study looked at the effect of parole on reoffending in general.[12] It matched offenders of similar risk levels released with and without parole.

1.22 The Bureau found that, 12 months after release, 48.6% of the unsupervised offenders had re-offended, compared with 43.6% of the supervised offenders. At 36 months, the comparative rates of re-offending were 70.3% for the unsupervised group and 65.7% for the supervised group. We discuss the research about the effect of parole on reoffending in Chapter 2.[13] This BOCSAR research is an important addition to that body of research.

1.23 The study also found that parolees supervised more intensively were less likely to re-offend than those supervised less intensively. It showed the nature of supervision made a difference: more intensive supervision tied to normal rehabilitative support lowered the risk of re-offending but simply carrying out more intensive checks on compliance with the conditions of parole did not.

1.24 A 2009 BOCSAR study estimated that a 10 percentage point reduction in return to prison rates would reduce the NSW sentenced prisoner population by 800, saving $28m per year.[14]

NSW 2021 plan

1.25 The goals set out by the Government in *NSW 2021*[15] are at the forefront of our consideration of the parole system, in particular:

- Goal 16: prevent and reduce the level of crime.
- Goal 17: prevent and reduce the level of reoffending.

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11. D Weatherburn and C Ringland, *Re-offending on parole*, Crime and Justice Bulletin No 178 (NSW Bureau of Crime Statistics and Research, 2014).
12. W Wan and others, *Parole Supervision and Re-offending: A Propensity Score Matching Analysis* (NSW Bureau of Crime Statistics and Research, 2014).
13. Para [2.21]-[2.29].
14. D Weatherburn, G Froyland, S Moffatt and S Corben, *Prison populations and correctional outlays: The effect of reducing re-imprisonment*, Crime and Justice Bulletin No 138 (NSW Bureau of Crime Statistics and Research, 2009).
15. NSW, Department of Premier and Cabinet, *NSW 2021: A Plan to Make NSW Number One* (2011).

1.26 Goal 17 in particular involves a number of practical actions that are intended to deal with criminogenic factors associated with offending. The parole system should, in part, provide a robust legal framework for preventing and reducing reoffending.

1.27 Our report fits well with these goals. Our aim has been to make recommendations that provide the best chance of reducing the likelihood of reoffending.

Other reviews

Law Reform Commission Report 79

1.28 In our 1996 report on sentencing, we recommended that statutory provisions relating to sentencing should be consolidated into two separate statutes, one dealing with the administration of sentences and the other dealing with sentencing principles and policy.[16] Consequently, Parliament enacted the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) and the *Crimes (Sentencing Procedure) Act 1999* (NSW).

1.29 We considered parole as part of our 1996 sentencing review. In that review, we made recommendations about the composition of the Parole Board (at the time, called the "Offenders Review Board") and SORC, and the parole decision making process, including:

- introducing a presumption in favour of parole except for serious offenders or offenders serving terms of imprisonment of more than eight years,[17] and
- replacing the public interest test for release on parole with the criteria that parole should be determined on the basis of the offender's ability to remain law abiding if released, taking into consideration that the protection of the public is paramount.[18]

1.30 Most of our recommendations concerning parole were not adopted. However, the new Act did include an expanded list of matters that SPA should take into account when considering parole in s 135.[19]

Statutory review, 2005

1.31 In 2005, Irene Moss conducted a statutory review of the CAS Act, which looked at the extent to which the Act was achieving its policy objectives rather than examining the provisions in the Act.[20] The review, and the Government's response, was tabled in Parliament on 1 April 2008. It made 35 recommendations, largely concerning the management of offenders in custody. The *Crimes (Administration of Sentences) Legislation Amendment Act 2008* (NSW) implemented most of these recommendations including:

16. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 83.
17. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 63.
18. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 64.
19. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 65.
20. *Crimes (Administration of Sentences) Act 1999* (NSW) s 273; I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) 5.

- the insertion of objects in the Act[21]
- enabling the Commissioner of Corrective Services to make submissions about the release of an offender on parole in exceptional circumstances,[22] and
- the insertion of introductory notes to clarify the purpose of certain substantive provisions.[23]

Victoria: the Callinan review

1.32 In July 2013 former High Court Justice Ian Callinan completed a review of the Victorian parole system. The review made 23 recommendations aimed at strengthening the parole decision making process in Victoria. The Victorian Government supported all of the recommendations except Measure 6, which suggested that offenders categorised as serious violent or sexual offenders should only be released on parole if there is a very high probability that the risk of reoffending is negligible and they are highly likely to comply with their parole conditions.[24]

1.33 In May 2014, the Victorian Government enacted the *Corrections Amendment (Further Parole Reform) Act 2014* (Vic) to amend the *Corrections Act 1986* (Vic) to implement recommendations including:

- the creation of a two tier parole process for serious violent and sexual offenders,[25] and
- a requirement that offenders whose parole has been revoked must serve at least half of their remaining term of imprisonment in custody before being eligible for parole (or three years in the case of offenders sentenced to a term of their natural life).[26]

1.34 We have had close regard to the Callinan report and discuss it where relevant in this report. There is a tension in policy between, on the one hand, protecting the community by incapacitation, that is, by isolating the offender from the community, and, on the other hand, protecting the community by reducing the prospect of reoffending through a system of supervised release on parole. The Callinan report

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21. I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) rec 2; *Crimes (Administration of Sentences) Act 1999* (NSW) s 2A as amended by *Crimes (Administration of Sentences) Legislation Amendment Bill 2008* (NSW) sch 1 [2].
22. I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) rec 28; *Crimes (Administration of Sentences) Act 1999* (NSW) s 160AA as amended by *Crimes (Administration of Sentences) Legislation Amendment Bill 2008* (NSW) sch 1 [13].
23. I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) rec 4; *Crimes (Administration of Sentences) Act 1999* (NSW) pt 1-9, 11-14 as amended by *Crimes (Administration of Sentences) Legislation Amendment Bill 2008* (NSW) sch 1 [1], [4], [6]-[10], [14], [17]-[18], [20], [22], [25]-[26].
24. I Callinan, *Review of the Parole System in Victoria* (2013) 91; E O'Donohue "Coalition Government to complete implementation of Callinan recommendations" (Media Release, 12 March 2014); S Farnsworth, *Victorian Parole Review: Government will not implement "Measure 6" of Callinan report* <http://www.abc.net.au/news/2014-05-23/vic-government-backs-away-from-for-parole-board-recommendation/5474726>.
25. *Corrections Act 1986* (Vic) s 74AAB as inserted by *Corrections Amendment (Further Parole Reform) Act 2014* (Vic) cl 7.
26. *Corrections Act 1986* (Vic) s 78 as amended by *Corrections Amendment (Further Parole Reform) Act 2014* (Vic) cl 9.

responded to particular circumstances in Victoria and went further in favour of the incapacitation approach than has previously been the case in Australia. None of the stakeholders who made submissions, or who we consulted, called for the measures recommended in the Callinan report to be implemented in NSW.

Aims of our review

1.35 At the heart of our review is the goal of improving the parole system to protect community safety, and to reduce reoffending by providing a means for supervised reintegration following imprisonment. Parole is not leniency shown at the end of a sentence, it is an integral part of a sentence of imprisonment that imposes significant restriction on liberty.

1.36 We aim to make the parole system better by simplifying the legal framework, simplifying and strengthening the operational policy framework, improving case management in custody, in the community and in the process of transition, and developing more options to respond to breach and use swift and certain responses.

Simplify the legal framework

1.37 We propose reforms to the legal framework that put community safety at the heart of parole decisions. They require SPA to balance the risk of releasing a person on parole against the risk of not releasing the person with a period under supervision.

1.38 Parole is often an area of law that provokes community interest and concern, sometimes in response to serious offending on parole. The risk of serious offending on parole should be managed carefully. However, there is a balance to be achieved. If we focus too much on preventing reoffending while on parole, we may pay too little attention to the benefit of parole - supervised transition into the community – which may increase the risk of reoffending once the sentence has ended. It is a complex balance.

1.39 Our recommendations aim to make explicit and transparent the key issues that SPA should consider. In addition, we have looked closely at the system of rules that govern the process for SPA decision making. It is overly complex and impedes efficiency. We propose a simpler system that gives SPA the flexibility it needs and which also enhances participation by victims.

Simplify and strengthen the operational policy framework

1.40 Corrective Services NSW has a large number of policy documents providing guidance for staff in carrying out their functions. In our view, there is too much of this material for it to be effective. At the same time, there are key gaps in providing guidance for how to exercise discretion in supervising parolees, and policy documents have become, in places, inconsistent, inflexible and difficult to apply. We make many recommendations to review this body of policy and strengthen it to help frontline officers do their job effectively.

Improve case management in custody, in the community and in the process of transition

1.41 The management of parole issues starts from the beginning of the sentence. Obtaining parole depends upon participating in in-custody programs that address offending behaviour, being granted any necessary leave, and being prepared for parole. Improvements to case management are required to ensure that preparation for parole starts early in order to get offenders parole ready by their parole date.

1.42 Improvements to case management systems, and to the process of transitioning on to parole are necessary.

1.43 One of the key issues affecting successful transition to parole that constantly arose in consultation with all stakeholders was the need for suitable post-release accommodation. This is one of the most difficult issues that the system faces and one of the hardest to resolve. Offenders' needs differ, and there are accommodation shortages. We make recommendations about taking a risk management approach to accommodation issues, planning for accommodation better, and evaluating the new funding package currently being implemented for accommodation and other post-release needs.

Develop more options to respond to breach and use swift and certain responses

1.44 We recommend a system of swift and certain responses to breaches of parole, that includes options short of returning the offender to prison. Mechanisms that allow for a swift response to breach, that is, bringing home the consequences of breach early, can significantly improve compliance.

1.45 We propose powers for Community Corrections officers to take action including new reasonable directions about curfews, and some new options for SPA, including imposing home detention. These new powers will need to be supported by good policy frameworks that allow Community Corrections to manage risk properly.

1.46 At present, in our view, too many breaches are being reported to SPA where there is no need for SPA action. This clogs SPA's list and undermines its effectiveness in dealing with those cases that do require attention. Our framework for graduated sanctions solves this issue, and creates a more effective parolee management framework.

This report

1.47 This report is arranged as follows:

2. **Purpose of parole and design of the parole system.** We discuss the main objections that opponents make to parole and articulate the key rationale for retaining parole. We also look at whether a statement of this rationale should be included in legislation. Finally, we consider whether NSW should have a system of automatic parole, discretionary parole, or retain its mixed system.

3. **Statutory parole.** We examine the role of sentencing courts in making parole orders and propose a "statutory parole" model as an alternative to court based parole. We also look at the power of SPA to revoke a court based parole order before the offender is released from custody, the mandatory supervision condition attached to court based parole orders and difficulties for accumulated and aggregate sentences.

4. **Factors guiding the parole decision.** We examine SPA's parole decision for those offenders (including serious offenders) who are serving head sentences of more than three years. We aim to simplify the way SPA takes various matters into account, ensuring a clear and consistent approach with a clear focus on risk to community safety.

5. **Parole decision making for serious offenders.** We deal with issues that are relevant to parole decision making for serious offenders, including the definition of "serious offender", the role of SORC, and the interface between the parole system and the *Crimes (High Risk Offenders) Act 2006* (NSW).

6. **A new parole decision making process.** We outline a new parole decision making process for SPA to follow when it is deciding whether to grant or refuse parole. Our recommendations aim to make the process efficient and transparent as well as fair, robust and independent.

7. **Other issues in the parole decision making process.** We look at three further procedural issues: access to information and documents during the parole decision making process; providing reasons for SPA's decisions, and the decision making process for parole in exceptional circumstances.

8. **Membership of SPA and SORC.** We look at the processes for appointing members, the criteria against which they are selected, and how their professional development and performance could be enhanced.

9. **Parole conditions.** We discuss the standard conditions that apply to all parole orders. We also look at the additional conditions that can be added by the sentencing court (for offenders subject to court based parole) or SPA.

10. **Breach and revocation.** We explore the goals of the breach and revocation system. We consider how SPA should respond to breaches of parole. We consider how and when SPA should decide to revoke parole. We also consider how Community Corrections should respond to and report breaches to SPA.

11. **Breach and revocation: procedural issues.** We examine some distinct procedural issues connected to breach and revocation of parole, including SPA's powers, transparency and procedural fairness, publishing reasons for decisions, stakeholders' involvement in the system, and SORC's role.

12. **Further applications for parole.** We look at provisions that deal with when and under what conditions offenders can apply for parole after SPA has refused parole or revoked a parole order.

13. **Appeals and judicial review of SPA decisions.** We look at the two avenues available to offenders and the State to apply to the Supreme Court for a review of SPA decisions.

14. **Case management and support in custody and in the community.** We look at Corrective Services NSW case management of offenders from custody to the community. We examine how offenders are prepared for, transitioned to and supported on parole.

15. **Pre-parole programs.** We examine the effectiveness of existing transition schemes, how they could be improved and what other approaches could help offenders establish links with community based services with a view to preventing reoffending.

16. **The problem of short sentences.** We consider the problems that arise for the significant number of offenders who serve short sentences of imprisonment and some strategies for dealing with them.

17. **Parole for young offenders.** We discuss the need for a separate juvenile parole system and the extent to which a separate system should be different from the adult parole system. We also discuss which groups of offenders should be subject to the juvenile parole system.

18. **Other issues requiring amendment.** We discuss two areas raised by stakeholders as being in need of reform: the breach and revocation processes for home detention orders and intensive correction orders; and the parole process for offenders with a compulsory drug treatment order that the Drug Court has revoked.

2. Purpose of parole and design of the parole system

In brief

Parole should be retained. Having reviewed the evidence, we conclude that parole works to reduce reoffending. As such, it contributes to the protection of community safety and so is in the community interest. This key purpose of parole – promoting community safety by reducing reoffending – should be expressly stated in the legislation.

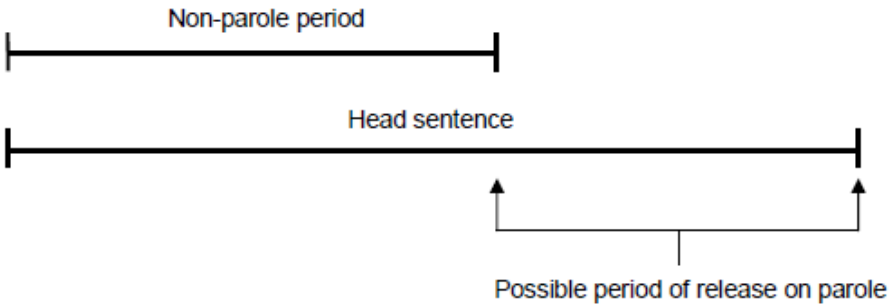
2.1 In this chapter we consider the role of parole in the criminal justice system. We discuss the main objections that opponents make to parole and articulate the key rationale for retaining parole. We also look at whether a statement of this rationale should be included in legislation. In the second part of the chapter, we consider whether NSW should have a system of automatic release on parole, a system of discretionary release on parole, or should retain its mixed system.

Parole in NSW

2.2 Modern parole was introduced in NSW in the 1960s with the *Parole of Prisoners Act 1966* (NSW). In most cases, when an offender is sentenced to imprisonment, the court imposes a non-parole period (the minimum period that the offender must spend in custody) and a head sentence (the maximum period that the offender can be kept in custody). The offender can then be released on parole at some point between the expiry of the non-parole period and the end of the head sentence (see Figure 2.1).[1]

1. An offender may be released on parole if they are serving a sentence of full time imprisonment or home detention: *Crimes (Administration of Sentences) Act 1999* (NSW) s 125.

Figure 2.1: Structure of sentences in NSW



2.3 When offenders are released on parole, they are serving the balance of the head sentence in the community.[2] Offenders can be recalled to prison for breaching the conditions of parole.

2.4 A court may in some circumstances choose to impose a "fixed term" of imprisonment.[3] Fixed terms do not have the structure shown in Figure 2.1. An offender must spend the whole of a fixed term of imprisonment in custody and is released unconditionally at the end of the term. There is no possibility of parole as part of a fixed term of imprisonment. In NSW, all sentences of six months or less must be fixed terms.[4]

2.5 Until 1989, a system of remissions existed in parallel to this parole structure. Remissions were effectively a discount of a set proportion of an offender's sentence. Initially, remissions reduced head sentences and were virtually automatic. From 1983, they applied also to the non-parole period and were earned through good behaviour in custody. However, the coexistence of the remissions and parole systems created the perception that sentences handed down by sentencing judges were not matched by the period spent in custody,[5] and that NSW suffered from what would be later referred to in public debates as the absence of "truth in sentencing".[6] The *Sentencing Act 1989* (NSW) abolished remissions and ensured that all offenders served in custody the minimum period set by the court.

The purpose of parole and objections to parole

2.6 Over 5000 adult offenders were released on parole in NSW in 2013.[7] As at 29 June 2014, Corrective Services NSW was supervising 4496 offenders on parole.[8]

2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 132.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
5. NSW Law Reform Commission, *Sentencing*, Discussion Paper 33 (1996) [4.8].
6. *R v Maclay* (1990) 19 NSWLR 112, 119.
7. NSW Bureau of Crime Statistics and Research, *NSW Custody Statistics: Quarterly Update December 2013* (2014) 28.
8. Corrective Services NSW, *Offender Population Report: Week Ending 29 June 2014* (2014) 3.

However, parole remains controversial. Concerns about parole comes from three main ideas raised by commentators:

- parole is seen to offend the principle of "truth in sentencing"
- parole is perceived to be overly lenient or a windfall for undeserving offenders and is seen to put the interests of offenders ahead of the interests of victims and the community, and
- parole might involve too great a risk to the community, because time spent on parole creates an opportunity to reoffend which would not have existed had the offender been kept in custody until the end of the head sentence.[9]

2.7 No stakeholders who made submissions for this reference opposed retaining parole.[10] Despite this unanimity, we think that it is important to answer the three objections listed above because they articulate concerns that some members of the community may have. This approach will also provide a framework for reviewing the justifications for parole.

Parole and truth in sentencing: parole is an integral part of the sentence

2.8 A 1987 paper defined parole as "a procedure whereby a sentence imposed by a court … may be varied by administrative action".[11] This definition was advanced in the context of the old NSW remissions system, where offenders could earn discounts on their sentences through good behaviour. The discount was granted by the executive and allowed an offender to achieve true "early release" from the sentence set by the court, with no further possibility of supervision or recall to custody.[12]

2.9 Remissions were abolished in NSW in the 1980s in favour of "truth in sentencing", where offenders are required to serve the sentence imposed by the sentencing court. The truth in sentencing movement has gone further in international jurisdictions, and in some places has also led to the abolition of parole, or at least

9. See, eg, M T Reist, "Offenders' rights must be secondary to those of victims", *Sydney Morning Herald*, 25 August 2013; A Warren, "Hard truth in sentencing is long overdue", *Sunday Telegraph*, 23 June 2013; N Ralston, H Alexander and L Davies, "Justice for whom?: Questions of Accountability", *Sydney Morning Herald*, 22 June 2013; "Safety of citizens must come first", *Daily Telegraph*, 21 June 2013.
10. See, eg, Public Interest Advocacy Centre, *Submission PA1*, 4; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 1; Children's Court of NSW, *Submission PA3*, 1; Legal Aid NSW, *Submission PA4*, 4; Law Society of NSW, *Submission PA5*, 1; Police Association of NSW, *Submission PA6*, 6; NSW Office of the Director of Public Prosecutions, *Submission PA7*, 1; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 4; Justice Action, *Submission PA10*, 2; NSW Bar Association, *Submission PA11*, 1; F Johns and D Hertzberg, *Submission PA12*, 2; NSW, State Parole Authority, *Submission PA14*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1; Women in Prison Advocacy Network, Submission *PA20*, 7; NSW Department of Justice, *Submission PA32*, 1-2.
11. I Vodanovich, "Has Parole a Future?" in I Potas (ed) *Sentencing in Australia,* Seminar Proceedings No 13 (Australian Institute of Criminology/Australian Law Reform Commission, 1987) 285.
12. See R Simpson, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999) 7-8.

the abolition of discretionary parole.[13] We use the term "discretionary parole" to describe a system where a decision maker – in NSW, the State Parole Authority (SPA) – exercises discretion about whether an offender will be released on parole. Discretionary parole is considered by some to offend the principle of truth in sentencing because it involves the exercise of executive discretion about the length of time an offender must be in custody.

2.10 In our view, defining parole as a means of administratively varying a sentence fundamentally misunderstands the relationship between modern parole and sentencing in NSW. An offender can only be released on parole in accordance with the sentence imposed by the sentencing court. The court sets limits on discretionary parole by setting a minimum term (the non-parole period) and a maximum term (the head sentence). The parole decision maker decides when (or if) an offender should be released on parole only within this court determined zone of discretion.

2.11 When an offender is paroled, the parole period remains part of the sentence. The offender is supervised, is subject to conditions and will be returned to prison if the conditions are breached and parole is revoked. In these circumstances, terming parole "early release" is misleading as it creates the impression that an offender's sentence is finished when the offender is paroled. It is not. The parole period is an integral part of the sentence.

Parole protects the community interest

2.12 The other two main objections to parole are linked and complex. In our view, the challenge is to demonstrate that parole produces some benefit to the community to overcome the argument that it prioritises offenders over the community interest. This benefit must outweigh any extra risks that the possibility of offenders reoffending while on parole might pose to the community.

2.13 In submissions, stakeholders put forward a variety of ideas about the purpose of parole and the ways it can serve the community's interests. In all, eight main elements emerged (see Table 2.1).

13. J Petersilia, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479, 480; D Dharmapala, N Garoupa and J M Shepherd, "Legislatures, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing" (2012) 62 *Florida Law Review* 1037, 1045.

Table 2.1: Stakeholder views on the purposes and benefits of parole

	Reducing reoffending	Rehabilitation or opportunity to reform	Protecting the community	Supported reintegration into the community	Incentive for good behaviour in custody	Incentive to participate in rehabilitation programs in custody	Enabling risk management and a focus on serious offenders	Reducing costs of imprisonment and prison overcrowding
Public Interest Advocacy Centre[14]	✗		✗	✗		✗		✗
Aboriginal Legal Service[15]		✗		✗				
Legal Aid NSW[16]		✗	✗	✗	✗	✗	✗	
Law Society of NSW[17]	✗	✗	✗					
Police Association of NSW[18]		✗	✗					
ODPP[19]	✗		✗			✗		
Young Lawyers[20]		✗		✗	✗	✗		
Justice Action[21]	✗			✗		✗	✗	
NSW Bar Association[22]		✗	✗			✗		
State Parole Authority[23]	✗		✗	✗		✗	✗	
Police portfolio[24]	✗			✗		✗	✗	
Women in Prison Advocacy Network[25]	✗		✗	✗		✗		
Department of Justice[26]	✗		✗	✗				✗

14. Public Interest Advocacy Centre, *Submission PA1*, 4-5.
15. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 1.
16. Legal Aid NSW, *Submission PA4*, 4.
17. Law Society of NSW, *Submission PA5*, 1.
18. Police Association of NSW, *Submission PA6*, 6
19. NSW Office of the Director of Public Prosecutions, *Submission PA7*, 1.
20. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 4.
21. Justice Action, *Submission PA10*, 2.
22. NSW Bar Association, *Submission PA11*, 2.
23. NSW, State Parole Authority, *Submission PA14*, 1.
24. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1.
25. Women In Prison Advocacy Network, *Submission PA20*, 7-8. In addition to the factors noted in Table 2.1, the Women in Prison Advocacy Network submitted that a recognised objective of parole should be to "empower offenders to reintegrate into society in a positive way".
26. NSW Department of Justice, *Submission PA32*, 3. The Department also put forward "implement the intention of the sentencing court" as an additional purpose of parole.

2.14 Two stakeholders submitted that an important function of parole is that it provides an incentive for good behaviour in custody. The High Court has recognised that the potential to be released on parole provides an incentive for offenders to be "better behaved while in confinement".[27] US research has found that, upon a change from discretionary parole to a system where offenders could only be released after serving 90% of their sentences, the affected offenders committed significantly more infractions in custody than a control group of offenders.[28] The fact that parole may encourage offenders to be of good behaviour while in custody can be seen as a practical means of managing the custodial population. However, the end of ensuring good behaviour in custody, although important, is not necessarily sufficient by itself to show that parole is in the community interest and that any additional risk to the community caused by release on parole is justified.

2.15 Two stakeholders nominated reduced costs and overcrowding as a key benefit of parole. The NSW Department of Justice submitted that parole supervision is much less expensive than keeping the same offender in custody. Were parole to be abolished, the Department estimates that approximately $1.2 billion would be required upfront to increase prison capacity and an extra $269 million would be needed each year to run an expanded prison system.[29] These dollar figures represent funds that then could not be used to deliver other public services such as health, education and housing.

2.16 SPA and the Police portfolio specifically objected to recognising reducing costs and prisoner numbers as a legitimate objective of, or justification for, parole.[30] Although abolishing parole could entail significantly increased costs to the public, it is difficult to maintain at the level of principle that this is a purpose of the parole system.

2.17 All the other purposes or benefits of parole that stakeholders nominated overlap and are either implicitly or explicitly about reducing reoffending:

- **Incentive for programs**. The purpose of in-custody programs is to reduce reoffending, and there is a large literature on the effectiveness of certain types of programs.[31] If the parole decision maker refuses parole when recommended programs have not been completed, then discretionary parole provides a crucial incentive for offenders to complete in-custody programs.

- **Protecting the community**. Protecting the community involves protecting the community from crime and reoffending.

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27. *R v Shrestha* (1991) 173 CLR 48, 69 (Deane, Dawson and Toohey JJ).
28. I Kuziemko, "How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed-Sentence Regimes" (2013) 128 *Quarterly Journal of Economics* 371.
29. NSW Department of Justice, *Submission PA32*, 2.
30. NSW, State Parole Authority, *Submission PA14*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1.
31. See, eg, 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; M W Lipsey, N A Landenberger and S J Wilson, *Effects of Cognitive-Behavioral Programs for Criminal Offenders* Campbell Systematic Reviews 2007:6 (2007); A Woodrow and D Bright, "Effectiveness of a Sex Offender Treatment Programme: A Risk Band Analysis" (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 43.

- **Rehabilitation**. The word "rehabilitate" means to restore a person to community life after a period of imprisonment.[32] Reducing reoffending is at the heart of this idea.

- **Supported reintegration into the community**. This phrase refers to the parole period's role as a managed transition into the community. During the parole period, nearly all parolees are supervised by Community Corrections officers. Supervision involves monitoring parolees to detect breaches, but also involves case management to help parolees to adjust to life after imprisonment, by ensuring that parolees have suitable accommodation, making referrals to required services and helping parolees to manage financial, personal and other problems. The protective effects of reintegration support, the deterrent effects of parole supervision and the threat of return to custody upon revocation, in combination, aim to reduce reoffending.

- **Risk management and a focus on serious offenders**. Discretionary parole allows lower risk offenders to be granted parole while higher risk offenders are separated out and targeted for more intensive intervention before or after being granted parole. This allows the parole system to minimise the risks to the community posed by reoffending.

2.18 The common element of all these ideas is the aim of reducing reoffending. Based on the evidence we outline below, reducing reoffending seems to be the main benefit of parole and its chief justification.

2.19 The NZ Law Commission in its 2006 review of the NZ parole system stated that the "explicit and widely recognised rationale for parole" is that it is a "method of administering sentences with a view to reducing the risk of reoffending".[33] The NZ Law Commission argued that parole can reduce reoffending by providing:

- an incentive for prisoners to participate in prison treatment programs

- an opportunity to manage the release and reintegration of prisoners, with the effect of postponing their recidivism (according to empirical evidence), and

- a vehicle for identifying and differently managing high-risk prisoners, by either detaining them for a greater proportion of their sentence, or managing them more closely on release bolstered by the threat of recall.[34]

2.20 Our view is that, to the extent that parole reduces reoffending, it is in the community interest and should be retained.

What is the evidence that parole reduces reoffending?

2.21 There is limited empirical research on the question of whether parole in fact can reduce reoffending. Descriptive studies have found lower rates of recidivism for parolees compared with offenders released unconditionally at the end of their

32. *Oxford English Dictionary Online* (June 2014), definition of "rehabilitate" meaning 3a.
33. New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 46.
34. New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 46.

sentences.[35] However, these studies did not control for other variables that are known to be linked to recidivism such as offence type, previous criminal history, age and sentence length. As a result, it is not possible to conclude from descriptive studies whether lower recidivism rates for parolees are a result of parole (a "parole effect") or due to the reality that offenders that are less likely to reoffend are more likely to be selected for parole by parole decision makers (a "selection effect").

2.22 Table 2.2 summarises the main research from the common law world that has attempted to control for key recidivism related variables in order to isolate the parole effect from selection effects and determine whether parole reduces reoffending.

Table 2.2: Quantitative research on the effect of parole on reoffending

Study (jurisdiction)	Comparison groups	Study period	Definition of reoffending	Results	Conclusion of researchers
Nuttall and others (1977)[36] **United Kingdom**	Comparing male parolees released through discretionary parole to male prisoners released unconditionally at the end of their sentences.	2 years after release from prison.	Reconviction	Parolees reoffended 5 percentage points less than expected at 6 months but there was no difference at 2 years.	Parole may reduce reoffending during the parole period, but findings were also consistent with the operation of selection effects.
Home Office (1978)[37] **United Kingdom**	Comparing male parolees released through discretionary parole to male prisoners released unconditionally at the end of their sentences.	2 years after release from prison.	Reconviction	There was little difference in reoffending for offenders released from sentences of 4 years or less but large difference between parolees and non-parolees released from sentences of more than 4 years.	Results may reflect that offenders discharged from longer sentences have more to lose through reconviction or that longer periods on parole are more effective at reducing reoffending.
Sacks and Logan (1979, 1980)[38] **United States**	Small sample (n=172) of male offenders convicted of low level felonies from one US state, comparing parolees with those released unconditionally.	3 years after release from prison.	Reconviction	After 1 year parole "modestly" reduced recidivism but the effect dissipated after the parole supervision period was over.	"Parole seems to affect recidivism while the parolee is on parole…but these effects begin to dissipate and tend to disappear by the time the parolees have finished 2 full years in the community".

35. See, eg, B Thompson, "The recidivism of early release, parole and mandatory release prisoners in NSW 1982-85" (Paper presented at 5th Annual Conference of the ANZ Society of Criminology, Sydney University, 1989); L Roeger, "Recidivism and parole" (Paper presented at 2nd Australian and New Zealand Society of Criminology Research Conference, 1987). See also C Jones and others, *Risk of re-offending among parolees*, Crime and Justice Bulletin No 91 (NSW Bureau of Crime Statistics and Research, 2006).
36. C P Nuttall and others, *Parole in England and Wales*, Home Office Research Study No 38 (1977).
37. Home Office, *Prison Statistics England and Wales 1977* (Cmnd 7286, 1978).
38. H R Sacks and C H Logan, *Does parole make a difference?* (University of Connecticut School of Law Press,1979); H R Sacks and C H Logan, *Parole: Crime Prevention or Crime Postponement* (University of Connecticut School of Law Press,1980) 15.

Study (jurisdiction)	Comparison groups	Study period	Definition of reoffending	Results	Conclusion of researchers
Hann and Harmann (1988)[39] **Canada**	Comparing male parolees with male prisoners released unconditionally at the end of their sentences.	2.5 years after release from prison.	Reconviction	No overall numerical results reported but parolees reoffended less than non-parolees with the same reconviction risk score.	"It is plausible that parole as practised does have a modest role in reducing reconviction".
Broadhurst (1990)[40] **Western Australia**	Sample of male non-Aboriginal offenders, comparing parolees with offenders released from fixed term sentences.	Not reported.	Re-imprisonment (includes non-reoffending breach and revocation of parole).	No overall numerical results reported but parolees had lower recidivism than non-parolees.	"Results tell us that parole works modestly better than unconditional release but we cannot be sure why. It appears that short term benefits of community supervision plus selection factors account for the differences observed".
Brown (1996)[41] **New Zealand**	Small sample of parole eligible offenders serving prison terms less than 7 years, comparing parolees with offenders released automatically to a short term of supervision with no treatment programs or possibility of recall to prison.	2.5 years after release from prison.	Reconviction	Only high risk parolees reoffended less than the comparison group over the short term. No long term differences in reoffending were found between the two groups.	Parole has a delaying effect on reoffending for high risk offenders.
Ellis and Marshall (2000)[42] **United Kingdom**	Comparing reconviction rates of parolees released through discretionary parole to predicted rates calculated from their characteristics; also comparing reconviction rates of parolees to those of prisoners released unconditionally at the end of their sentences.	2 years after release from prison.	Reconviction	Parolees reoffended 2 percentage points less than predicted; Parolees reoffended 3 percentage points less than non-parolees	Parole reduces reoffending at least over two years. Although the parole effect seems small, this was a significant proportionate reduction.

39. R G Hann and W G Harman, *Release Risk Prediction: A Test of the Nuffield Scoring System* (Ministry of the Solicitor General, 1989); R G Hann, W G Harman and K Pease, "Does Parole Reduce the Risk of Reconviction?" (1991) 30 *Howard Journal of Criminal Justice* 66, 74.
40. R Broadhurst, "Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?" (Paper presented at Keeping People Out of Prison, Hobart, 27 March 1990) 37.
41. M Brown, "Serious Offending and the Management of Public Risk in New Zealand" (1996) 36 *British Journal of Criminology* 18.
42. T Ellis and P Marshall, "Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners" (2000) 33 *Australian and New Zealand Journal of Criminology* 300.

Study (jurisdiction)	Comparison groups	Study period	Definition of reoffending	Results	Conclusion of researchers
Solomon, Kachnowski and Bhati (2005)[43] **United States**	Very large sample from 15 US states, comparing parolees released through discretionary parole, parolees released through automatic parole, and prisoners released unconditionally at the end of their sentences.	2 years after release from prison.	Rearrest including arrests not leading to conviction (includes non-reoffending breach and revocation of parole).	Automatic parolees and offenders released unconditionally reoffend at the same rate. Reoffending of discretionary parolees is 4 percentage points lower.	"This modest difference may be due to factors other than supervision, given that parole boards base their decisions on such factors as attitude, motivation and preparedness for release that our model cannot take into account".
Schlager and Robbins (2008)[44] **United States**	Sample from one US state, comparing offenders released on discretionary parole with offenders who 'maxed out' and were released unconditionally at the end of their sentences.	N/A	Reconviction and re-imprisonment (not including non-reoffending breach and revocation of parole).	After controlling for a number of other variables, parolees were less likely to be reconvicted and less likely to be re-imprisoned.	Parolees are able to remain free from reconviction and re-imprisonment longer than max outs. Conflict with Solomon, Kachnowski and Bhati (2005) is likely due to national aggregate data obscuring important state level differences.
Ostermann (2013)[45] **United States**	Large sample of offenders from one US state, comparing offenders released through discretionary parole with prisoners released unconditionally at the end of their sentences.	3 years after release from prison.	Rearrest including arrests not leading to conviction (includes non-reoffending breach and revocation of parole).	Reoffending of parolees is 1 percentage point lower than prisoners released unconditionally. Reoffending of parolees that are still on parole and being supervised at 3 years is 8 percentage points lower.	"Supervision can insulate offenders from recidivism, but after supervision has expired, parole does not have substantial long lasting effects".
Wan and others (2014)[46] **New South Wales**	Large sample of offenders serving 12 months or less in custody, comparing offenders released on parole with offenders released unconditionally.	1, 2 and 3 years after release from prison.	Reconviction and re-imprisonment (not including non-reoffending breach and revocation of parole).	Reoffending of parolees is approximately 5 percentage points lower than that of prisoners released unconditionally after 1, 2 and 3 years.	Parolees "took longer to commit a new offence, were less likely to commit a new indictable offence and committed fewer offences than offenders who were released unconditionally".

2.23 Overall, it is true that the results of these studies are mixed and it is difficult to draw sweeping conclusions from the empirical evidence summarised above. As one reviewer of the UK literature wrote in 2004:

43. A Solomon, V Kachnowski and A Bhati, *Does Parole Work? Analysing the Impact of Postprison Supervision on Rearrest Outcomes* (Urban Institute, 2005) 15.
44. M Schlager and K Robbins, "Does Parole Work? – Revisited: Reframing the Discussion of the Impact of Postprison Supervision on Offender Outcome" (2008) 88 *Prison Journal* 234.
45. M Ostermann, "Active Supervision and Its Impact Upon Parolee Recidivism Rates" (2013) 59 *Crime and Delinquency* 487, 504-5.
46. W Wan and others, *Parole Supervision and Reoffending* , Trends and Issues in Crime and Criminal Justice No 485 (Australian Institute of Criminology, 2014) 6.

> After thirty-five years of research, can it now be said with confidence that parole either does or does not have a beneficial effect on recidivism? Sadly…the answer is no. It has been possible to establish that parolees are, on average, less likely to be reconvicted (at least in the short term) than non-parolees. But it has not been possible to demonstrate conclusively that there is a "parole effect" that operates independently of a possible "selection effect".[47]

2.24 At the same time, we consider that recent and directly applicable evidence gives us good reason to be optimistic about parole's ability to reduce reoffending. The only study of NSW offenders, and also the most recent study summarised in Table 2.2, found that parole does reduce reoffending.[48] This research was based on the 7494 NSW offenders who were released between January 2009 and June 2010 after serving 12 months or less in custody. Offenders released on parole were matched with a group of offenders released unconditionally based on a large range of characteristics including age, gender, Aboriginality, location and criminal history. This matching aimed to ensure that any observed differences in reoffending rates between the two groups were due to a "parole effect" rather than selection effects. The study found that offenders released unconditionally were more likely to reoffend than parolees, and that this was statistically significant.

2.25 The effect parole could have in reducing reoffending may not be strongly apparent in some of the empirical research in Table 2.2 because the management and support of parolees in the community needs to be better. This issue is the focus of Chapters 10 and 14. Each study can only report the extent to which parole is working to reduce reoffending in that particular jurisdiction at the time of the study.[49] And the effectiveness of parole management differs. Researchers have cautioned against drawing conclusions about parole based on research from different jurisdictions given how greatly parole systems and the management of parolees may differ.[50]

2.26 There are also two pieces of indirect evidence that parole reduces reoffending. First, there is evidence that time in prison has a criminogenic effect. Offenders who are sentenced to imprisonment are more likely to reoffend than otherwise similar offenders who receive a community based sentence.[51] Also, longer prison terms

47. S Shute, "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2 *Ohio State Journal of Criminal Law* 315, 321.

48. W Wan and others, *Parole Supervision and Reoffending*, Trends and Issues in Crime and Criminal Justice No 485 (Australian Institute of Criminology, 2014).

49. For a critique of the services provided to parolees in the US, possibly affecting the results of the US reoffending research, see J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) ch 4; J Petersilia, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479, 501-509. For criticisms of the management of parolees in the UK see T Ellis and P Marshall, "Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners" (2000) 33 *Australian and New Zealand Journal of Criminology* 300, 309.

50. M Schlager and K Robbins, "Does Parole Work? – Revisited: Reframing the Discussion of the Impact of Postprison Supervision on Offender Outcome" (2008) 88 *Prison Journal* 234, 237-238.

51. See, eg, D Weatherburn, *The Effect of Prison on Adult Re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010); R Lulham, D Weatherburn and L Bartels, *The Recidivism of Offenders Given Suspended Sentences: A Comparison With Full-time Imprisonment*, Crime and Justice Bulletin No 136 (NSW Bureau of Crime Statistics and Research, 2009); K Gelb, G Fisher and N Hudson, *Reoffending Following Sentencing in the Magistrates' Court of Victoria* (Victorian Sentencing Advisory Council, 2013) 25; M Killias, P Villettaz and I Zoder, *The Effects of Custodial vs. Non-Custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge* Campbell Systematic Reviews, 2006:13 (2006);

increase reoffending rates compared to shorter terms.[52] It is logical to reason from this evidence that a parole system which causes offenders to spend time supervised in the community rather than in custody would contribute to lower rates of reoffending.

2.27 Secondly and more significantly, there is a good body of research showing that in-custody and community based rehabilitation programs and other therapeutic interventions can reduce reoffending.[53] Parole is currently the main incentive for most offenders to participate in recommended in-custody programs. Parole is also the main incentive for offenders' participation in programs and interventions once they have been released into the community, as participation is often a condition of parole.

2.28 In 2006, the NZ Law Commission reached the following view:

> We should not design whole sentencing systems on unsupported hopes; but nor should we be hasty about abolishing existing systems when the evidence is marginally positive, even if we cannot be precise about the reason.[54]

2.29 Similarly, the Victorian Sentencing Advisory Council, in 2012, considered it "reasonable … to adopt the hypothesis that, to the extent that parole addresses factors likely to contribute to reoffending, the supervised, conditional release of prisoners on parole is likely to reduce reoffending".[55]

Our view: parole should be retained

2.30 We agree with the statements of the NZ Law Commission and Victorian Sentencing Advisory Council and consider that there is sufficient evidence to conclude that parole reduces reoffending. On this basis, we consider that parole is in the community interest and brings a long term benefit that outweighs any risk to the community of an offender reoffending when released on parole.

2.31 Furthermore, abolishing parole would increase risk to the community once an offender is released because:

F T Cullen, C L Jonson and D S Nagin, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science" (2011) 91 *Prison Journal Supplement* 48S.

52. P Smith, C Goggin and P Gendreau, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Public Works and Government Services Canada, 2002).

53. See, eg, K Howells and A Day, *The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems*, Trends and Issues in Crime and Criminal Justice No 112 (Australian Institute of Criminology, 1999); F T Cullen and P Gendreau, "Assessing Correctional Rehabilitation: Policy, Practice and Prospects" (2000) 3 *Criminal Justice 2000* 109; F T Cullen and others, "Nothing Works Revisited: Deconstructing Farabee's 'Rethinking Rehabilitation'" (2009) 4 *Victims and Offenders* 101; J Petersilia, "What Works in Prisoner Reentry? Reviewing and Questioning the Evidence" (2004) 68(2) *Federal Probation* 4; 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); M W Lipsey, N A Landenberger and S J Wilson, *Effects of Cognitive-Behavioral Programs for Criminal Offenders,* Campbell Systematic Reviews 2007:6 (2007).

54. New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) [168].

55. H Little and S Farrow, *Review of the Victorian Adult Parole System* (Victorian Sentencing Advisory Council, 2012) [1.40].

- it would remove incentives to participate in rehabilitation programs in custody and after release
- there would be no way to supervise and manage the re-entry of offenders into the community, including offenders who had been incarcerated for significant periods of time.

2.32 No stakeholders opposed retaining parole.

2.33 We conclude that parole is in the interests of community safety and should be retained in NSW.

Recommendation 2.1: Retention of parole

Parole should be retained.

Explicit statement of the primary purpose of parole

2.34 The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) includes a general objects clause stating that the objects of the Act are:

> (a) to ensure that those offenders who are required to be held in custody are removed from the general community and placed in a safe, secure and humane environment,
>
> (b) to ensure that other offenders are kept under supervision in a safe, secure and humane manner,
>
> (c) to ensure that the safety of persons having the custody or supervision of offenders is not endangered,
>
> (d) to provide for the rehabilitation of offenders with a view to their reintegration into the general community.[56]

2.35 The Act does not refer to the purpose or function of parole. It also does not explicitly refer to the important goal of reducing reoffending (although this is implied through the words "rehabilitation" and "reintegration").

2.36 Nearly all the submissions we received supported including in the CAS Act an explicit statement of the purpose of parole.[57] Parole remains controversial and its role and benefits are not well understood. Yet it is a critical part of our criminal justice system. In this environment, we agree that the CAS Act should include a clear statement of the primary purpose of parole.

56. *Crimes (Administration of Sentences) Act 1999* (NSW) s 2A(1).

57. Public Interest Advocacy Centre, *Submission PA1*, 5; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 2; Children's Court of NSW, *Submission PA3*, 1; Law Society of NSW, *Submission PA5*, 1; NSW Office of the Director of Public Prosecutions, *Submission PA7*, 1; Legal Aid NSW, *Submission PA4*, 5; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 4; Justice Action, *Submission PA10*, 3; NSW Bar Association, *Submission PA11*, 2; NSW, State Parole Authority, *Submission PA14*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1; Women in Prison Advocacy Network, *Submission PA20*, 8.

2.37 Such a statement might help to reduce misconceptions about the role of parole. More importantly, it would provide focus and clarity for the agencies and individuals working in the parole system. Many of the recommendations we make in the rest of this report aim to align the framework for parole decision making and the operation of the parole system more closely with its overarching purpose of promoting community safety through reducing reoffending. A clear legislative statement that this is the main point of parole will provide a better sense of mission and direction for the system.

2.38 In 2012, the Victorian Sentencing Advisory Council considered that the Victorian Adult Parole Board should adopt the following statement:

> the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion.[58]

2.39 The statement captures the importance of reducing reoffending as well as its relationship with supported reintegration and the protection of the community. We recommend that a simplified version of this statement be included in the CAS Act.

2.40 Corrective Services NSW suggested that a statement about the purpose of parole in the CAS Act could also explain how the purpose of parole relates to the purposes of sentencing.[59] The *Crimes (Sentencing Procedure) Act 1999* (NSW) states that the purposes of sentencing are:

> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community.[60]

2.41 As this list shows, the act of imposing a sentence on an offender serves many different competing purposes. However, once the sentence is imposed, we consider that any parole component must be administered for one main purpose: promoting community safety by reducing reoffending. Other purposes mentioned by Corrective Services NSW, although important at the time of sentencing, are not relevant to parole.

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58. H Little and S Farrow, *Review of the Victorian Adult Parole System* (Victorian Sentencing Advisory Council, 2012) 29.
59. Information provided by Corrective Services NSW (18 September 2014).
60. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

2.42 Corrective Services NSW also suggested that s 132 of the CAS Act could be redrafted in plain English and relocated so it sits with the new provision outlining the purpose of parole. Currently, s 132 states:

> An offender who, while serving a sentence, is released on parole in accordance with the terms of a parole order is taken to continue serving the sentence during the period:
>
> (a) that begins when the offender is released, and
>
> (b) that ends when the sentence expires or (if the parole order is sooner revoked) when the parole order is revoked.

2.43 This provision is important because it encapsulates the principle that an offender continues to serve his or her term of imprisonment while on parole: parole is an integral part of the sentence. It means that parole is not a discount or leniency. Instead it is a component of the original sentence. The offender remains subject to conditions and restriction of liberty, and may be returned to prison if parole is revoked. We agree with Corrective Services NSW that this provision could be more clearly and strongly expressed.

Recommendation 2.2: Statement of the primary purpose of parole

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should include a statement of the purpose of parole along the following lines:

The primary purpose of parole is to promote community safety by supervising and supporting the conditional release and re-entry of prisoners into the community, thereby reducing their risk of reoffending.

(2) The *Crimes (Administration of Sentences) Act 1999* (NSW) should make clear that parole remains part of the sentence. Such a statement should be located near the new provision that states the purpose of parole.

Design of the parole system

2.44 How should a parole system be designed to best achieve its primary objective of reducing reoffending? Other chapters of this report consider this question at a detailed level. In this section we consider this question as it relates to the mechanism that achieves an offender's release on parole after the end of the non-parole period. Specifically, we consider whether NSW should have:

- a system of discretionary parole, where a decision maker must decide whether to release the offender
- a system of automatic parole, where the offender is released automatically on a set day, unless a decision maker decides not to release the offender, or
- a mixed parole system that combines elements of both systems, depending on factors such as length of sentence or characteristics of the offence or the offender.

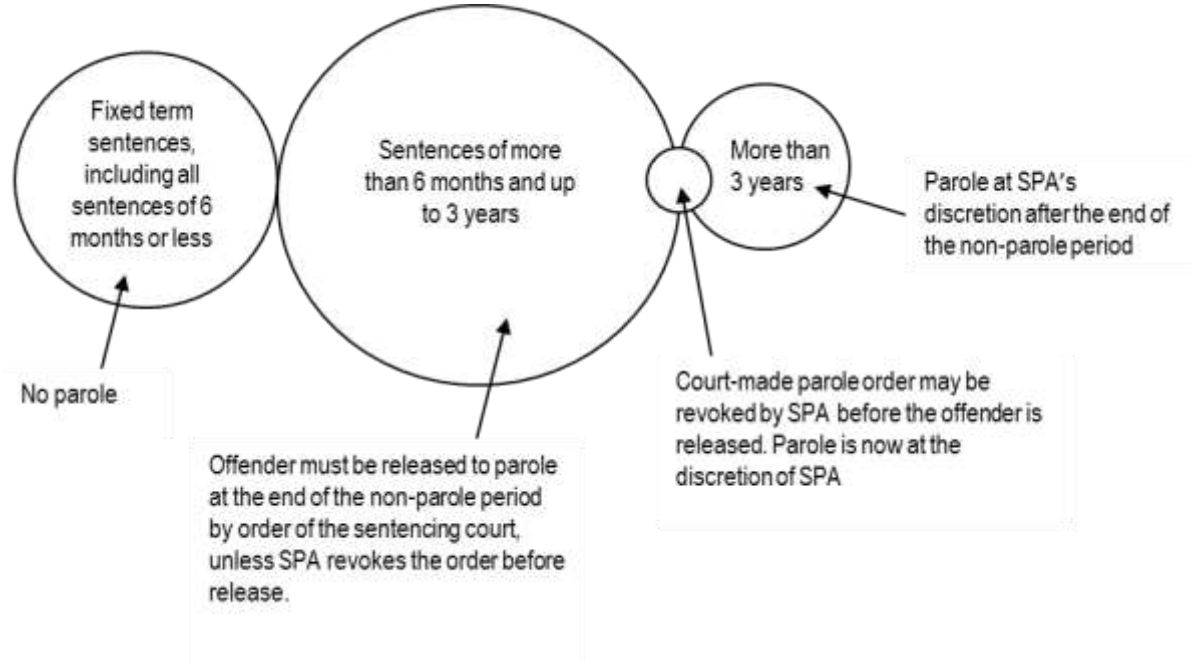
Current mixed system of automatic and discretionary parole

2.45 NSW currently has a mixed parole system. Offenders who are sentenced to a head sentence of three years or less (where the sentence is not a fixed term) are generally released on parole automatically at the end of the non-parole period by order of the sentencing court. The court also determines the conditions attached to the parole order.[61] A court *must* make a parole order directing the release of the offender at the end of the non-parole period if the head sentence is three years or less.[62] The offender will, therefore, be released automatically at the end of the non-parole period unless SPA revokes the parole order before the offender's release.[63] In this sense, NSW has automatic parole for such sentences. In 2013, 4603 adult offenders were automatically released on parole.[64] In 2013, SPA revoked 235 parole orders before the offender was released on parole.[65]

2.46 We discuss statutory parole (which gives rise to automatic parole for head sentences of three years or less under our proposals) in Chapter 3.

2.47 If an offender is sentenced to a head sentence of more than three years (where the sentence is not a fixed term), the court does not make an order. Instead, release on parole is at SPA's discretion (see Figure 2.2).

Figure 2.2: Parole system in NSW



Note: the size of each circle has been used to roughly approximate the relative number of sentences that fall into each category.

61. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51.
62. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.
63. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222; *Crimes (Administration of Sentences) Act 1999* (NSW) s 130.
64. NSW, State Parole Authority, *Annual Report 2013* (2014) 12.
65. NSW, State Parole Authority, *Annual Report 2013* (2014) 15.

2.48 SPA may decide to release an offender at the end of the non-parole period, or at some later point during the possible period of release on parole, or not at all. Different considerations guide SPA than those that guide the courts' sentencing discretion. We look at SPA's parole decision making in Chapters 4, 5, 6 and 7. If SPA grants parole, it also determines the conditions that will be part of the parole order (we discuss conditions in Chapter 9). SPA released 971 offenders on discretionary parole in 2013.[66]

2.49 Nearly all offenders who have been consistently refused parole will still be released at the end of the head sentence. The only exceptions are the very few offenders serving parole eligible life sentences or subject to a continuing detention order under the provisions of the *Crimes (High Risk Offenders) Act 2006* (NSW).

2.50 As courts in NSW can impose a fixed term of imprisonment instead of a sentence structured as a head sentence and a non-parole period, the sentencing courts also effectively have a role in parole decision making. A court may choose to impose a sentence so that there is no possibility of parole, either by imposing:

- a head sentence of six months or less (for which the court cannot set a non-parole period)[67] or
- a head sentence of more than six months, which the court has chosen to impose as a fixed term.[68]

In 2013, NSW adult courts imposed 2793 fixed terms of imprisonment, of these, 2534 were for head sentences of 6 months or less.[69]

Parole systems in other jurisdictions

Australian parole systems

2.51 Other Australian jurisdictions have fairly similar systems to NSW.[70] In Victoria, SA, WA, the NT and the ACT, parole is not available for short sentences of less than 12 months.[71] In these jurisdictions, as in NSW, the sentencing court may also in some circumstances choose not to fix a non-parole period for longer sentences, meaning that the offender will not be eligible for parole.[72] Tasmania does not have a restriction on parole for short sentences, but again the sentencing court may choose not to set a non-parole period so that the offender will not be eligible for parole.[73]

66. NSW, State Parole Authority, *Annual Report 2013* (2014) 12.
67. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
68. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45.
69. NSW Bureau of Crime Statistics and Research (unpublished data, ref: Dg14/12433HcLc). See also NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139-A (2013) 30.
70. See Appendix C.
71. *Sentencing Act 1991* (Vic) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(a); *Sentencing Act 1995* (WA) s 89(2); *Sentencing Act* (NT) s 53; *Crimes (Sentencing) Act 2005* (ACT) s 65.
72. *Sentencing Act 1991* (Vic) s 11(1); *Criminal Law (Sentencing) Act 1988* (SA) s 32(5)(c); *Sentencing Act 1995* (WA) s 89(4); *Sentencing Act* (NT) s 53(1); *Crimes (Sentencing) Act 2005* (ACT) s 65(4).
73. *Sentencing Act 1997* (Tas) s 17.

Only Queensland has a system where parole must apply to all sentences, but in that state the court may set the parole eligibility or release date as the last day of the sentence, effectively meaning that there can be no parole.[74]

2.52 For parole eligible sentences, Victoria, WA, Tasmania, the NT and the ACT have systems entirely of discretionary parole. In these jurisdictions, a parole decision maker like SPA will decide whether a parole eligible offender should be released on parole once the non-parole period has been served.

2.53 Only Queensland and SA are similar to NSW in having some type of automatic parole for adults. In Queensland, where a court imposes a sentence of three years or less, and the sentence is not for a serious violent or sexual offence, the court must set a date when the offender will be released on parole.[75] Discretionary parole decision making applies to other sentences.

2.54 In SA, there is automatic parole for head sentences of less than five years provided the sentence is not for a sexual offence, personal violence offence, an act of arson or serious firearm offence. For sentences that come under automatic parole, the parole board must order an offender's release on parole at the end of the non-parole period.[76] Other SA sentences are subject to discretionary parole decision making. Unlike NSW, SA and Queensland do not have any safeguard or check on automatic parole beyond the offence based restrictions.

2.55 The Commonwealth operates a different kind of mixed system for federal offenders. When sentencing a federal offender to a term of imprisonment of three years or less, the court must make a recognizance release order unless the court decides that it is not appropriate to do so, having regard to the nature and circumstances of the offence and the antecedents of the offender.[77] A recognizance release order carries similar conditions to a parole order and means that the offender is released providing that he or she abides by the conditions. The court can set the recognizance release order to start at any date during the offender's term of imprisonment.[78] If an offender is sentenced to a term of imprisonment of six months or less, the court may choose to make a recognizance release order but is not required to do so.[79]

2.56 For sentences of more than three years, a court may either make a recognizance release order or set a non-parole period.[80] If the court sets a non-parole period, the Commonwealth Attorney-General considers the offender's discretionary release on parole at the end of the non-parole period.[81] Effectively, then, federal offenders subject to sentences with a non-parole period come under a system of discretionary parole decision making. Federal offenders subject to a recognizance release order come under a somewhat automatic system. A court may decline to make a

74. *Penalties and Sentences Act 1992* (Qld) s 160B.
75. *Penalties and Sentences Act 1992* (Qld) s 160B.
76. *Correctional Services Act 1982* (SA) s 66(2).
77. *Crimes Act 1914* (Cth) s 19AC.
78. *Crimes Act 1914* (Cth) s 20(1).
79. *Crimes Act 1914* (Cth) s 19AC(3).
80. *Crimes Act 1914* (Cth) s 19AB.
81. *Crimes Act 1914* (Cth) s 19AL.

recognizance release order but, if an order is made, the offender must be released in accordance with the order.

NZ, Canada and the UK

2.57 NZ operates a reasonably similar system to NSW, SA and Queensland. In NZ, offenders serving sentences of two years or less are automatically released on parole by statute after serving one half of their sentence.[82] The NZ Parole Board must consider the release of an offender serving a sentence over two years at the end of the non-parole period,[83] which is usually one third of an offender's sentence.[84]

2.58 Automatic parole is much more commonly used in other international jurisdictions than it is in Australia or NZ. In Canada, for example, offenders serving sentences of two years or more can apply for discretionary parole after serving one third of their sentence or seven years, whichever is less.[85] If parole is not granted, however, most offenders are still eligible for automatic parole (called "statutory release"). All offenders (except those serving a life or indeterminate sentence)[86] must be released with supervision after serving two thirds of their sentence.[87] There is no possibility for the sentencing court to impose a sentence where the offender is ineligible for discretionary or automatic parole, unless an indeterminate sentence is imposed.

2.59 As a safeguard on statutory release, the Correctional Service Canada can refer cases to the Parole Board, and the Parole Board will prevent an offender from being automatically released if it is satisfied that the offender is likely to commit an offence involving death or serious physical or psychological harm, a sexual offence involving a child, or a serious drug offence.[88] In these cases, the Parole Board then takes over responsibility for making the parole decision for these offenders.

2.60 In England and Wales, most offenders serving sentences of more than 12 months are automatically released into the community at the halfway point of their sentence.[89] The exception is offenders who are serving extended sentences.[90] Extended sentences may be imposed on an offender if the following conditions apply:

- the offender has committed a specified violent or sexual offence[91]

82. *Parole Act 2002* (NZ) s 86.
83. *Parole Act 2002* (NZ) s 21.
84. *Sentencing Act 2002* (NZ) s 86; *Parole Act 2002* (NZ) s 84.
85. *Corrections and Conditional Release Act*, SC 1992, c 20 (Can) s 120(1).
86. For offenders serving a life sentence, parole eligibility is set by the sentencing court. For first degree murder, eligibility is automatically set at 25 years, and for second degree murder, eligibility may be set at between 10 to 25 years. See *Criminal Code*, RSC 1985, c 46 (Can) s 745.
87. *Corrections and Conditional Release Act*, SC 1992, c 20 (Can) s 127.
88. *Corrections and Conditional Release Act*, SC 1992, c 20 (Can) s 129.
89. *Criminal Justice Act 2003* (UK) s 244.
90. *Criminal Justice Act 2003* (UK) s 226A. *Criminal Justice Act 2003* (UK) s 226B provides a similar extended sentence framework for offenders under the age of 18 years.
91. These offences are listed under *Criminal Justice Act 2003* (UK) sch 15 pt 1-2.

- there is significant risk of serious harm to the public by the commission of further specified offences[92]
- the court is not required to impose a sentence of imprisonment for life,[93] and
- either:
  - at the time the offence was committed, the offender had already been convicted of a specified offence,[94] or
  - the custodial term in the sentence will be at least 4 years.[95]

2.61 These extended sentences consist of a custodial term and an "extension period" during which the offender is released on licence, as set by the sentencing court.[96] Offenders are to be automatically released after serving two thirds of the custodial term, unless the custodial term is 10 years or more or the offence is of a particular type.[97] If one or both of these conditions applies, the offender will not qualify for automatic release. Instead, the parole authority will consider the offender for discretionary parole after serving two thirds of the sentence.[98] The parole authority may not release the offender unless it is satisfied that it is no longer necessary for the protection of the public that the offender remain in custody.[99]

US parole systems

2.62 In the US, there was a large scale movement away from discretionary parole in the 1970s and 1980s. In 1976, 65% of all prison releases in the US were to discretionary parole, as decided by a parole board, compared to 24% in 1999.[100] By 2002, only 16 US states still had a fully discretionary parole system. Nineteen states had moved to a mixed system where discretionary parole was not available for some types of offences or sentences. In the remaining 15 states, discretionary parole had been abolished altogether.[101]

2.63 Commentators have attributed the US pattern of abolishing or limiting discretionary parole to several factors. It was partly a result of the disillusionment in the 1970s with the effectiveness of rehabilitation and the rise of the "nothing works" movement. Reviews of correctional programs at the time found that they had little or no effect on recidivism. This led to an increased emphasis on punishment and "just

92. *Criminal Justice Act 2003* (UK) s 226A(1)(b).
93. *Criminal Justice Act 2003* (UK) s 226A(1)(c). See also *Criminal Justice Act 2003* (UK) s 224A, s 225(2).
94. *Criminal Justice Act 2003* (UK) s 226A(1)(d), s 226A(2). These offences are listed under *Criminal Justice Act 2003* (UK) sch 15B.
95. *Criminal Justice Act 2003* (UK) s 226A, s 246A(1)-(4). See also *Legal Aid, Sentencing and Punishment of Offenders Act 2012* (UK) s128.
96. *Criminal Justice Act 2003* (UK) s 226A(5)-(8).
97. *Criminal Justice Act 2003* (UK) s 246A(2). The disqualifying offences are listed in sch 15B pt 1-3.
98. *Criminal Justice Act 2003* (UK) s 246A.
99. *Criminal Justice Act 2003* (UK) s 246A(6).
100. J Travis and S Lawrence, *Beyond the Prison Gates: The State of Parole in America* (Urban Institute, 2002) 4.
101. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 66-7.

deserts" in sentencing.[102] Against this background, discretionary parole was perceived as emphasising the interests of the offender over the interests of the community; or, as one commentator has put it, "the perception that violent and dangerous offenders were being released too early because of a naïve emphasis on rehabilitation rather than a commitment to incapacitation and retribution".[103]

2.64 At the same time, a sentencing reform movement grew which advocated restricted judicial discretion in sentencing. Many states moved from indeterminate to determinate sentencing models and introduced sentencing guidelines, mandatory minimum sentences and "three strikes" laws. A natural extension of this reform movement was the restriction or abolition of the discretion of parole boards.[104]

2.65 A simultaneous push for "truth in sentencing" gave further impetus for the abolition of discretionary parole. Proponents of truth in sentencing argued that certainty of release after serving a set (and high) percentage of the sentence led to greater honesty in sentencing decisions and longer periods in custody for serious offenders.[105] Federal funds were made available to US states that ensured that offenders convicted of certain offences served at least 85% of their full sentence in custody. The 27 states that implemented an 85% system did so either by abolishing or limiting discretionary parole and replacing it with a system of automatic parole at the 85% (or higher) mark.[106]

2.66 However, most states recognised the importance of continuing some type of post-custody supervision and so this aspect of parole remained in all but two states through systems of automatic parole, even when discretionary parole was abolished.[107] In recent years, budget pressures in the US have led to a focus on justice reinvestment, and more funding and attention has been allocated to improving support and programs for parolees and to increasing access to parole with the aim of reducing recidivism rates.[108]

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102. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 63-4.
103. H Aviram, V Kraml and N Schmidt, "Dangerousness, Risk and Release" (2010) 7 *Hastings Race and Poverty Law Journal* 175, 176.
104. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 68; D Dharmapala, N Garoupa and J M Shepherd, "Legislatures, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing" (2010) 62 *Florida Law Review* 1037, 1042-9.
105. J Petersilia, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479, 480; D Dharmapala, N Garoupa and J M Shepherd, "Legislatures, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing" (2010) 62 *Florida Law Review* 1037, 1048; H Aviram, V Kraml and N Schmidt, "Dangerousness, Risk and Release" (2010) 7 *Hastings Race and Poverty Law Journal* 175, 176; D M Fetsco, "Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends" (2011) 11 *Wyoming Law Review* 99, 110.
106. J Petersilia, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003) 68.
107. J Petersilia, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479, 481-2. See also S Shane-DuBow, A P Brown and E Olsen, *Sentencing Reform in the United States: History, Content and Effect* (US Department of Justice, 1985).
108. N La Vigne and others, *The Justice Reinvestment Initiative: Experiences from the States* (Urban Institute, 2013); P J Larkin, "Clemency, Parole, Good-Time Credits and Crowded Prisons: Reconsidering Early Release" (2013) 11 *Georgetown Journal of Law and Public Policy* 1, 32-33; D M Fetsco, "Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and

Advantages and disadvantages of automatic and discretionary parole

2.67 A key advantage of discretionary parole is that it enables a risk management approach to the release of offenders. A decision maker can choose to release low risk offenders, saving the community the cost of their unnecessary continued incarceration. The decision maker can choose not to release or to delay the release of offenders that pose a high level of risk to community safety and can manage the release of these offenders much more stringently.

2.68 Discretionary parole also means that parole can operate as an incentive for offenders to participate in in-custody rehabilitation programs and other activities, and as an incentive for general good behaviour in custody. Under a discretionary parole system, both of these incentives may operate to change the behaviour and reduce the reoffending even of those offenders who are not in fact paroled. As one commentator wrote of the US trend towards automatic parole, "the public does not understand the tremendous power that is lost when [discretionary] parole is abandoned".[109]

2.69 The disadvantages of discretionary parole are that parole decision making is resource intensive and that there is no guarantee that all offenders will be subject to supervision and receive support upon leaving custody. Those offenders denied parole may serve out their head sentence and then be released unconditionally into the community, negating any opportunity to reduce their recidivism risk through supervised reintegration.

2.70 Originally, NSW had a system entirely of discretionary parole. The current mixed system with automatic parole for sentences of three years or less was introduced on the recommendation of the 1978 Nagle Commission and was entirely directed at reducing the workload of the discretionary parole decision maker to manageable levels.[110] We recognised the practical advantages of automatic parole in our 1996 review and said that it was "justified by administrative convenience and the allocation of scarce resources".[111]

2.71 Automatic parole also ensures that offenders (who are not sentenced to a fixed term) are supervised for a period and have the opportunity to attempt to reduce their recidivism risk. However, it cannot provide an incentive for good behaviour in custody or for offenders to participate in programs unless there is a means to revoke or override automatic parole for some offenders on this basis. Offenders released automatically on parole also cannot be subject to a risk management approach.

Elsewhere and an Examination of Current and Future Trends" (2011) 11 *Wyoming Law Review* 99, 118-9.

109. J Petersilia, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479, 480.
110. J F Nagle, *Report of the Royal Commission into NSW Prisons* (Parliament of NSW, 1978) 402-3.
111. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [11.11].

Stakeholder support for a mixed parole system

2.72 Nearly all stakeholders who made submissions on the design of the parole system supported some kind of mixed parole system for NSW.[112] Legal Aid NSW noted that some space for automatic parole is necessary to keep SPA, Corrective Services NSW and Community Corrections workloads under control.[113] The NSW Department of Justice submitted that a mixed system is beneficial as it allows for a risk management approach, if lower risk offenders are subject to automatic parole and higher risk offenders are subject to discretionary parole.[114]

2.73 Stakeholders had diverging views about how the divide between automatic and discretionary parole should be drawn.

2.74 SPA, the Aboriginal Legal Service, the Office of the Director of Public Prosecutions, NSW Young Lawyers and the Police portfolio supported the current system, where the divide between automatic and discretionary parole is based on sentence length and the cut off is a head sentence of three years.[115]

2.75 The Law Society of NSW also supported a cut off based on sentence length, but thought that the limit should be lifted from three years to four years.[116] Legal Aid NSW held a similar view but preferred the limit to be increased to a head sentence of five years.[117]

2.76 The NSW Bar Association proposed that, along with automatic parole for sentences of three years or less, there should be a cross over zone for sentences of between three and five years. The Association submitted that within this cross over zone, the sentencing court could choose to make a parole order (and so cause the offender to be automatically paroled at the end of the non-parole period) or not to make an order (and so cause the offender to be subject to SPA's discretionary parole decision making). All offenders serving head sentences of more than five years would be subject to discretionary parole. The NSW Bar Association submitted that the cross over zone of discretion for the sentencing court would be particularly useful where a longer sentence has been backdated due to time spent on remand so that there is not much of the non-parole period left to serve after the date of sentencing.[118]

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112. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 2; NSW Office of the Director of Public Prosecutions, *Submission PA7*, 1; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 4; NSW, State Parole Authority, *Submission PA14*, 2; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1; Law Society of NSW, *Submission PA5*, 1; Legal Aid NSW, *Submission PA4*, 5; NSW Department of Justice, *Submission PA32*, 4; NSW Bar Association, *Submission PA11*, 2. Justice Action supported a fully automatic parole system: Justice Action, *Submission PA10*, 4.
113. Legal Aid NSW, *Submission PA4*, 5-6.
114. NSW Department of Justice, *Submission PA32*, 4.
115. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 2; NSW Office of the Director of Public Prosecutions, *Submission PA7*, 1; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 4; NSW, State Parole Authority, *Submission PA14*, 2; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 1.
116. Law Society of NSW, *Submission PA5*, 1.
117. Legal Aid NSW, *Submission PA4*, 5.
118. NSW Bar Association, *Submission PA11*, 2.

Our view: retain a mixed parole system

2.77 In principle, we consider discretionary parole to be the ideal model because it:

- creates an incentive for offenders to participate in rehabilitation programs and other activities
- creates an incentive for good behaviour in custody, and
- best protects the safety of the community and reduces reoffending by allowing a risk management approach, where lower risk offenders are released on parole and higher risk offenders are kept back in custody or managed more intensively.

2.78 However, moving to discretionary parole for all offenders would require a very large increase in the resources directed towards SPA and parole decision making.

2.79 Pragmatically, we agree with stakeholders that a mixed parole system is the best model for NSW, as long as the mixed system is designed with a risk management approach in mind. In general, lower risk offenders should be subject to automatic parole and higher risk offenders subject to discretionary parole. The priority for lower risk offenders (with sentences that include a non-parole period) is to ensure that they have some period of parole supervision and that the community is saved the cost of unnecessary incarceration. Higher risk offenders need to be scrutinised by a decision maker to ensure that risk to the community is minimised and that these offenders have an incentive to complete rehabilitation programs and other activities in custody. A risk based design for a mixed parole system ensures that resources (in the sense of resource intensive discretionary parole decision making) are focused on higher risk offenders. Lower risk offenders receive less attention and fewer resources.

2.80 In the current system, sentence length is used as an approximation for the risk posed to the community by a particular offender. Offenders serving head sentences of three years or less are labelled lower risk and so are subject to automatic parole. Offenders serving sentences of more than three years are categorised as higher risk and so are subject to discretionary parole.

2.81 There are alternative options:

- Restricting automatic parole based on a combination of sentence length and offence type which, as we have noted, is the case in SA and Queensland. In those States, offence type has been added to sentence length to try to arrive at an approximation of the risks an offender poses.
- Having some kind of explicit risk assessment at the time of sentencing. Offenders could be allocated to either automatic or discretionary parole based on this assessment. Community Corrections could make this assessment as part of a pre-sentence report. While this alternative appears to add some rigour to the setting of non-parole period, its usefulness is reduced by the extent to which it is not possible to predict whether and to what extent criminogenic needs[119] will be addressed while the offender is in custody. This approach would also be resource intensive and would cause uncertainty for offenders.

119. On “criminogenic needs”, see para [4.49].

2.82 Overall, however, we consider that the current mixed system based on sentence length should be retained. We accept that sentence length is not a perfect marker of an offender's risk of reoffending. As the NSW Department of Justice noted in its submission, "offenders with shorter sentences can represent a high risk/high rotation group".[120] However, sentence length is a reasonable indicator of the level of concern about the nature of any reoffending that the parole decision must manage.

2.83 In recommending that the system continue to be divided based on sentence length, we are also influenced by the practical realities of short sentences.[121] For offenders serving short sentences, there is limited time for an offender to engage in the programs or other rehabilitative activities that are often required to be completed before SPA will grant parole.

2.84 As sentence length only approximates the risks posed by an offender, we consider that SPA should continue to have a power to revoke parole pre-release as a safeguard on automatic parole. This allows Community Corrections and SPA to assess an offender close to the end of the non-parole period and revoke the automatic parole in some circumstances.[122] We discuss how such a mechanism should operate in Chapter 3.[123]

2.85 Despite the submissions of some stakeholders, we cannot see any strong reasons for moving away from the current cut off of three years for automatic parole. As we recognised in our 1996 report on sentencing, any dividing line based on sentence length will be arbitrary to some extent.[124] In the absence of strong arguments for a different cut off level, we are satisfied that a head sentence of three years remains an appropriate dividing line between automatic and discretionary parole.

Recommendation 2.3: A mixed parole system

The *Crimes (Administration of Sentences) Act 1999* (NSW) should retain the current mixed parole system where automatic parole applies to offenders serving head sentences of three years or less that have a non-parole period and discretionary parole applies to offenders serving sentences of more than three years.

120. NSW Department of Justice, *Submission PA32*, 5.
121. See Chapter 16.
122. The circumstances in which SPA can revoke a parole order pre-release are outlined in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222.
123. Para [3.18]-[3.59] and Recommendation 3.2.
124. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [11.13].

3. Statutory parole

In brief

A number of issues and complexities arise from the current system of court based parole orders for sentences of three years or less, including the need for a separate court order and the relevance of parole conditions that are imposed at the time of sentencing. We propose a "statutory parole" model in place of court based parole. Statutory parole will authorise release on parole for sentences of three years or less without the need for a separate court order. It will move the power to impose additional conditions from the sentencing court to the State Parole Authority (SPA) which will be in a better position to assess the offender's progress to rehabilitation while in custody. SPA should still be able to revoke such an order before the offender's release but only on limited risk based grounds.

3.1 In this chapter we discuss court based parole in NSW. We look at the role of sentencing courts in making parole orders and imposing additional conditions in the case of sentences of three years or less. We propose a "statutory parole" model in place of court based parole. Statutory parole will authorise release on parole for sentences of three years or less without the need for a separate court order and will move the power to impose additional conditions from the sentencing court to the State Parole Authority (SPA) which will be in a better position to assess the offender's progress to rehabilitation while in custody. We also look at the scarcity of suitable post-release accommodation for offenders, the power of SPA to revoke a court based parole order before the offender is released from custody, the mandatory supervision condition attached to court based parole orders and difficulties for accumulated and aggregate sentences.

Operation of court based parole

3.2 When a court imposes a head sentence of three years or less, the court must make a parole order directing the release of the offender at the end of the non-parole period,[1] unless the court imposes a fixed term of imprisonment.[2] When it makes the parole order, the court sets the conditions that will apply to the order beyond the standard conditions of parole.[3] The offender is released on parole when the non-parole period under the court based parole order expires.[4]

3.3 Under certain circumstances, SPA can revoke the court based parole order before the offender is released on parole.[5] SPA can also add to or vary the conditions the court has placed on the parole order at any time.[6]

3.4 Offenders with a head sentence of more than three years do not receive a court based parole order. Instead, the release of these offenders to parole is at SPA's discretion. Offenders who have their court based parole orders revoked by SPA pre-release are paroled at the discretion of SPA in the same way as offenders serving sentences of more than three years.[7]

3.5 The majority of offenders who are released on parole from adult custody are subject to a court based parole order (see Table 3.1).

Table 3.1: Offenders released on parole in NSW from adult custody

	2009	2010	2011	2012	2013
Total parole releases	5542	5687	5447	5470	5574
SPA parole orders	924	951	1036	1051	971
Court based parole orders (% of total)	4618 (83%)	4736 (83%)	4411 (81%)	4419 (81%)	4603 (83%)

Source: NSW, State Parole Authority, Annual Reports 2009-2013 (2010-2014).

Replacing court based parole with "statutory parole"

3.6 Court based parole for sentences of three years or less effectively achieves automatic release on parole in NSW, except in those cases where SPA revokes an offender's court based parole order before release. The sentencing court is involved in the offender's parole because it:

1. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50.
2. All sentences of six months or less must be fixed terms, and a court may choose to impose a fixed term in some other circumstances. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 45-46.
3. For more about parole conditions, see Chapter 9.
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 126-127.
5. *Crimes (Administration of Sentences) Act 1999* (NSW) s 130, s 159; *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222.
6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128.
7. See Chapter 4 on SPA's discretionary parole decision making.

- must, when it imposes a sentence of three years or less that includes a non-parole period, make a parole order, and
- can set the conditions attached to the order beyond the standard conditions of parole.[8]

3.7 Some stakeholders have raised the issue of courts imposing parole conditions that can be problematic and hard to implement.[9] A significant period of time can elapse between the sentencing court setting the conditions of the parole order and the offender actually being released on parole. Court imposed conditions may no longer be relevant to the offender or it may be impossible to comply with them. We were also told during our sentencing reference that problems sometimes occur when a sentencing court neglects to make a parole order at the time of sentencing.[10]

New system of statutory parole so courts no longer set parole conditions

3.8 SPA can vary or remove court imposed conditions before an offender is released on parole.[11] We think that this approach can better achieve the purposes of parole and should replace the system of additional conditions imposed as part of the court based parole model. SPA is better placed than the sentencing court to determine what additional conditions (if any) should be imposed because it makes its decision nearer the time of release and with the benefit of advice from Community Corrections. We cannot see any reason for the courts to retain a role in setting parole conditions. If courts do not set parole conditions, there is then no reason to have a system that requires the court to impose a parole order at the time of sentencing.

3.9 Instead of the court being required to make the parole order at sentencing, the *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act) should state that all offenders serving head sentences of three years or less with a non-parole period must be released on parole at the end of the non-parole period, unless SPA revokes parole in advance. This will render unnecessary the court based parole order provisions, including s 50, s 51, s 51A and s 51B of the *Crimes (Sentencing Procedure) Act 1999* (NSW).

3.10 The CAS Act should provide that the standard conditions of parole apply to statutory parole and SPA should continue to have the power to impose additional conditions. We expect that Community Corrections would request that SPA impose such additional conditions close to the time of the offender's release on parole.

3.11 This change would mean that courts would continue to have a role in parole in the case of sentences of three years or less because the decision whether to impose a fixed term or set a non-parole period (and the length of that period) would determine whether and when an offender can be released on parole. However, the courts

8. For the standard conditions of parole see para [9.2]-[9.34].
9. NSW Department of Justice, *Submission PA32*, 6; City Community Corrections Office management team, *Consultation PAC8*; Wagga Wagga Community Corrections Office, *Consultation PAC14*; Roundtable: legal practitioners, *Consultation PAC28.*
10. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) 137.
11. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2)(b).

would no longer be required to make parole orders or have a role in setting parole conditions.

Supervision conditions on statutory parole orders

3.12 Currently, the standard conditions of parole require an offender to be of good behaviour, adapt to normal lawful community life, and not commit any offence.[12] These conditions apply automatically to all parole orders (whether they are made by a court or by SPA) and cannot be altered.[13] Supervision is not a standard condition of parole but s 51(1AA) of the *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that the conditions of a court based parole order automatically include supervision unless the court expressly states otherwise. The mechanism of s 51(1AA) cannot operate if court based parole is replaced with statutory parole.

3.13 We discuss supervision conditions in Chapter 9.[14] The presumption in favour of a supervision condition on court based parole orders was legislated in 2003,[15] when it was found that most parolees released on court based parole were unsupervised, despite Community Corrections identifying supervision as a key factor in reducing the risk of recidivism.[16] Supervised offenders were considered less likely to reoffend on parole than offenders who had little or no assistance from Community Corrections.[17]

3.14 Some stakeholders have opposed the presumption in favour of supervision because it means that SPA will revoke some court based parole orders before the offender is released.[18] Stakeholders say that SPA will revoke an order pre-release if the offender is not be able to meet the obligations of supervision, including having an approved address. In their view, fewer offenders who are subject to supervision conditions might mean fewer offenders whose parole is revoked before release.

3.15 We acknowledge stakeholders' concerns about pre-release revocation, particularly when the offender cannot find suitable post-release accommodation. We discuss these issues later in this chapter.[19] However, we do not consider that the solution to this problem is to have fewer offenders supervised on parole.

3.16 We recommend in Chapter 9 that supervision should be a standard condition attaching to all parole orders.[20] Supervision is a key part of the public understanding of parole and is essential if parole is to serve its purpose of managing offenders' re-

12. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 214.
13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128.
14. Para [9.35]-[9.75].
15. *Crimes (Sentencing Procedure) Act 1999 (*NSW) s 51(1AA), amended by *Crimes Legislation Amendment (Parole) Act 2003* (NSW), commenced on 3 November 2003.
16. See the second reading speech to the Crimes Legislation Amendment (Parole) Bill 2003 (NSW): NSW, *Parliamentary Debates,* Legislative Council, 21 May 2003, 781.
17. NSW, *Parliamentary Debates,* Legislative Council, 21 May 2003, 782.
18. NSW Bar Association, *Submission PA11,* 3; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 6. Also Legal Aid NSW, *Submission SE31*, 4: see NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
19. Para [3.33]-[3.59].
20. Para [9.8]-[9.17] and Recommendation 9.1.

entry to the community to reduce reoffending. Supervision according to the best practice risk-needs-responsivity principles[21] has been proven to reduce reoffending.[22] In 2006, a review of 291 evaluations of programs for adult offenders conducted throughout the US and other English speaking countries during the previous 35 years showed that intensive supervision programs "where the focus is on providing treatment services for the offenders" reduced reoffending rates by around 20%.[23] Recent NSW research specifically investigating the effects of parole supervision has found that a higher level of parole supervision is associated with a lower risk of reimprisonment, and that active rehabilitation focused supervision, in particular, significantly reduces reoffending.[24]

3.17 Under our proposed statutory parole model, all offenders released on statutory parole would be subject to supervision as part of a standard condition. As we discuss in Chapter 9,[25] Community Corrections would retain discretion to suspend an offender's obligations under the supervision condition where the offender is relatively low risk, does not require monitoring or intervention and is not benefiting from supervision.

Recommendation 3.1: Introducing a statutory parole model

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that an offender sentenced to a head sentence of three years or less with a non-parole period must be released on parole at the end of the non-parole period ("statutory parole"), unless the State Parole Authority has revoked parole.

(2) Statutory parole should be subject to the standard conditions of parole set out in Recommendation 9.1.

(3) The Authority should have the same power to impose any additional conditions as it currently has for court based parole orders.

(4) The statutory parole model should replace the court based parole order model in the *Crimes (Sentencing Procedure) Act 1999* (NSW).

Pre-release revocation of court based (or statutory) parole orders

3.18 The *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation) sets out the circumstances in which SPA can revoke an offender's court based parole order before the offender is released. The circumstances are:

- where the offender requests revocation

21. On risk-needs-responsivity principles, see para [14.4]-[14.5].
22. E Drake, *Inventory of Evidence-Based and Research-Based Programs for Adult Corrections* (Washington State Institute for Public Policy, 2013).
23. S Aos, M Miller and E Drake, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (Washington State Institute for Public Policy, 2006) 3, 6.
24. W Wan and others, *Parole Supervision and Re-offending: A Propensity Score Matching Analysis*, Report to the Criminology Research Advisory Council, Grant CRG 23/12-13 (Australian Institute of Criminology, 2014) 31.
25. Para [9.14]-[9.16].

- where SPA decides that the offender is unable to adapt to normal lawful community life, or
- where SPA decides that satisfactory post-release accommodation or plans have not been made or cannot be made.[26]

3.19 SPA can also revoke its own parole order before the offender is actually released. The circumstances in which this can be done are slightly broader than for court based parole orders. We discuss SPA's power to revoke its own orders before an offender is released in Chapter 6.[27]

3.20 While SPA can revoke both kinds of parole orders, Table 3.2 indicates that the majority of pre-release revocations are of court based parole orders.

Table 3.2: Parole revocations by SPA prior to release

	2009	2010	2011	2012	2013
Total parole revocations prior to release	194	227	286	235	235
Proportion of parole orders revoked prior to release, that were court based parole orders (% of total)	79.8%	80.2%	93.4%	95.3%	92.3%

Source: NSW, State Parole Authority, Annual Reports 2009-2013 (2010-2014); Information provided by NSW, State Parole Authority (4 September 2014).

Importance of the pre-release revocation safeguard

3.21 In submissions to our sentencing reference, some stakeholders expressed concerns about SPA having the power to revoke a court based parole order before an offender is released on parole.[28] Shopfront Youth Legal Centre submitted that revoking a court based parole order before release is contrary to the sentencing court's intention that an offender be automatically released at a specified point in time.[29] For this reason, Shopfront Youth Legal Centre supported pre-release revocation in "exceptional cases" only.[30] In submissions to this reference, other stakeholders also favoured limiting the power to exceptional circumstances,[31] while some did not think it was necessary to make any change.[32]

3.22 Our view is that the pre-release revocation power is an important safeguard. As we discussed in Chapter 2, the express reason for the introduction of a system of

26. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1)(a)-(c).
27. Para [6.91]-[6.103] and Recommendation 6.6.
28. Shopfront Youth Legal Centre, *Submission SE28,* 5; NSW Bar Association, *Submission SE27*, 4. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
29. Shopfront Youth Legal Centre, *Submission SE28,* 5. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
30. Shopfront Youth Legal Centre, *Submission SE28,* 5. See NSW Law Reform Commission, *Sentencing*, Report 139 (2013).
31. Legal Aid NSW, *Submission PA4,* 7; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 2; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 5; NSW Bar Association, *Submission PA11,* 3-4.
32. NSW, State Parole Authority, *Submission PA14,* 3; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.

automatic parole for offenders serving shorter sentences was to conserve the resources of the parole decision maker.[33] In this context, we think it is important for SPA to have a power – not confined to "exceptional circumstances" – to prevent the automatic release of offenders with sentences of three years or less who appear to require closer consideration. We take this view whether or not the model of statutory parole we propose in Recommendation 3.1 is introduced.

3.23 Due to the importance of this power, we also recommend that the grounds for pre-release revocation be included in the CAS Act rather than the CAS Regulation.

3.24 We appreciate that there are some serious issues with the ambit of the power set out in cl 222 of the CAS Regulation. We discuss these problems and recommend changes to address them in the following paragraphs. We recommend a further change to this power in the context of a back end home detention scheme in Chapter 15.[34]

3.25 We make a single recommendation for this section of the chapter and the following sections (on reasons for pre-release revocation) with a proposed new legislative provision on pre-release revocation of statutory parole orders in Recommendation 3.2.

Revocation because of risk to the community

3.26 Many stakeholders have raised concerns about offenders being required to "adapt to normal lawful community life". This phrase appears in the:

- grounds for pre-release revocation in cl 222(1)(b)
- standard conditions of parole,[35] and
- factors that SPA must consider when deciding whether to release on parole an offender serving a head sentence of more than three years.[36]

3.27 Our view is that the concept of adapting to "normal lawful community life" should not be used in parole legislation. We discuss our reasons in Chapter 9.[37] Beyond these reasons, there is an additional problem with cl 222(1)(b) that persuades us it should be replaced. The Supreme Court has found that the precise terms of cl 222(1)(b) require SPA to be satisfied that an offender does not have the *capacity* to adapt to normal lawful community life, not just that the offender is *unlikely* to be able to adapt to normal lawful community life if released on parole.[38] In our view, this construction of cl 222(1)(b) poses considerable difficulties for SPA in determining how such incapacity might be established.

33. Para 2.70.
34. Para [15.110] and Recommendation 15.11(2).
35. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 214(c); see also Chapter 9.
36. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(2)(f); see also Chapter 4.
37. Para [9.23]-[9.34].
38. *Murray v State Parole Authority* [2008] NSWSC 962.

3.28 In practice, SPA generally uses the "unable to adapt to normal lawful community life" ground in cl 222(1)(b) to revoke a parole order before release when something has happened while the offender was in custody that indicates that the offender should not be released on parole. The NSW Department of Justice gave the examples of incidents such as a serious assault, drug use or psychotic behaviour.[39] In other words, SPA uses the power when incidents in custody indicate that the offender will pose an unacceptable risk to the community or him or herself if released on parole.

3.29 We propose that SPA have the power to revoke a statutory (or court based) parole order before an offender is released if SPA is satisfied that the offender's conduct in custody indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender. The weighing of these two factors strikes a balance between risk to community safety and the savings to be made through automatic parole. This would ensure that statutory parole does not become de facto discretionary parole through SPA assessing a much greater number of offenders than it currently does.

3.30 We intend "conduct" to be interpreted widely so that it includes the offender's behaviour, drug use, associations, communications and alleged plans. For example, a psychological report indicating that the offender has been planning post-release offences would amount to evidence of "conduct in custody" and be sufficient to activate SPA's power under our proposed clause. SPA would then assess whether, on the basis of this information, the risk to community safety posed by the offender outweighs the likely benefits of parole supervision.

3.31 To ensure an offender's own safety can also be considered, another separate clause should give SPA the power to revoke parole prior to release if it is satisfied that the offender, if released, would pose a serious and immediate risk to his or her own safety. We propose the language of "serious and immediate risk" to ensure that an offender's release on parole is only prevented on this ground when SPA has grave concerns about the likelihood of self harm.

3.32 Our conclusions in this section are set out in Recommendation 3.2(2)(a)-(c) below.

Revocation because the offender has no post-release accommodation

3.33 One of the biggest issues raised by stakeholders in this reference has been the difficulty that offenders with court based parole orders can have in arranging suitable post-release accommodation. Clause 222(1)(c) of the CAS Regulation gives SPA the power to revoke a court based parole order before an offender is released if satisfactory accommodation or post-release arrangements have not been made or cannot be made. A lack of suitable accommodation is the main reason for SPA revoking parole prior to release.[40]

39. NSW Department of Justice, *Submission PA32,* 6.
40. NSW Department of Justice, *Submission PA32,* 6.

Difficulties offenders can have sourcing post-release accommodation

3.34 Previous Australian research has found that between 7% and 11% of NSW prisoners were living in primary homelessness before their entry into custody.[41] The term "primary homelessness" is generally used to describe the circumstances of people living on the street, sleeping rough or living in cars and squats. People with transient living arrangements – living in refuges, shelters or couch surfing – are described as living in secondary homelessness. Tertiary homelessness is used to describe people living in longer term but still insecure accommodation, such as boarding houses and caravan parks.[42] Corrective Services NSW reports that, in 2011-12, 5% of receptions in NSW prisons were living in primary homelessness prior to their entry into custody and over 50% were living in secondary homelessness.[43]

3.35 For those offenders who did have stable housing before entering custody, imprisonment can often mean that such housing is no longer available when the offender is approaching the parole date. Offenders who lived in mortgaged properties or private rental properties are likely to have lost their housing due to inability to pay while in custody. Some offenders will have lost access to their previous residence due to relationship or family breakdown.[44] Offenders who were previously accommodated in public housing will have lost their tenancy after being in custody for more than three months.[45]

3.36 A Community Corrections officer from the Parole Unit attached to an offender's correctional centre is allocated to an offender six months before he or she is due to be released from custody on court based parole.[46] If the offender is unable to identify any accommodation options, the Community Corrections officer will be responsible for finding an accommodation placement for the offender. However, it can be very difficult for Community Corrections to find any accommodation for an offender because:

- offenders exiting custody are likely to have difficulties gaining or affording private rental accommodation, particularly due to the stigma of having been in prison[47]
- waiting lists for public housing managed by Housing NSW are long and it is difficult for Housing NSW to prioritise ex-prisoners over other prospective tenants

41. E Baldry, "Homelessness and the Criminal Justice System" (2011) 14(10) *Parity* 5.
42. NSW Government, *A Way Home: Reducing Homelessness in NSW: NSW Homelessness Action Plan 2009-2014* (2009) 5.
43. Information provided by Corrective Services NSW (29 October 2014).
44. M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 29.
45. Housing NSW, "Tenancy Policy Supplement" (NSW Department of Family and Community Services, 28 July 2014) <http://www.housing.nsw.gov.au/Forms+Policies+and+Fact+Sheets/Policies/Tenancy+Policy+Supplement.htm>.
46. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section K part 2.
47. M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 30; S Thomas, "Housing Issues for Ex-Prisoners" (2010) 81 *Around the House* 13, 14.

- some offenders who have previously lived in Housing NSW accommodation may be blacklisted because of problems or debts from their previous tenancy, particularly offenders with cognitive or mental health impairments[48]
- some offenders need support to sustain a successful tenancy and there is a shortage of supported accommodation for offenders[49]
- accommodation providers cannot hold a place for an offender far enough in advance[50]
- some accommodation providers are reluctant to allocate beds to parolees, or more than a certain proportion of their beds to parolees
- accommodation providers can be reluctant to accept an offender because of the nature of the offence (particularly sex offenders),[51] and
- short non-parole periods and backdated sentences (so the offender only spends a very short period in custody as a sentenced prisoner before the non-parole period is due to expire) can severely limit the amount of time officers have to find placements for offenders.

3.37 These barriers also need to be seen in their wider context. The Australian Bureau of Statistics has estimated that there are just under 30 000 homeless people in NSW.[52] As at June 2013, there were 4511 people registered on the Housing NSW priority waiting list for social housing.[53] In 2012-13, homelessness services in NSW had to turn away over 100 requests for assistance per day, mostly because no accommodation was available at the time of the request.[54]

3.38 Corrective Services NSW has recently announced a new package of funding to assist offenders on parole, including some funding for supported post-release accommodation.[55] This "Funded Partnership Initiative" aims to provide better access to accommodation, including supported accommodation, for higher risk parolees, and may reduce the number of offenders who have their parole orders revoked prior to release due to a lack of accommodation. We support working with the non-government sector to provide accommodation options as an effective way of

48. S Thomas, "Housing Issues for Ex-Prisoners" (2010) 81 *Around the House* 13, 14; Women In Prison Advocacy Network, *No Exit into Homelessness: Still a Dream? The Housing Needs of Women Leaving Prison*, Discussion Paper (2011).
49. L Schetzer and StreetCare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 78-79; *Homelessness and the Justice System,* NSW Homelessness Community Alliance, Policy Statement (2011).
50. V Apted, R Hew and T Sinha, *Barriers to Parole for Aboriginal and Torres Strait Islander People in Australia* (University of Queensland, 2013) 12-13; NSW Department of Justice, *Submission PA32*, 11.
51. NSW Department of Justice, *Submission PA32*, 11.
52. Australian Bureau of Statistics, *Census of Population and Housing: Estimating Homelessness 2011* (ABS 2049.0, 2012) 12. This estimate includes people living in supported accommodation for the homeless, boarding houses, temporary lodgings or severely overcrowded dwellings.
53. Housing NSW, *Expected Wait Times for Social Housing 2013 – Overview* (NSW Department of Family and Community Services, 2013).
54. Australian Institute of Health and Welfare, *Specialist Homelessness Services 2012-13* (2013) 106-108.
55. B Hazzard, "Community, Offenders Benefit with $17 million Support to Stay Straight" (Media Release, 4 September 2014). We discuss this new package in Chapter 14.

delivering services. However, it is not yet clear whether the funding will extend to enough offenders or whether it will be accessed by the group that is currently revoked prior to release.

Additional requirement that accommodation be "suitable"

3.39 Some offenders may identify somewhere to live on parole but SPA still revokes their parole order before release under cl 222(1)(c) because the proposed accommodation is not "suitable". Any accommodation identified by an offender or the Parole Unit must pass a suitability assessment carried out by the local Community Corrections office that will be supervising the offender before it is considered "suitable" accommodation.[56] The local Community Corrections office and the Parole Unit must reach agreement about the suitability of any proposed accommodation.[57]

3.40 Requiring accommodation to be "suitable" ensures that offenders can be prevented from living in circumstances that make proper parole supervision difficult or are likely to increase risk to the community. However, there is currently no formal policy within Community Corrections about what constitutes suitable or unsuitable accommodation. Officers are instead directed to look at certain factors in forming their assessments, including:

- the consent of any proposed co-residents
- criminal records of any proposed co-residents
- access to public transport from the address
- access to programs and services from the address
- any likely community or media concerns about the address
- the ability of officers to supervise the offender at that address, and
- any concerns about the address connected to the victim.[58]

3.41 Corrective Services NSW policy is more prescriptive about assessing the proposed accommodation of sex offenders. A child sex offender's accommodation must be assessed as unsuitable if it is within 500 metres of a child related facility or a child lives at the address, unless a senior Community Corrections executive allows an exemption to these restrictions because he or she is satisfied that supervision and monitoring can manage any risks posed to children.[59]

3.42 Corrective Services NSW recognises that the suitability assessment process can be an obstacle to offenders successfully arranging post-release accommodation and

56. Corrective Services NSW, *Community Corrections Policy and Procedures Manual*: *Pre-release Home Visit Assessments* (2013) section K part 3, 2.
57. Corrective Services NSW, *Community Corrections Policy and Procedures Manual*: *Pre-release Home Visit Assessments* (2013) section K part 3, 2.
58. Corrective Services NSW, *Community Corrections Policy and Procedures Manual: Pre-release Home Visit Assessment Form* (2013) section K part 3, Annexure K3.1.
59. Corrective Services NSW, *Community Corrections Policy and Procedures Manual: Managing Risk of Harm to Children* (2013) section A part 4.

achieving parole. Recent procedural changes require Community Corrections officers also to consider:

- whether it is likely that the offender will reside at the address anyway at some point in the future
- whether it is likely that the offender will spend significant amounts of time at the address anyway even if paroled to a different address, and
- the nature and impact of available emergency or temporary accommodation on the offender if an address is assessed as unsuitable.[60]

Reasons why post-release accommodation is required

3.43 Corrective Services NSW policy is that no offender should be released to primary homelessness.[61] This is part of the NSW Government's broader commitment to a policy of "no exits into homelessness" from correctional centres, psychiatric hospitals and other institutions.[62] The "no exits into homelessness" policy is a national approach developed under the Commonwealth Government's 2008 White Paper *The Road Home*.[63]

3.44 There are strong reasons for the current practice of Corrective Services NSW and SPA in requiring post-release accommodation and revoking parole if such accommodation cannot be found. First, accommodation is generally necessary to enable Community Corrections to supervise an offender adequately. Without a residence, Community Corrections supervisors are likely to have difficulty contacting an offender, monitoring behaviour and associates, and generally being aware of a parolee's living circumstances. Accommodation is also necessary to ensure that offenders have a stable base from which to access the health, mental health, disability, legal and other services that they need.

3.45 Secondly, the key objective of parole is to reduce reoffending by providing for an offender's supervised reintegration into the community. Homelessness is likely to contribute to social exclusion through lack of access to medical care, education, employment and community life. In this way, releasing offenders to primary homelessness is counterproductive and undermines the broader purpose of parole.

3.46 Thirdly, there is some evidence linking homelessness to increased levels of reoffending. The literature on this point is not clear.[64] As one review of the literature has noted:

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60. Corrective Services NSW, *Community Corrections: Assistant Commissioner's Memorandum 2014/10* (2014) 2.
61. NSW Department of Justice, *Submission PA32*, 11.
62. NSW Government, *A Way Home: Reducing Homelessness in NSW: NSW Homelessness Action Plan 2009-2014* (2009) 16.
63. Commonwealth of Australia, *The Road Home: A National Approach to Reducing Homelessness,* White Paper (2008) 27-28.
64. C O'Leary, "The Role of Stable Accommodation in Reducing Recidivism: What Does the Evidence Tell Us?" (2013) 12 *Safer Communities* 5. See also M Miller and I Ngugi, *Impacts of Housing Supports: Persons with Mental Illness and Ex-Offenders* (Washington State Institute for Public Policy, 2009); I Brunton-Smith and K Hopkins, *The Factors Associated with Proven Re-*

> While some studies conclude that homelessness causes crime, others have found that homelessness does not lead to crime, rather that crime leads to homelessness…For many people who become homeless and have a criminal record, homelessness and offending may act on each other bi-directionally so that the experience of being homeless leads to offending behaviour, while offending and incarceration leads to an exacerbation of homelessness and exclusion from society.[65]

3.47 We are aware of only one study of NSW ex-prisoners examining the link between homelessness and reoffending. This 2003 research looked at released prisoners in Victoria and NSW and found that 61% of the ex-prisoners who were homeless had been reincarcerated by the end of a nine month follow up period, compared to 35% of those who were not homeless. Even after other variables were controlled for, homelessness or a transient accommodation situation were found to be significant predictors of return to prison.[66] This research does not show that homelessness *causes* reoffending but it does mean that post-release homelessness is a known risk factor for increased reoffending.

3.48 Finally, under the current policies, Community Corrections officers expend considerable effort trying to find accommodation for offenders. The possibility of pre-release revocation may have the unintended consequence that busy Community Corrections officers may allocate fewer resources to assisting offenders with this important need.

Stakeholder submissions

3.49 Despite these four reasons, several stakeholders strongly argued that the current practice unfairly disadvantages homeless offenders, and that lack of accommodation should not constitute a sole basis for pre-release revocation.[67] Stakeholders pointed out that many offenders who are unable to identify suitable post-release accommodation might in fact never have had access to such accommodation. They argued that it is illogical and unfair to require this of offenders as the criteria for leaving custody on a court based parole order. Stakeholders also noted that release to homelessness on parole might be a better outcome for the offender and the community compared to the offender remaining in custody only to be released to homelessness at the end of the sentence.

3.50 Other stakeholders did not support paroling offenders to homelessness, although the NSW Department of Justice allowed that "lack of accommodation may not always constitute a risk to the community".[68] The Public Interest Advocacy Centre

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offending Following Release from Prison: Findings from Waves 1 to 3 of SPCR (UK Ministry of Justice, 2013) 20, 26, 28.

65. M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 45.
66. E Baldry and others, *Ex-Prisoners, and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration?* Final Report No 46 (Australian Housing and Urban Research Institute, 2003) 11-12, 22.
67. Legal Aid NSW, *Submission PA4*, 7; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 5; Roundtable: legal practitioners, *Consultation PAC21*; Roundtable: legal practitioners, *Consultation PAC28*.
68. NSW Department of Justice, *Submission PA32*, 6.

and SPA submitted that the Government should invest in providing more post-release and transitional accommodation for offenders.[69] NSW Young Lawyers noted that the costs of providing more accommodation for parolees are still likely to be less than the costs of keeping these offenders in custody.[70] In 2012-13, it cost an average of $249 per day ($1745 per week) to keep an offender in a NSW adult prison.[71] Significantly less than this amount might be required to provide the offender with suitable post-release housing.

3.51 Some stakeholders also noted that sometimes an offender proposes several accommodation options and each is assessed as unsuitable in turn without the offender knowing why.[72] We found an example of this problem in our study of a sample of 97 cases in which SPA refused parole.[73] In this case, Community Corrections found two proposed addresses unsuitable and a third had not been assessed by the time the offender's parole was considered. The fact that the offender had proposed two inappropriate options suggests a lack of understanding about what constitutes suitable housing for the purpose of parole.

Our view on accommodation issues

3.52 We find this a very difficult issue. We appreciate the practical problems created by the current rule and are sensitive to stakeholders' arguments that the rule unfairly penalises offenders with no community support. At the same time, we have difficulty accepting the alternative outcome, which is intentionally releasing an offender to homelessness on parole.

3.53 In Chapter 14, we make some recommendations for improvements to in-custody case management and the links between custodial and community based services. Implementing these recommendations may make it easier for some offenders to find suitable post-release accommodation. In Chapter 16, we discuss how the situation might be improved for offenders serving short periods as sentenced prisoners.[74]

3.54 Beyond this, we recommend that Corrective Services NSW review its suitability assessment practices and develop a robust policy to help achieve consistency in decision making and increase the likelihood of identifying suitable accommodation. Suitability criteria should focus on risks to community safety, particularly the safety of victims and children, and on the ability of Community Corrections to supervise an offender adequately at an address. The policy should be strongly connected to the

69. Public Interest Advocacy Centre, *Submission PA1*, 11; NSW, State Parole Authority, *Submission PA14*, 8. See also L Schetzer and StreetCare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 78-79.
70. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 12.
71. Commonwealth of Australia, *Report on Government Services 2014* (Productivity Commission, 2014) volume C, table 8A.7. This average figure includes both sentenced and unsentenced prisoners.
72. Roundtable: legal practitioners, *Consultation PAC28*.
73. See Appendix D for more information about our review of parole refusal decisions.
74. Para [16.13]-[16.22].

emerging evidence on the effectiveness (in terms of reducing reoffending) of different types of restrictions on the places offenders can live.[75]

3.55 We recommend that, when accommodation is assessed as unsuitable, Community Corrections should clearly communicate the reason to the offender or the offender's legal representative. A process that involves multiple assessments without clear communication of criteria appears to be inefficient and likely to reduce the chances of an offender securing suitable accommodation pre-release.

3.56 We also recommend that both Community Corrections and SPA should take a risk based approach where an offender has no accommodation or the proposed accommodation has been assessed as unsuitable. Currently, Community Corrections policy indicates that, in these situations, pre-release revocation should only be requested from SPA "where the offender's release poses a significant risk to the community".[76] However, this stipulation does not come through strongly in other parts of the policy and it seems to us that pre-release revocation is routinely requested where there is no accommodation or proposed accommodation is unsuitable. Corrective Services NSW policy should be amended so that it clearly and consistently requires Community Corrections to take a risk based approach. Pre-release revocation should only be requested where the offender's accommodation situation means that the offender poses a significant risk to community safety, and this risk outweighs any reduction in risk likely to be achieved through supervising the offender on parole. In assessing this, Community Corrections should look at the viability of supervising the offender without suitable accommodation and the extent to which the offender's accommodation situation would contribute to reoffending risk.

3.57 Similarly, the new provision replacing cl 122(1)(c) of the CAS Regulation should provide that SPA has power to revoke court based parole prior to release where it:

- determines that satisfactory accommodation arrangements or post-release arrangements have not been made or cannot be made, *and*
- considers that the risk to community safety posed by the offender's release on parole outweighs any reduction in risk that parole supervision of the offender is likely to achieve.

3.58 This second risk based limb would limit pre-release revocation to situations where the offender's unsatisfactory accommodation situation connects to risk to community safety and this risk outweighs the potential benefits of parole.

3.59 Finally, we recommend that Corrective Services NSW conduct an evaluation of its new Funded Partnership Initiative to establish whether the funding program is meeting demand for suitable post-release accommodation and to assess whether the level of post-release accommodation is adequate to meet requirements. Such

75. See, eg, B Huebner and others, "The Effect and Implications of Sex Offender Residence Restrictions: Evidence from a Two State Evaluation" (2014) 13 *Criminology and Public Policy* 139; K M Socia, "Residence Restrictions are Ineffective, Inefficient and Inadequate: So Now What?" (2014) 13 *Criminology and Public Policy* 179.
76. Corrective Services NSW, *Community Corrections Policy and Procedures Manual: Pre-release Home Visit Assessments* (2013) section K part 3.

an evaluation could be commenced after the Funded Partnership Initiative has been in place for 12 months.

Recommendation 3.2: Pre-release revocation of statutory parole

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the State Parole Authority may revoke statutory parole (or a court based parole order if court based parole is retained) before an offender is released on parole. This should replace the current cl 222(1) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(2) The Authority may revoke such parole if:

(a) the Authority is satisfied that the offender's conduct in custody indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(b) the Authority is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(c) the Authority is satisfied that satisfactory accommodation or post-release arrangements have not been made or cannot be made and the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(d) the offender requests that the order be revoked.

(3) Corrective Services NSW should develop and publish a robust policy for assessing the suitability of offenders' proposed post-release accommodation. The policy should focus on risk to community safety and be grounded on the available evidence about the extent to which different types of restrictions on the places offenders may live can reduce the risk of reoffending.

(4) When an offender's proposed post-release accommodation is assessed as unsuitable, Community Corrections should clearly communicate the reasons for this assessment to the offender or the offender's legal representative.

(5) Corrective Services NSW should amend its policy to make clear that Community Corrections officers should seek pre-release revocation on the basis of an offender's accommodation situation only if the absence of arrangements for suitable accommodation indicates that the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender.

(6) Corrective Services NSW should evaluate the provision of post-release accommodation under the Funded Partnership Initiative. The evaluation should assess whether the level of post-release accommodation is adequate to meet requirements.

Court based (or statutory) parole for accumulated and aggregate sentences

3.60 Currently, whether an offender is subject to automatic court based parole or discretionary SPA parole can depend on how the court structures the offender's sentence.

3.61 When a court sentences an offender for multiple offences, the court must either impose a separate sentence for each offence[77] (accumulated sentences) or impose a single aggregate sentence.[78] If the court accumulates sentences then it must determine how they will be accumulated (that is, whether they will be served concurrently, consecutively or partly concurrently).[79] On the other hand, if the court imposes an aggregate sentence it will impose an aggregate head sentence and an aggregate non-parole period. It must disclose the separate sentences that would have been imposed but the aggregate sentence imposed is a single sentence for all the offences.[80]

3.62 The divide between automatic and discretionary parole is currently drawn based on sentence length. Head sentences of three years or less (with a non-parole period) are subject to automatic parole. If an offender is serving a head sentence of more than three years (with a non-parole period), SPA decides whether the offender should be released on parole. This means that the sentencing court's approach to sentencing when there are multiple offences – that is, whether the court chooses to accumulate sentences or impose one aggregate sentence – can determine whether an offender is subject to automatic or discretionary parole.

3.63 For example, three separate sentences of two years each are accumulated. The non-parole periods and head sentences are staggered (by fixing different commencement dates for each sentence) with the result that the effective sentence is five years, but the sentencing court must make three parole orders corresponding to the separate sentences (or, under our proposed system of statutory parole, the legislation would establish three separate release dates). The offender would be automatically released on parole at the end of the last non-parole period to expire.[81]

3.64 In contrast, if the court instead imposes an aggregate sentence of five years, the sentence will be more than three years and SPA will be the parole decision maker.

Achieving the same parole outcomes for aggregate sentences and accumulated sentences

3.65 Aggregate sentencing was introduced in 2011. The aim was to:

77. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53.
78. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.
79. *Pearce v R* [1998] HCA 57; 194 CLR 610.
80. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 53A.
81. *Crimes (Administration of Sentences) Act 1999* (NSW) s 126 and s 158.

> remove the current complexity of identifying the commencement and expiry dates of non-parole periods within an overall period of imprisonment, which ultimately adds little to anyone's understanding of the sentence ... [82]

3.66 At the same time, the second reading speech emphasised that:

> these amendments are not intended to alter the way offenders are sentenced in any substantial way … It is designed purely to simplify the process when setting sentencing for multiple offences, such that the overall impact of the sentence is clear ...[83]

3.67 If it is accepted as fundamental that an offender should receive the same effective sentence under either approach to sentencing, the parole outcome must also be the same under either approach. We favour a legislative amendment ensuring that the parole decision maker is determined by the *effective* length of an offender's sentence. This would ensure consistency for offenders sentenced for multiple offences under the two approaches.

3.68 More importantly, it would also ensure that the dividing line between statutory and discretionary parole is more closely based on the time that an offender has spent in custody before parole. Offenders sentenced to several accumulated head sentences (all of three years or less) that result in them being in custody for three or four years before parole are not appropriate candidates for statutory parole.

3.69 SPA supported the idea of being responsible for parole determinations for every offender whose effective head sentence is greater than three years.[84] Other stakeholders were of the view that the potential for inconsistency caused by the two approaches to sentencing is not problematic and therefore no change is necessary.[85] While not disagreeing with the premise that parole for aggregate and accumulated sentences should work in the same way, these stakeholders considered that, in practice, courts can successfully avoid successfully the complexities potentially arising from the current system.[86]

3.70 We acknowledge that courts are aware of the parole implications of choosing to accumulate sentences or impose an aggregate sentence. However, we do not think it appropriate for courts to be able effectively to select the kind of parole that applies to an offender. Sentencing courts are responsible for formulating an offender's sentence according to a complex range of principles and factors.[87] Once this process is complete, the parole system should apply to similar offenders in a similar way.

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82. NSW, *Parliamentary Debates*, Legislative Council, 23 November 2010, 27869.
83. NSW, *Parliamentary Debates*, Legislative Council, 23 November 2010, 27870.
84. NSW, State Parole Authority, *Submission PA14*, 2; Police Association of NSW, *Submission PA6*, 9.
85. Legal Aid NSW, *Submission PA4*, 7; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 2; Office of the Director of Public Prosecutions, *Submission PA7*, 1; Law Society of NSW, *Submission PA5*, 3; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 5.
86. Legal Aid NSW, *Submission PA4*, 7; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 2; Office of the Director of Public Prosecutions, *Submission PA7*, 1.
87. NSW Law Reform Commission, *Sentencing,* Report 139 (2013) ch 2-4.

Preventing multiple unnecessary dates for release on parole

3.71 The current situation for accumulated sentences can involve imposing multiple court based parole orders when all but one will be artificial. If an offender receives accumulated sentences, only the non-parole period expiry date and parole order for the last sentence will be meaningful. The parole orders associated with the earlier sentences have no effect in practice.

3.72 The NSW Department of Justice noted that, where there are multiple parole eligibility dates and sentence expiry dates for an offender, this means that Corrective Services NSW must enter additional data into its Offender Integrated Management System. Including the extra information has no practical benefit or effect but can cause administrative difficulties and increases the possibility of error in sentence administration. This could all be avoided if only one parole order applied to the offender under the current system.[88]

3.73 Likewise, under our proposals for statutory parole, the current arrangements for accumulated sentences, without suitable amendments, would result in multiple dates for release on parole for sentences of three years or less, only one of which would be effective.

3.74 In our recent reference on sentencing, we recommended that a sentencing court, in accumulating sentences, should be required to state the term of each head sentence and then set a single non-parole period in relation to the overall effective term.[89] This is a feature of the Commonwealth sentencing process.[90] If this recommendation is implemented, it will be essential for the dividing line between automatic and discretionary parole to be determined by the effective length of an offender's total head sentence under the accumulation approach.

3.75 Situations may arise where an offender is sentenced for multiple offences and those offences are not all dealt with together, such as where an offender is sentenced for one or more offences, enters custody, and is subsequently sentenced for another offence. In these cases, it would not be practical for the offender's parole situation to be changed based on the new effective overall sentence. We consider that the main concern that we are addressing is the potential for inconsistent outcomes for an offender sentenced for multiple offences together at the original sentencing. Similarly, we consider a situation of an offender re-offending after being released on parole to be beyond the scope of this concern.

Recommendation 3.3: Parole for accumulated sentences

(1) When an offender is sentenced for multiple offences, the effective length of the overall head sentence (whether an aggregate sentence or accumulated sentences) should be used to determine whether the offender should be subject to statutory parole (or court based parole, if retained) or discretionary parole.

88. NSW Department of Justice, *Submission PA32,* 5.
89. NSW Law Reform Commission, *Sentencing,* Report 139 (2013) rec 6.4(1)(c).
90. See *Crimes Act 1914* (Cth) s 19A.

(2) In the case of accumulated sentences, where the effective length of the overall head sentence is three years or less:

(a) there should be a single date for release on parole that corresponds with the end of the last operative non-parole period (if statutory parole is implemented); or

(b) the court should make a parole order that requires release on parole at the end of the last operative non-parole period (if court based parole is retained).

4. Factors guiding the State Parole Authority's decisions

In brief

The State Parole Authority's decision making should be clearly focused on risk to community safety. Its decision making framework should be clarified and simplified to ensure that community safety is at the forefront. All the matters that the Authority takes into account – such as risk assessments, accommodation, security classification, completion of rehabilitation programs, participation in external leave and likely deportation – should be considered through the lens of risk to community safety.

4.1 In this chapter, we examine the parole decision making process for offenders who are serving head sentences of more than three years. In considering parole for these offenders the State Parole Authority (SPA) is guided in two main ways:

- by the legislative framework in the *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act), and
- by considering practical matters such as an offender's security classification, accommodation arrangements and participation in external leave.

4.2 Our recommendations aim to simplify the way SPA takes various matters into account, ensuring a clear and consistent approach across both the legislation and decision making in practice.

4.3 This chapter covers issues that affect all offenders, including serious offenders. Chapter 5 covers issues that are only relevant to parole decision making for serious offenders. In Chapters 6 and 7, we discuss SPA's decision making process.

The legislative framework

4.4 Section 135(1) of the CAS Act states that SPA must not make a parole order unless it is "satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest".

4.5 When considering the public interest, SPA must have regard to the 12 matters listed in s 135(2) of the CAS Act, which are:

(a) the need to protect the safety of the community

(b) the need to maintain public confidence in the administration of justice

(c) the nature and circumstances of the offence to which the offender's sentence relates

(d) any relevant comments made by the sentencing court

(e) the offender's criminal history

(f) the likelihood of the offender being able to adapt to normal lawful community life

(g) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole

(h) any report in relation to the granting of parole to the offender that has been prepared by or on behalf of [Community Corrections], as referred to in section 135A

(i) 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, the Commissioner or any other authority of the State

(ia) if the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the *Drug*

Court Act 1998, the circumstances of that decision to decline to make the order

(j) such guidelines as are in force under section 185A, and

(k) such other matters as the Parole Authority considers relevant.

4.6 Section 135(2)(h) requires SPA to have regard to a Community Corrections pre-release report. Section 135A requires the report to address a further nine matters:

(a) the likelihood of the offender being able to adapt to normal lawful community life

(b) the risk of the offender re-offending while on release on parole, and the measures to be taken to reduce that risk

(c) the measures to be taken to assist the offender while on release on parole, as set out in a post-release plan prepared by [Community Corrections] in relation to the offender

(d) the offender's attitude to the offence to which his or her sentence relates

(e) the offender's willingness to participate in rehabilitation programs, and the success or otherwise of his or her participation in such programs

(f) 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

(g) 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

(h) the likelihood of the offender complying with any conditions to which his or her parole may be made subject, and

(i) in the case of an offender in respect of whom the Drug Court has declined to make a compulsory drug treatment order on the ground referred to in section 18D(1)(b)(vi) of the *Drug Court Act 1998*, the contents of any notice under section 18D(2)(b) of that Act.

4.7 We consider the current framework, embodied in s 135(1) and (2), is appropriate. An overall test should be retained in s 135(1), a subsidiary list of factors should be kept in s 135(2), and there should be a list of matters to be covered in a Community Corrections report. However, within this structure, changes are necessary to streamline the legislative framework and bring focus and clarity to SPA's decision making.

Replacing the public interest test in s 135(1)

4.8 The breadth of the public interest test means that it gives SPA little practical guidance. The long list of mandatory considerations in s 135(2) includes principles other than the "public interest" but there is nothing in the CAS Act about how SPA is to weigh these against each other when applying the public interest test.

Submissions criticised the public interest test as too broad and open ended[1] and the Law Society commented that the test "cannot be easily defined with precision".[2]

Options for reform

4.9 In 1996, we recommended replacing the public interest test with a more specific 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".[3] We argued that this phrasing captured the "public interest" relevant to the parole decision and made clear that community safety should be the overriding consideration.

4.10 Most other Australian jurisdictions focus on community safety rather than the public interest as the main consideration.[4] In consultations, SPA and Corrective Services NSW agreed that SPA generally treats community safety as the most important consideration.[5] In fact, under the heading "Public Interest", SPA's *Operating Guidelines* state:

> When considering whether a prisoner should be released from custody on parole, the highest priority for the Parole Authority should be the **safety** of the community and the need to maintain public confidence in the administration of justice.[6]

4.11 Queensland has a clear test based on community safety and risk expressed in ministerial guidelines. The Queensland test states that:

> the highest priority for the Queensland Parole Board should always be the safety of the community.
>
> The Board should consider whether there is an unacceptable risk to the community if the prisoner is released to parole; and whether the risk to the community would be greater if the prisoner does not spend a period of time on parole.[7]

4.12 If parole is consistently refused, all offenders must eventually be released at the end of the head sentence without any further supervision or monitoring.[8] The Queensland test recognises this by including the important balancing consideration of the risk to the community if the offender is *not* released on parole and is instead

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1. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 5.
2. Law Society of NSW, *Submission PA5*, 3; see also Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 5.
3. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) rec 64.
4. *Corrections Act 1986* (Vic) s 73A; *Correctional Services Act 1982* (SA) s 67(3a); *Sentence Administration Act 2003* (WA) s 5A, s 5B, s 20; Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) guideline 1.2.
5. Corrective Services NSW, *Consultation PAC19*; NSW, State Parole Authority, *Consultation PAC20*.
6. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 1.1 (emphasis in original).
7. Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) cl 1.2-1.3.
8. The only exceptions are the very small number of offenders serving parole-eligible life sentences.

released without supervision at the end of the head sentence. Similarly, in NSW, SPA's *Operating Guidelines* state:

> 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.[9]

4.13 A number of submissions favoured adopting the Queensland test.[10] In consultations, stakeholders emphasised the importance of SPA balancing the risks of parole against the risks of no parole when deciding whether or not to grant parole to an offender.[11]

4.14 Other submissions expressed concern that the Queensland test might overemphasise risk and that it leaves out other relevant considerations that can currently be captured by the public interest test.[12] Several submissions supported the public interest test because its wide scope allows SPA to balance a broad range of competing considerations flexibly.[13] Some stakeholders also opposed any change on the basis that it might introduce uncertainty.[14]

Our view: a test based on risk to community safety

4.15 As we discussed in Chapter 2, the main purpose of parole is to promote community safety through reduced reoffending. Parole supervision of prisoners released into the community reduces the risk of reoffending and so reduces risk to community safety. On the other hand, being on parole rather than in custody can create a risk to the community that would not exist had the offender been kept in custody.

4.16 Release on parole is justified and contributes to greater community safety when the chance of reducing reoffending through parole supervision outweighs the risk to the community created by release on parole. Whether or not the benefits (the chance of reducing reoffending) are likely to outweigh the risks (the increased risk created by release) will depend on the circumstances of each offender. The answer to this question may change over time depending on an offender's attitude, behaviour and many other factors. Our view is that answering this question must be at the heart of principled parole decision making.

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9. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.7.
10. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4; Police Association of NSW, *Submission PA6*, 12; Justice Action, *Submission PA13*, 3.
11. Corrective Services NSW, *Consultation PAC19;* NSW, State Parole Authority, *Consultation PAC20*; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22.*
12. Legal Aid NSW, *Submission PA4*, 12; Roundtable: legal practitioners, *Consultation PAC21*; Public Interest Advocacy Centre, *Submission PA1*, 7.
13. NSW Bar Association, *Submission PA11*, 5; NSW, State Parole Authority, *Submission PA14*, 6; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 9; Public Interest Advocacy Centre, *Submission PA1*, 7; Law Society of NSW, *Submission PA5*, 3; Legal Aid NSW, *Submission PA4*, 12.
14. Legal Aid NSW, *Submission PA4*, 12; NSW Bar Association, *Submission PA11*, 5.

4.17 We take the concept of "risk to community safety" to be broader than an assessment of the risk of reoffending. An offender might present a high risk of reoffending but only pose a low risk to community safety because potential reoffending is minor and non-violent. Many different considerations – such as offence seriousness, criminal history, behaviour and progress in custody, family supports, availability of counselling, to name just a few – are likely to be relevant to a full and balanced assessment of the risk that an offender would pose to community safety if he or she is paroled. Similarly, many factors would need to inform an assessment of the risk that an offender is likely to pose to community safety if he or she is *not* paroled.

4.18 An approach based on assessing and balancing risks to community safety would better reflect what SPA is already doing in practice when it considers the "public interest" under s 135(1). In our view, community safety is the "public interest" most relevant to parole. As a statutory body representing the community and its interests, SPA should focus on risk to community safety above all other considerations.

4.19 We recommend that the current s 135(1) be replaced with a new provision that incorporates key elements of the Queensland test. The provision should require SPA to be satisfied that parole is in the interests of community safety. To make this decision, SPA should be required to look at the risk to the community of paroling the offender, the risk to the community of releasing the offender later with no parole (or with a shorter period of parole supervision) and the extent to which parole conditions would mitigate any risk during the parole period. In requiring SPA to take into account the extent to which parole conditions would mitigate the risk to community safety, we note that there are some risks that cannot be managed in the community. In such cases, where the high risk offenders regime is not applied,[15] incapacitation for the remainder of the sentence may be the best option.

4.20 We emphasise that this is not a major change from the "public interest" test that is currently in place, nor a departure from the way that SPA currently approaches decision making in practice. However, in our view, it provides the right focus and makes clear to the public the central issues and the balance to be achieved in deciding whether to parole an offender or to delay or not grant parole.

4.21 **Standard of proof.** The current s 135(1) includes the phrase "on the balance of probabilities", but we do not consider it necessary to include this phrase in the new s 135(1). The phrase refers to the standard of proof in civil litigation and there is a long line of complex authority on its meaning and application.[16] SPA, however, is exercising executive power through its discretion under s 135(1), which is a fundamentally different exercise to determining a civil case. In this context, we consider that including "on the balance of probabilities" creates unnecessary technicality and complexity.[17]

4.22 Instead, we prefer that s 135(1) simply requires that SPA be "satisfied" that making a parole order is in the interests of community safety. Statutes commonly require

15. On parole and the *Crimes (High Risk Offenders) Act 2006* (NSW) see para [5.48]-[5.89].
16. See, eg, *Briginshaw v Briginshaw* (1938) 60 CLR 336; *Rejfek v McElroy* (1965) 112 CLR 517.
17. See, eg, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 282; *Sullivan v Civil Aviation Safety Authority* [2014] FCAFC 93.

executive decision makers to be "satisfied" that a certain fact or situation exists before exercising a discretionary power. In one sense, the requirement to be "satisfied" is just another way of describing the "balance of probabilities" standard, as a decision maker would be "satisfied" of something by using probative evidence to conclude that is more likely than not that the required situation exists.[18] However, where there is only a requirement to be "satisfied", the decision maker will have made an error under the applicable administrative law only if any of the grounds for judicial review are made out. For this reason, we consider that the "satisfaction" standard gives SPA more room to consider and weigh relevant material in making a decision.

Recommendation 4.1: Replacing the public interest test

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to the following effect:

The State Parole Authority may make a parole order for an offender if it is satisfied that making the order is in the interests of community safety. In doing so, the Authority must take into account:

(a) the risk to community safety of releasing the offender on parole

(b) whether parole supervision is likely to aid in reducing the possibility of the offender reoffending

(c) the risk to community safety if the offender is released at the end of the sentence without a period of parole supervision, or is released at a later date with a shorter period of parole supervision, and

(d) the extent to which parole conditions can mitigate any risk to community safety during the parole period.

Amendments to the mandatory considerations in s 135(2)

4.23 No submission made comments about s 135(2) as a whole. However, stakeholders identified problems with particular items on the list in s 135(2). We propose that four items, s 135(2)(a), (b), (f) and (j), be removed. We do not propose any change to the following items:

- the nature and circumstances of the offence to which the offender's sentence relates: s 135(2)(c)
- any relevant comments made by the sentencing court: s 135(2)(d)
- the offender's criminal history: s 135(2)(e)
- the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole: s 135(2)(g)
- any report in relation to the granting of parole to the offender that has been prepared by or on behalf of Community Corrections, as referred to in s 135A: s 135(2)(h)

18. See, eg, Administrative Review Council, *Decision Making: Evidence, Facts and Findings*, Best Practice Guide 3 (2007) 7-8.

- 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 or any other authority of the State: s 135(2)(i)
- if the Drug Court has notified SPA that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in s 18D(1)(b)(vi) of the *Drug Court Act 1998*, the circumstances of that decision to decline to make the order: s 135(2)(ia)
- such other matters as SPA considers relevant: s 135(2)(k).

4.24 We also propose that two new items be added. After these amendments, the resulting s 135(2) would be a list of types of information or issues that SPA must consider when applying the overall test in s 135(1).

4.25 In consultation discussions, some stakeholders suggested that s 135(2) could be removed entirely, pointing out that it is probably not necessary for the CAS Act to require SPA to look at certain types of information or issues which it would almost certainly consider anyway. We appreciate this argument but cannot see any disadvantage in retaining the remainder of s 135(2) as a list of the most important things SPA must consider when making a decision about risk under s 135(1). SPA would still be able to consider any other relevant matter under s 135(2)(k).

Removing competing principles

4.26 In our view, s 135(2) should not contain anything that detracts from the core risk assessment that SPA must carry out under s 135(1). Instead, s 135(2) should direct SPA's attention to some important sources of information for the purposes of the decision under s 135(1). For this reason, the current s 135(2)(a) and (b) should be removed.

4.27 Section 135(2)(a), "the need to protect the safety of the community", becomes the focus of our proposed s 135(1). Although "the need to maintain public confidence in the administration of justice" (s 135(2)(b)) is important in the design of all aspects of a criminal justice system, it is hard to see how SPA would actually take this into account in individual parole decisions. In the context of parole decision making, we consider that public confidence is best maintained if SPA is required to focus on community safety, balancing the risks we outline in our proposed test.

Replacing "normal lawful community life" with risk and seriousness of reoffending

4.28 Many stakeholders have expressed concerns about the requirement for SPA to consider "the likelihood of the offender being able to adapt to normal lawful community life" (s 135(2)(f)). Stakeholders preferred that this concept be removed wherever it appears in the CAS Act.[19] We discuss the problems with the phrase "normal lawful community life" in Chapters 3 and 9.[20]

19. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 5; Corrective Services NSW, *Consultation PAC19;* NSW, State Parole Authority, *Consultation PAC20*; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22.*.
20. Para [3.26]-[3.31] and [9.23]-[9.34].

4.29 In consultations, stakeholders agreed that a more relevant concept would be "the likelihood of the offender reoffending".[21] We recommend that the current s 135(2)(f) be replaced with "the likelihood of the offender reoffending" and "the likely seriousness of any reoffending" that together are important indicators of risk to community safety).

Adding victim submissions

4.30 We consider that a new subsection should be added so that s 135(2) also requires SPA to consider the submissions made by any registered victim of the offender. Registered victims can make submissions to SPA when an offender is being considered for parole[22] but there is currently no direct requirement for SPA to take these submissions into account.

Removing the reference to guidelines

4.31 Section 135(2)(j) requires SPA to have regard to any guidelines that are in force under s 185A of the CAS Act. We have received conflicting information about whether SPA's *Operating Guidelines* are in fact guidelines in force under s 185A for the purposes of s 135(2)(j).[23] If the *Operating Guidelines* have legislative force, a failure by SPA to consider the matters in the *Operating Guidelines* may be an error of law.[24]

4.32 SPA's current *Operating Guidelines* provide general commentary for SPA members about procedures, interpretation of the CAS Act and how decisions should usually be made. A few parts of the *Operating Guidelines* go further, adding mandatory decision rules that sit uncomfortably alongside the CAS Act. For example, the section that we quoted earlier at paragraph 4.10 gives different content to the public interest test than is apparent on the face of the legislation.

4.33 In consultations, stakeholders supported deleting s 135(2)(j) so that guidelines cannot import additional mandatory considerations into SPA's parole decision making.[25] We support this amendment. Deleting the reference to guidelines in s 135(2) would mean that SPA must only consider those matters clearly listed in s 135(2) when applying the test in s 135(1). We consider that this would simplify the decision making framework, reduce legal complexity and reduce the possibility of accidental errors of law. If this amendment is made, SPA's *Operating Guidelines* could continue to assist the decision making process but would not have mandatory force.

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21. Corrective Services NSW, *Consultation PAC19;* NSW, State Parole Authority, *Consultation PAC20*; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22.*
22. See Chapter 6.
23. NSW Department of Justice, *Submission PA32*, 9, states that the *Operating Guidelines* are in force under s 185A and s 135(2)(j). *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223 found that they were not. SPA is not sure (see [53]-[68]): Information provided by NSW, State Parole Authority (14 March 2014).
24. *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223.
25. NSW, State Parole Authority, *Consultation PAC20*; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22*.

Recommendation 4.2: Mandatory considerations

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that when the State Parole Authority is making a decision in accordance with Recommendation 4.1 it is required to consider:

(a) the nature and circumstances of the offence to which the offender's sentence relates

(b) any relevant comments made by the sentencing court

(c) the offender's criminal history

(d) the likelihood that the offender, if released, will reoffend, and the likely seriousness of any reoffending

(e) the likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole

(f) any submissions from any registered victim

(g) any report in relation to the granting of parole to the offender that has been prepared by or on behalf of Community Corrections, as referred to in section 135A

(h) 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, the Commissioner or any other authority of the State

(i) if the Drug Court has notified the Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the *Drug Court Act 1998* (NSW), the circumstances of that decision to decline to make the order, and

(j) such other matters as the Authority considers relevant.

Clarifying the status of SPA's Operating Guidelines

4.34 Section 185A states that SPA may develop guidelines "in consultation with" the Minister. It is not clear what such consultation would involve. As we discussed in the previous section, we have received conflicting reports about whether SPA's *Operating Guidelines* document meets the requirements of s 185A.

4.35 In the context of SPA's role as an independent decision making body and the removal of s 135(2)(j) so that guidelines have no legislative force, we recommend removing the requirement that guidelines be developed "in consultation with the Minister". This would remove any doubt about the status of the *Operating Guidelines* and allow SPA to amend and update the document as required. Stakeholders supported this reform in consultations.[26]

26. NSW, State Parole Authority, *Consultation PAC20*; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22*.

Recommendation 4.3: Clarifying the status of the State Parole Authority's *Operating Guidelines*

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove the requirement that guidelines under s 185A be developed "in consultation with the Minister".

Contents of the pre-release report under s 135A

4.36 Section 135A describes the contents of the Community Corrections pre-release report that SPA must consider.[27] This report should contain much of the information SPA needs to make a full and balanced assessment of the risk that the offender would pose to the community if released on parole, and the reduction in risk likely to be achieved through parole supervision. Under the existing s 135A, the report must already cover relevant matters such as the risk of reoffending and risk mitigation strategies, the offender's behaviour in custody and participation in rehabilitation programs and the likelihood of the offender complying with parole conditions, among others. Stakeholders did not make any overall comments about s 135A.

4.37 We propose that the contents of s 135A be moved from the CAS Act to a clause in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (the CAS Regulation). It is important that SPA's decision making framework be clear on the face of the legislation. However, we do not consider it necessary for the required contents of a Community Corrections report to be listed as part of the framework in the Act. Moving the provision to the CAS Regulation would also make it easier for Corrective Services NSW to obtain changes or updates to the list to reflect available information.

4.38 In addition, we propose four minor amendments to s 135A to ensure that the report gives SPA the information it needs to make an informed decision under s 135(1).

4.39 First, the Community Corrections pre-release report will in practice make a recommendation to SPA for or against parole for the offender. Nothing in the CAS Act refers to this recommendation but SPA gives it significant weight.[28] We studied a sample of cases in which SPA refused parole and found that the Community Corrections pre-release report recommended parole in only one of the 97 cases where SPA refused parole.[29]

4.40 We favour s 135A clearly stating that the Community Corrections report must include a recommendation for or against parole for the offender (formulated with regard to the list of factors in s 135A). We intend this change, in the interests of transparency, to align the CAS Act with current SPA and Community Corrections practice.

27. See para 4.6.
28. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(a). See, eg, *Al-Qatrani v State Parole Authority* [2007] NSWSC 1270 [7]*; S v State Parole Authority* [2007] NSWSC 1287 [5]-[6].
29. See Appendix D for more information about our review of parole refusal decisions.

4.41 Secondly, we recommend removing s 135A(a) - which refers to the likelihood of the offender being able to adapt to normal lawful community life - for the reasons discussed in Chapters 3 and 9.[30] The more appropriate matter to consider is the likelihood of the offender reoffending and the seriousness of the likely offence. The likelihood of the offender reoffending is already addressed in s 135A(b).

4.42 Thirdly, parole decision makers in all Australian jurisdictions except NSW and the ACT are required to consider an offender's behaviour during any previous period on parole, period of leave or community based sentence.[31] Such a consideration is wider than an offender's criminal history (s 135(2)(e)) or behaviour in custody (s 135A(g)). As the Police portfolio noted, this information could act as an indication of future compliance with parole conditions[32] and might be more relevant than behaviour in a correctional centre. Section 135A(h) already requires assessment of the likelihood of an offender complying with parole and, in practice, this is likely to involve considering any previous breaches of community supervision. However, we consider that it would be beneficial for s 135A(h) to be augmented so that it explicitly requires that the Community Corrections report include this information.

4.43 Fourthly, s 135A(e) currently refers only to an offender's willingness to participate in "rehabilitation programs" and the success of that participation. In other jurisdictions, there is either an express reference to participating in work and education programs,[33] or the decision maker must consider program participation in general.[34] Participating in work and education programs can show an offender's capacity to reintegrate into the community, and such programs have been found to lower participants' recidivism rates.[35] The Women in Prison Advocacy Network also favoured including a consideration of participation in mentoring programs within this section.[36] We propose that s 135A(e) be amended so that it refers to an offender's participation in rehabilitation, education, work or other programs.

4.44 Many stakeholders reported that offenders' difficulties in accessing programs while they are in custody.[37] With this in mind, we also recommend that s 135A(e) require

30. Para [3.26]-[3.31] and [9.23]-[9.34].
31. Contained in the Members' Manual of the Adult Parole Board of Victoria, see I Callinan, *Review of the Parole System in Victoria* (2013) 32-35; Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) guideline 2.1; *Correctional Services Act 1982* (SA) s 67(4); *Sentence Administration Act 2003* (WA) s 5A, s 20(2); *Corrections Act 1997* (Tas) s 72(4); Parole Board of the Northern Territory, *Annual Report 2013 (2014)* 18-19; Commonwealth Attorney-General's Department, *Amendments to Commonwealth Parole – Information Circular* (2012) 3-4.
32. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4.
33. Parole Board of the Northern Territory, *Annual Report 2013 (2014)*, 18.
34. Contained in the Members' Manual of the Adult Parole Board of Victoria, see I Callinan, *Review of the Parole System in Victoria* (2013) 33-34; Queensland Minister for Police and Community Safety, *Ministerial Guidelines to the Queensland Parole Board: Parole Orders* (2012) cl 2.1; *Sentence Administration Act 2003* (WA) s 5A, s 20(2).
35. D B Wilson, C A Gallagher and D L MacKenzie, "A Meta-Analysis of Corrections Based-Education, Vocation and Work Programs for Adult Offenders" (2000) 37 *Journal of Research in Crime and Delinquency* 347, 348; 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) 8-10.
36. Women in Prison Advocacy Network, *Submission PA20*, 10.
37. On in-custody rehabilitation programs, see para [4.86]-[4.96] and ch 14.

the Community Corrections report to include information about the availability of such programs.

Recommendation 4.4: Content of Community Corrections reports

(1) Section 135A of the *Crimes (Administration of Sentences) Act 1999* (NSW), which relates to the content of Community Corrections reports, should be moved to the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(2) The new clause should require the pre-release report from Community Corrections to recommend for or against parole.

(3) The new clause should not require the report to address the likelihood of the offender adapting to normal lawful community life.

(4) The new clause should require the report to address any established breaches during a previous period on parole, a period of leave or a community based sentence.

(5) The new clause should require the report to address the offender's participation in rehabilitation, education, work or other programs in prison. Where relevant, the report should also address the availability or unavailability of such programs and the offender's willingness or unwillingness to participate.

Specific issues affecting decision making in practice

4.45 Within the legislative framework described in the first part of this chapter, the practical issues which most commonly affect SPA's decision making are:

- actuarial assessments of reoffending risk
- security classification
- participation in rehabilitation programs
- completion of pre-release external leave
- suitable post-release accommodation, and
- deportation.[38]

SPA's *Operating Guidelines* describe the way SPA generally takes these issues into account. In the rest of this chapter, our recommendations about SPA's practices address stakeholders' concerns and will ensure that SPA considers all of these issues in a way that informs an assessment of risk to community safety under Recommendation 4.1.

38. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3, cl 2.8.

Assessments of reoffending risk

4.46 Community Corrections pre-release reports to SPA must include details of "the risk of the offender reoffending while on release on parole".[39] SPA's *Operating Guidelines* state that, in order to be granted parole, offenders should "be assessed as a low risk of committing serious offences on parole, particularly sexual or violent offences".[40] Reoffending risks can be assessed in an unstructured way using professional judgment or through a formal assessment tool or by a combination of the two approaches.

Reoffending risk assessment tools used by Corrective Services NSW

4.47 The *Compendium of Assessments* outlines the reoffending risk assessment tools approved by Corrective Services NSW. The Level of Service Inventory-Revised (LSI-R) is the most common and Community Corrections officers administer it to all offenders. The LSI-R scores the offender's risk of reoffending based on the offender's risk factors. It also identifies the offender's "criminogenic needs" in order to establish the level of supervision required for that offender and to determine whether that offender's risk factors can be adequately addressed.[41]

4.48 A number of factors have been shown to affect the risk of reoffending. Some of these factors are "static" and cannot be changed. Examples of static risk factors include the age of first offending and previous criminal record. Other risk factors are known as "dynamic" and are susceptible to change. Examples of dynamic risk factors include substance abuse, low educational attainment, pro-criminal attitudes and values and poor financial management. In actuarial risk assessments, the number and magnitude of the applicable static and dynamic risk factors combine to provide a measure of a person's risk of reoffending. There are other dynamic, or changeable, factors which, in the past, have been thought to be associated with an increased risk of offending, but research has not supported this conclusion.

4.49 The term "criminogenic needs" refers to the dynamic risk factors that relate to an offender, that is, the factors that have a known association - demonstrated in the criminological literature - with elevated risks of reoffending and which are amenable to change. Because these factors are amenable to change they are targeted by programs that aim to reduce reoffending.[42]

4.50 The LSI-R has been found to have predictive validity for the reoffending of NSW offenders[43] and Corrective Services NSW uses it for many purposes, including

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39. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135A(b).
40. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(f).
41. See I Watkins, *The Utility of Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments*, Research Bulletin No 29 (Corrective Services NSW, 2011) 2.
42. E J Latessa and C Lowenkamp, "What are Criminogenic Needs and Why are they Important?" [2005] *For the Record* (4th Quarter, 2005) 15.
43. C Hsu, P Caputi and M K Byrne, "The Level of Service Inventory-Revised (LSI-R): A Useful Risk Assessment Measure for Australian Offenders?" (2009) 36 *Criminal Justice and Behavior* 728; C Hsu, P Caputi and M K Byrne, "The Level of Service Inventory-Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity and Specificity" (2011) 38 *Criminal Justice and Behavior* 600; See also I Watkins, *The Utility of Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments*, Research Bulletin No 29 (Corrective Services NSW, 2011); NSW Department of Justice, *Submission PA32*, 12.

security classification decisions and to determine an offender's treatment needs and eligibility for programs.[44]

4.51 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 can have a similar LSI-R result to offenders likely to commit a dishonesty offence. Corrective Services NSW has recently developed the Community Impact Assessment to complement the LSI-R by providing a measure of the consequences of reoffending. The two scores can be put together to make a combined result. Corrective Services NSW has only recently implemented the Community Impact Assessment and the tool has not yet been validated.[45]

4.52 There is a range of other risk assessment tools. Some are:

- specific to particular criminogenic needs or types of offending
- used to evaluate attitudes and abilities before and after participating in rehabilitation programs, and
- clinical assessments that are administered by psychologists or other clinicians.[46]

As well as having the LSI-R administered by a Community Corrections officer, the Serious Offender Assessment Unit assesses all identified serious sex and violent offenders early in their sentences. The Unit is staffed by psychologists who can use a range of specialist tools from the *Compendium of Offender Assessments*[47] such as the Static-99R (for sex offenders) or the HCR-20 (for violent offenders).[48]

SPA's current use of risk assessment results

4.53 The Community Corrections pre-release report to SPA is informed by the LSI-R and Community Impact Assessment results. Staff are required to include the LSI-R results in the pre-release report and may also specifically include the Community Impact Assessment results. On a case by case basis, the officer preparing the report might also source the results of other assessments (such as those carried out by the Serious Offender Assessment Unit). SPA generally accesses the results of risk assessment tools only through the Community Corrections report, although it can order a separate psychological assessment of an offender's reoffending risk if it chooses.[49]

4.54 In practice, SPA tends not to focus exclusively on the results from risk assessment tools when coming to a view about the reoffending risks posed by an offender.

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44. Corrective Services NSW Offender Assessment Unit, *Fact Sheet: Offender Risk Profile.* See also Corrective Services NSW Offender Assessment Unit, *Fact Sheet: Criminogenic Needs*.
45. Information provided by Corrective Services NSW (11 September 2013); Corrective Services NSW, *Community Impact Assessment – Scoring Guide* (2013) 4; Information provided by Corrective Services NSW (28 October 2014).
46. NSW Department of Justice, Corrective Services NSW, *Compendium of Offender Assessments* (3rd ed, 2014) 4.
47. NSW Department of Justice, Corrective Services NSW, *Compendium of Offender Assessments* (3rd ed, 2014).
48. NSW Department of Justice, *Submission PA32*, 12-13.
49. Information provided by Corrective Services NSW (19 May 2014).

Instead, SPA reaches a broad assessment of the risks posed by an offender based on all the material and reports available to it (including results from risk assessment tools) and uses this to inform its decision making.[50] SPA submitted:

> SPA are not the experts on risk assessments and rely on the information provided to them by Community Corrections, psychologists and psychiatrists along with the information provided through judges' sentencing remarks, criminal history, etc.
>
> Whilst SPA does not utilise a matrix for risk assessments the members do utilise a level of professional discretion and individuality when considering the risk level each offender presents.[51]

Value of risk assessment tools

4.55 The LSI-R is an actuarial risk assessment tool. An actuarial risk assessment tool is created by taking a sample of offenders and collating information about their characteristics such as age, criminal history, psychiatric history and sentence length. These offenders are followed up (or followed back) over a period of time and their reoffending recorded. Statistical analysis can then identify the factors or combinations of factors that are most reliably related to reoffending. These results can be used in a tool that allows an assessor to collect information about a particular person connected to the factors known to be related to offending. This information can be turned into a score (for example, this offender is at 17% risk of reoffending). The score predicts the likelihood of an offender reoffending based on the previously observed reoffending rates of offenders that share similar characteristics.[52]

4.56 Actuarial risk assessment tools are valuable because they provide evidence based and empirically validated predictions of reoffending risk.[53] Meta-analyses have found that actuarial risk assessment instruments predict reoffending more accurately than unstructured clinical assessments of risk.[54] 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.[55] The recent Callinan review of the Victorian parole

50. Information provided by NSW, State Parole Authority (3 September 2013).
51. NSW, State Parole Authority, *Submission PA14*, 8.
52. NSW Sentencing Council, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012) [2.74]-[2.78].
53. G R Palk, J E Freeman and J D Davey, "Australian Forensic Psychologists' Perspectives on the Utility of Actuarial Versus Clinical Assessment for Predicting Recidivism Among Sex Offenders" (paper presented at 18th Conference of the European Association of Psychology and Law, Maastricht, 2008) 2, 7.
54. S D Gottfredson and L J Moriarty, "Clinical Versus Actuarial Judgments in Criminal Justice Decisions: Should One Replace the Other?" (2006) 70(2) *Federal Probation* 15; W M Grove and others, "Clinical Versus Mechanical Prediction: A Meta-Analysis" (2000) 12 *Psychological Assessment* 19; J R P Ogloff and M R Davis, "Assessing Risk for Violence in the Australian Context" in D Chappell and P RWilson (ed) *Issues in Australian Crime and Criminal Justice* (LexisNexis, 2005) 294, 306-307; P M Harris, "What Community Supervision Officers Need to Know About Actuarial Risk Assessment and Clinical Judgment" (2006) 70(2) *Federal Probation* 8.
55. 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 (ed), *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*

system 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.[56]

4.57 The parole decision makers of more than 30 US states as well as the national US Parole Commission and the Parole Board of Canada have direct regard to a risk assessment instrument in their decision making.[57] The Parole Board for England and Wales must currently have regard to any actuarial risk assessments.[58] A 2007 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.[59]

4.58 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.[60] There is a complex literature around risk assessment tools and not all tools perform equally well for all types of offenders. Some critics also point out that the score really relates to a population of offenders similar to the offender in question, rather than to the offender him or herself.[61] Commentators have noted that the scoring of the LSI-R involves some exercise of clinical judgement by Community Corrections officers[62] and have raised concerns about whether individual officers can use and score it in a way that is consistent.[63] Academics have also raised concerns about the use of

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Journal of Criminal Law 315, 328-330; HM Prison Service, *Comprehensive Review of Parole and Lifer Processes* (2001) 87-88.

56. I Callinan, *Review of the Parole System in Victoria* (2013) 95.

57. See, eg, Arkansas Parole Board, *Policy Manual* (2013) 2.2; CRS § 17-22.5-404 (2013); CT Gen Stat § 18-81z (2012); Iowa Code § 904A.4(8); US Parole Commission, *Rules and Procedures Manual* (2010) 2.20; Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (2nd ed, 2014) 2.1.6-7. See also 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 M Cox, *Assessment and Validation of Connecticut's Salient Factor Score* (Connecticut Statistical Analysis Center, 2007) 10-11.

58. Parole Board for England and Wales, *Oral Hearings Guide* (2013) annex G6; *Guidance to Members* (2013).

59. S Ratansi and S M Cox, *Assessment and Validation of Connecticut's Salient Factor Score* (Connecticut Statistical Analysis Center, 2007) 18.

60. D J 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.

61. D J 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, 149-150.

62. J M 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.

63. J Austin, "How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections" (2006) 70(2) *Federal Probation* 58; J M 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*

actuarial risk assessment tools to assess certain groups of offenders (such as Aboriginal offenders and female offenders) when the tool has not been validated for those groups.[64]

4.59 Additionally, many actuarial risk assessment tools (such as the Static-99R) rely only on static risk factors to generate an assessment of the risk of an offender reoffending. Static factors include such factors as age at first arrest and number of prior convictions. Relying on static factors means that the score is not sensitive to dynamic (changing) factors, such as an offender's attitudes or his or her responses to treatment.[65] The LSI-R does consider dynamic risk factors. However, other commentators have criticised the inclusion of dynamic factors on the basis that they increase "noise" and actually reduce the predictive power of the assessment.[66]

4.60 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. The RMA also has a role in leading best practice offender risk assessment. The RMA mandates the structured professional judgement (SPJ) approach to risk assessment.[67] The approach may use the results of actuarial risk assessment tools but also incorporates other clinical factors. The SPJ approach is carried out according to a tool that ensures that the resulting risk assessment and synthesis of risk factors into a risk rating is structured and transparent rather than unstructured and instinctive.[68] Although they incorporate clinical judgement, SPJ tools are empirically validated. The RMA publishes a directory of the available actuarial and SPJ tools with information about their reliability and validity.[69]

4.61 SPJ risk assessment tools overcome some of the problems with actuarial risk assessment – for example, SPJ assessments are individualised and can pay sufficient attention to dynamic factors, while still generating an evidence based and empirically validated result. Several of the risk assessment tools approved in Corrective Services NSW's *Compendium of Assessments* are SPJ tools (for example, the HCR-20). However, the expertise required for SPJ assessments means that they are time consuming and expensive,[70] particularly compared to the

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Study of the LSI-R Risk Assessment Instrument (Institute on Crime, Justice and Corrections, 2003).

64. Australian Justice Reinvestment Project, *Submission PA24*, 5.
65. NSW, State Parole Authority, *Submission PA14*, 8; G R Palk, J E Freeman and J D Davey, "Australian Forensic Psychologists' Perspectives on the Utility of Actuarial Versus Clinical Assessment for Predicting Recidivism Among Sex Offenders" (paper presented at 18th Conference of the European Association of Psychology and Law, Maastricht, 2008) 7-8.
66. C Baird, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* (National Council on Crime and Delinquency, 2009) 3-5.
67. Scotland, 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.
68. See J R P Ogloff and M R Davis, "Assessing Risk for Violence in the Australian Context" in D Chappell and P R Wilson (ed) *Issues in Australian Crime and Criminal Justice* (LexisNexis, 2005) 294, 315-317.
69. Scotland, Risk Management Authority, *RATED: Risk Assessment Tools Evaluation Directory* (version 2, 2007).
70. 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.

LSI-R which can be completed by Community Corrections officers. Scotland only uses SPJ assessments for a small group of very serious offenders. Corrective Services NSW already uses the SPJ approach for the serious offenders assessed by the Serious Offender Assessment Unit but it would be very resource intensive to extend it to a broader population of offenders.

Stakeholders' views on the way SPA considers risk assessment results

4.62 Stakeholders put forward a range of conflicting views about the desirability of relying on the results of risk assessment tools when making the parole decision. SPA did not support any changes to the way it currently assesses risk of reoffending.[71]

4.63 The NSW Bar Association argued that, because validated actuarial risk assessments have been shown to be more accurate than unstructured judgement, SPA should only depart from an LSI-R risk assessment "if there are compelling reasons to do so".[72] Similarly, the Police portfolio submitted that SPA should adopt the risk assessment tool that has been shown to have the best validity and reliability in predicting reoffending.[73] In contrast, the Aboriginal Legal Service stated that SPA already places too much reliance on results from the LSI-R when it is assessing reoffending risk, submitting:

> The ALS is in favour of an instinctive synthesis approach which draws upon various sources of information and material to assess the risk that an offender poses, rather than placing reliance upon actuarial risk assessment instruments.[74]

4.64 The Law Society of NSW agreed, submitting that "the Committees recognise the difficulties that SPA faces when it makes decisions about risk and are of the view that each case should be considered on its own merits".[75]

4.65 NSW Young Lawyers cautioned that reliance on the LSI-R risk score may lead to a form of double counting, as this score contributes to other factors – such as security classification, program participation and the recommendation from Community Corrections – that SPA also considers. NSW Young Lawyers submitted that "while the LSI-R is a useful tool for assessing risk and can help overcome potential problems pertaining to the partiality of decision-makers, [we are] of the view that the illusion of certainty must be avoided when it comes to risk assessments".[76]

Our view on the way SPA considers risk assessment results

4.66 Risk assessment in the parole context is a very difficult and complex task. As a general rule, we prefer an approach to risk assessment that is structured and evidence based. UK research has found that parole decision makers' unstructured instinctive risk assessment tends to overestimate offenders' risk of reoffending

71. NSW, State Parole Authority, *Submission PA14*, 8.
72. NSW Bar Association, *Submission PA11*, 7.
73. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4.
74. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 6-7.
75. Law Society of NSW, *Submission PA5*, 4.
76. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 12.

greatly compared to the risk rating produced by a validated risk assessment tool.[77] If SPA were to rely on more cautious instinctive assessments of risk and refuse parole to low risk offenders, many offenders could be kept in custody to prevent a relatively small number of likely further offences.[78] Overestimation of risk could also lead to many offenders being refused parole and being released at the end of the head sentence with no parole supervision, which may be counterproductive.

4.67 In an ideal world, SPA would have access to a risk assessment result for every offender it considered, generated by an experienced clinician through a validated and comprehensive approach like the SPJ method. SPA could be required to take into account the risk prediction generated by such an assessment. However, given the costliness of the SPJ approach, such assessments are not realistic except for a small group of the most serious offenders.

4.68 By contrast, every offender that SPA considers has been assessed using the LSI-R. We note that parole decision makers in several overseas jurisdictions must consider results from similar actuarial risk assessment tools. We also appreciate the attraction of SPA's decisions being more strongly connected to the reoffending risk prediction generated by evidence based tools like the LSI-R. At the same time, we note the drawbacks and criticisms of actuarial risk assessment tools. In this context, we are not prepared to recommend that SPA be required to have regard to the results of a particular actuarial risk assessment tool when making the parole decision.

4.69 We do think, however, that SPA should have access to any risk prediction results generated by an evidence based risk assessment tool. We recommend that the Community Corrections pre-release report to SPA include details of any risk assessment tools used by Corrective Services NSW to assess the offender and their results. In practice this will involve SPA, at the very least, noting the results of the LSI-R.

4.70 The results of such tools will only be useful in informing SPA's decision making if SPA members have the knowledge and awareness to give this information its appropriate weight. SPA's Community Corrections members are likely to have this expertise already but other members may have limited understanding of the nature and operation of such tools.

4.71 Legal Aid NSW submitted that SPA's membership should include a specialist forensic psychologist or psychiatrist to ensure that "the members are able to understand and critically analyse any information regarding risk that is put before them".[79] We discuss this proposal in Chapter 8 but conclude that it would be better if SPA is not formally required to include such professionals in its membership.[80] However, we do recommend there that all SPA members should undergo an

77. 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.
78. 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.
79. Legal Aid NSW, *Submission PA4*, 15.
80. Para [8.52]-[8.55].

enhanced program of professional development and evaluation. Instead of a specialist forensic psychologist or psychiatrist member, we recommend that all SPA members' professional development include training in the value, uses and limitations of risk assessment tools, and particularly the LSI-R. This would ensure that members can include risk assessment results in their decision making with an awareness of what such results can and cannot tell them.

4.72 We also recommend that the statements in SPA's *Operating Guidelines* about risk assessment be amended to reflect better the role of risk assessment in the parole context. The *Operating Guidelines* currently expect offenders to "be assessed as a low risk of committing serious offences on parole, particularly sexual or violent offences" before parole will be granted.[81] This requirement conflicts with our preferred overall test for release on parole (Recommendation 4.1) and should be removed. Rather than requiring offenders to be low risk, our proposed test requires SPA to be satisfied that parole is in the interests of the community, taking into account the risk to community safety if the offender is released (which includes the risk of reoffending as well as the seriousness of likely reoffending), the reduction in risk likely to be achieved through parole supervision, the risk to community safety if the offender is released with no period of parole supervision or a shorter period of parole supervision and the extent to which parole conditions can mitigate the risk. The *Guidelines* should reflect this.

Recommendation 4.5: The State Parole Authority's use of risk assessment results

(1) The Community Corrections pre-release report should include the results of any evidence based risk assessment tool used by Corrective Services NSW to assess the offender.

(2) The State Parole Authority members' professional development program should include training in the value, uses and limitations of risk assessment tools, particularly the Level of Service Inventory-Revised (LSI-R).

(3) The requirement in the Authority's *Operating Guidelines* that an offender must generally be assessed as low risk before being granted parole should be removed. Instead, the *Operating Guidelines* should emphasise that risk assessment results should be given weight in accordance with the legislative framework for assessing release on parole set out in Recommendations 4.1-4.4.

Security classification

4.73 SPA's *Operating Guidelines* currently state that "while there will be exceptions, in principle an inmate should achieve ... a low level of prison classification indicating acceptable behaviour and progress in custody and a satisfactory record of conduct in custody, particularly with regard to violence and substance abuse" before being granted parole.[82]

81. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(f).
82. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(b).

4.74 The current system of security classification is complex. The CAS Regulation sets out seven different security classification levels for males (AA to C3) and five for females (Category 5 to 1), as well as two additional escape risk classifications (E1 and E2).[83] Offenders can have difficulty progressing to lower classifications for a range of reasons, including lack of time (classification is generally only reviewed annually), immigration status, or because they have attracted an E classification.

4.75 We discuss the system of security classification and the difficulties offenders can have in navigating this system in Chapter 14.[84] In Chapter 14, we also recommend that the system of security classification be streamlined and simplified to reduce the barriers to progression.[85] Corrective Services NSW has indicated that it is investigating the possibility of simplifying the system of security classification.

Stakeholders' views on the way SPA considers security classification

4.76 The NSW Bar Association submitted that SPA should not consider an offender's security classification when making the parole decision. The NSW Bar Association argued:

> An offender's behaviour in custody, evidence of which is available from various reports, is the relevant matter to be taken into account. The security classification is only secondary evidence of this and, of itself, is of little relevance. In the case of an escapee, the classification may stem from conduct which occurred years before the present period of incarceration.[86]

4.77 Justice Action also submitted that SPA should not take an offender's security classification into account, preferring that SPA assess offenders on their preparedness to enter the community.[87]

4.78 Legal Aid NSW, the Law Society of NSW, NSW Young Lawyers and the Aboriginal Legal Service did not specifically object to SPA considering an offender's security classification. However, all four organisations submitted that SPA should consider the reasons behind an offender's failure to achieve a low security classification. These organisations stressed that failure to achieve a low security classification does not necessarily indicate a heightened risk to the community.[88]

4.79 The NSW Department of Justice also submitted that an offender's security classification might not accurately reflect the chances of the offender being successful on parole. The Department pointed out:

> In many cases the security classification given to an inmate reflects behaviour in custody at a particular time, or for a particular situation/incident, which is not

83. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 24(1), cl 25(1), cl 26(1).
84. Para [14.14]-[14.21], [14.25], [14.36].
85. Para [14.53]-[14.55] and Recommendation 14.1(4).
86. NSW Bar Association, *Submission PA11*, 6.
87. Justice Action, *Submission PA13*, 3.
88. Legal Aid NSW, *Submission PA4*, 13; Law Society of NSW, *Submission PA5*, 4; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 11; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 6.

necessarily synonymous with behaviour in the community, for example a fight between two inmates may not be indicative of behaviour in the community.[89]

4.80 The Department also stressed that SPA must keep in mind, regardless of security classification, the risks to the community if an offender is refused parole and then released at the end of the head sentence without any support or supervision.[90]

4.81 SPA was mainly concerned that some offenders could not make timely progress to lower classifications during their sentences, either because they had an E classification or had spent significant time on remand.[91] The Police portfolio submitted that security classification should be a significant factor in parole decision making, no matter the reasons behind an offender receiving that classification.[92]

Our view on the way SPA considers security classification

4.82 An offender's security classification is based on a range of factors, many of which are relevant for parole decision making. Such factors include the offender's criminal history, seriousness of the offence, behaviour in custody, risk to the community and results of risk assessment tools.[93] The lists in s 135(2) and s 135A of the CAS Act already require SPA to consider these factors when it makes decisions about parole. In this way, SPA's consideration of security classification amounts to a form of double counting.

4.83 More importantly, we agree with the NSW Bar Association that security classification is effectively only secondary evidence of such matters. It may not always be particularly accurate or reliable secondary evidence, as several stakeholders pointed out, because security classification is an administrative tool. Its purpose is to assist in managing offenders and correctional centres.

4.84 It may be difficult for SPA to avoid taking an offender's security classification into account entirely when an offender has a high classification. SPA could consider, in addition to the classification itself, the reasons behind an offender's failure to progress to a low classification. Depending on what these reasons are, SPA could decide how much weight to give the offender's higher classification in its assessment of the risks posed by the offender and the reduction in risk likely to be achieved through parole. In consultations, some stakeholders supported this option, although others noted that SPA might not always have good information about the reasons for an offender's failure to progress. We appreciate this difficulty but consider that SPA should take these reasons into account if they are known.

4.85 We also recommend that the current SPA operating guideline that suggests an offender should achieve a low level classification should be qualified by the observation that offenders with a higher level of prison classification, who otherwise meet the requirements for a grant of parole may still be suitable for parole.

89. NSW Department of Justice, *Submission PA32*, 10.
90. NSW Department of Justice, *Submission PA32*, 10.
91. NSW, State Parole Authority, *Submission PA14*, 7.
92. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4.
93. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* (2014) ch 13.1.

Recommendation 4.6: The State Parole Authority's consideration of security classification

The State Parole Authority's *Operating Guidelines* should provide that if an offender has failed to achieve a low level of prison classification, the Authority should, when considering whether to grant parole, take into account:

(a) any reasons for the failure to achieve a low level of prison classification, and

(b) that an offender with a higher level of prison classification, who otherwise meets the requirements for a grant of parole, could still be regarded as suitable for parole.

Completion of in-custody rehabilitation programs

4.86 Corrective Services NSW conducts a number of offender behaviour change programs in custody.[94] These programs follow a group therapy format to address issues such as sex offending, violent offending, gambling addiction and alcohol and other drug dependence. The aim of these programs is to reduce reoffending by treating an underlying problem connected to an offender's criminal conduct.[95] Some of the in-custody group behaviour change programs conducted by Corrective Services NSW include:

- for sex offenders: the CUBIT program, CORE Moderate program, Deniers program and the Self-Regulation program: Sexual Offenders
- for violent offenders: the Violent Offender Therapeutic Program (VOTP), Self-Regulation Program: Violent Offenders, EQUIPS Aggression and EQUIPS Domestic Abuse
- for general offenders: EQUIPS Foundation, and
- for offenders with substance abuse and other addiction issues related to their offending behaviour: EQUIPS Addiction, the Intensive Drug and Alcohol Treatment Program (IDATP), and the Ngara Nura program.

4.87 The pre-release Community Corrections report to SPA addresses "the offender's willingness to participate in rehabilitation programs, and the success or otherwise of his or her participation in such programs".[96] SPA looks at whether the offender has achieved "satisfactory completion of programs and courses aimed at reducing their offending behaviour" and generally refuses parole if the offender has not satisfactorily completed these programs.[97] SPA does take into account an offender's circumstances where the offender has been unable to access a program, although the *Operating Guidelines* state:

94. The EQUIPS suite of programs (Foundation, Aggression, Addiction, Domestic Abuse) are also run in the community at Community Corrections Offices for eligible and suitable offenders under supervision in the community.
95. Corrective Services NSW, *Compendium of Correctional Programs in NSW* (2013) 1.
96. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135A(e).
97. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(c).

> 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 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.[98]

Lack of access to in-custody rehabilitation programs

4.88 Some offenders may simply be unwilling to complete in-custody rehabilitation programs. However, stakeholders raised lack of access to such programs for otherwise willing offenders as a critical issue.[99] In brief, the barriers to access raised by stakeholders included:

- cognitive impairments
- poor literacy
- mental health impairments
- insufficient time as a sentenced prisoner
- insufficient planning during the sentence to ensure programs can be started and completed, including lack of communication with offenders about what programs are likely to be required
- lack of targeted appropriate programs
- long waiting lists and demand for program places outstripping supply
- security classification barring access to programs
- transfers between correctional centres precluding or interrupting programs
- association and protection issues, and
- scheduling of programs at long intervals and at different correctional centres.

4.89 Given the emphasis that SPA places on completion of in-custody rehabilitation programs, these barriers to access represent a significant and systemic problem. Corrective Services NSW does attempt to open program participation as far as possible to offenders with cognitive impairments. The Statewide Disability Services branch of Corrective Services NSW provides advice to other Corrective Services NSW staff members about how cognitively impaired offenders can be supported to participate in programs and no prisoner with a disability can be excluded from any

98. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.6.

99. Public Interest Advocacy Centre, *Submission PA1*, 7, 9; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 5; Children's Court of NSW, *Submission PA3*, 5; Legal Aid NSW, *Submission PA4*, 12; Law Society of NSW, *Submission PA5*, 3-4; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 10; NSW Bar Association, *Submission PA11*, 6; Justice Action, *Submission PA13*, 3; NSW, State Parole Authority, *Submission PA14*, 7; NSW, State Parole Authority, *Submission PA19*, 1; K Marslew, *Submission PA15*; Women in Prison Advocacy Network, *Submission PA20*, 10; N Beddoe, *Preliminary Submission PPA1*, 5; Mental Health Commission of NSW, *Submission PA56*, 3, 5. See also 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.

program without contacting Statewide Disability Services.[100] Corrective Services NSW also tries to create versions of programs specifically for offenders with cognitive impairments.[101] Similarly, Corrective Services NSW's policy is that poor literacy should not exclude a prisoner from a program. Instead, action should be taken to meet the needs of the individual, such as providing extra assistance with reading and writing tasks, or delivering the program in a way that does not rely on reading and writing.[102]

4.90 In Chapter 14, we discuss the case management of offenders in custody, and the ways that improved case management could lessen or remove some of the barriers to program access identified by stakeholders. However, improvements in case management will never entirely resolve these problems. In this context, the way that SPA takes program participation into account is a difficult and controversial issue.

4.91 Most stakeholders accepted the relevance of completion of in-custody rehabilitation programs for a parole decision maker. However, many suggested that SPA should take into account the situation of an offender who was unable to access a program for reasons beyond his or her control.[103] The NSW Bar Association also submitted that SPA should very carefully consider whether a similar program is available in the community before refusing parole on the basis that an offender has not completed a custodial rehabilitation program.[104]

4.92 A majority of SPA submitted that no change is necessary to the way it currently takes completion of in-custody rehabilitation programs into account when making the parole decision.[105] Similarly, the Police portfolio argued that, as release on parole is not a right, completion of in-custody program should be a major consideration.[106]

Our view on completion of rehabilitation programs and SPA's decision making

4.93 On the one hand, there is an issue of basic fairness. It seems unfair for an offender who is willing to make progress in his or her rehabilitation to be denied parole because the offender has been unable to access a recommended in-custody program. In these circumstances, it can be argued that SPA, when making the parole decision, should take into account the reasons why an offender was unable to access a program.

4.94 On the other hand, an offender who has not completed a recommended program is essentially an "untreated" offender. Whether lack of completion was in or out of the offender's control, the effect is the same: the offender has not participated in the

100. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* (2012) [24.1.5].
101. See, eg, NSW Department of Attorney General and Justice, *2012-13 Annual Report* (2013) 24.
102. Corrective Services NSW, *Compendium of Correctional Programs in NSW* (2013) 8.
103. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 5; Legal Aid NSW, *Submission PA4*, 13; NSW Bar Association, *Submission PA11*, 6; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 10; Women in Prison Advocacy Network, *Submission PA20*, 10-11; Law Society of NSW, *Submission PA5*, 3-4; NSW, State Parole Authority, *Submission PA14*, 7.
104. NSW Bar Association, *Submission PA11*, 6.
105. NSW, State Parole Authority, *Submission PA14*, 7.
106. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4.

program recommended by Corrective Services NSW as necessary to reduce his or her risk of reoffending. Since SPA must be primarily concerned with community safety, it is difficult to see how considerations of access to programs should be allowed to affect its decision to refuse parole.

4.95 Despite this conclusion, SPA must be careful only to have regard to participation in programs that are relevant and appropriate to that offender and likely to reduce risk to the community. The NSW Department of Justice stated:

> There should be a balance between the risk to the community of an offender not being given a period of community supervision prior to expiration of their head sentence, and the risk of non-completion of a program in custody which the inmate may have not had access to given resource limitations. The assessment made for intervention, that is, is the program necessary or of likely benefit to the offender, is of vital importance.[107]

The Department also noted that it is important that "adequate flexibility" be given to allow each case to be assessed on its "individual circumstances and merits", rather than having a presumption that offenders participate in programs.[108]

4.96 We strongly agree with the NSW Department of Justice that there should not be a default presumption that offenders participate in programs. An offender should only be required to complete those programs that are likely to reduce the risk of reoffending or that prepare offenders to participate in those programs. In making its decision under s 135(1), SPA should consider the likely reduction in risk to be achieved through an in-custody program in the context of the reduction in risk likely to be achieved through parole, and the overall risk that the offender would pose if paroled. It is not always possible, without increasing the risk to the community, to provide community based programs that address the criminogenic needs of some offenders, especially high risk offenders. However, where there are appropriate community based programs and where SPA's assessment of the risk indicates that parole is otherwise appropriate, completion of programs in custody should not be emphasised over completion of similar programs on parole. In both of these areas, SPA must rely to a significant extent on the expert advice provided by Community Corrections about which programs are necessary and the setting in which they should be delivered.

Recommendation 4.7: The State Parole Authority's approach to in-custody rehabilitation programs

The State Parole Authority's *Operating Guidelines* should be amended to the following effect:

(a) Where an offender has not completed a recommended in-custody rehabilitation program for reasons beyond his or her control, the Authority should not take those reasons into account.

(b) The Authority should take into account an offender's participation (or lack of participation) only in those programs likely to reduce that

107. NSW Department of Justice, *Submission PA32*, 10.

108. NSW Department of Justice, *Submission PA32*, 10.

particular offender's reoffending risk, or that prepare offenders to participate in those programs.

(c) The Authority should take program participation into account on a case by case basis when making the parole decision.

(d) The Authority should consider whether the offender could, without increased risk to the community, complete a recommended program in the community.

Participation in pre-release external leave

4.97 Pre-release leave from a correctional centre allows offenders to experience time in the community to prepare them for full release on parole. There are currently three main categories of leave available to offenders:

- escorted internal leave (outside the correctional centre but within the correctional complex/property)
- escorted external leave (outside the correctional complex/property), and
- unescorted external leave (outside the correctional complex/property).

4.98 We describe the current system of pre-release leave in Chapter 15.[109]

4.99 External leave offers a number of benefits, including:

- gradual acclimatisation to community life for institutionalised prisoners, increasing their independence and ability to take responsibility for themselves
- Corrective Services NSW can test the appropriateness of an offender's proposed accommodation
- offenders have an opportunity to reintegrate with family
- offenders can establish positive community support networks, such as churches, charities, community organisations and prisoner support groups, to rely on when released
- offenders can establish support from specialist services such as housing agencies, doctors, counsellors and psychologists, and
- offenders can obtain employment, which may be ongoing after release, or participate in external education or training.[110]

4.100 External leave also provides a test of an offender's willingness and ability to comply with conditions in the community.

4.101 SPA's *Operating Guidelines* state that, while there will be exceptions, in principle, serious offenders and other long term inmates should have participated in pre-release external leave in order to be granted parole.[111] Although it does not have a

109. Para [15.12]-[15.38].

110. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* (2014) [20.1.8].

111. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(g).

firm rule, SPA has advised us that it generally considers offenders serving non-parole periods of more than five years to be "long term inmates".[112] Our review of a sample of 97 cases where SPA refused parole found the failure to complete external leave was a relevant consideration for a majority of the serious offenders refused parole.[113] On the other hand, lack of external leave participation was only a consideration for one non-serious offender. In this case, SPA refused parole due to lack of leave because the offender had been cycling in and out of custody over a long period of time and was severely institutionalised.

4.102 As with in-custody rehabilitation programs, some offenders can have difficulty participating in external leave for reasons beyond their control. Such reasons include the offender's security classification, inability to find a sponsor for unescorted leave, insufficient planning for leave to take place before parole eligibility, and the complex rules governing access to leave. We discuss some ways to reduce these barriers to access in the context of improved in-custody case management in Chapter 14. In Chapter 15, we examine the ways external leave arrangements could be streamlined and consider some other transitional options that could supplement external leave arrangements to help offenders to bridge the gap between custody and the community.

4.103 Despite any improvements that can be made, there will likely always be some offenders who cannot (and possibly should not) access external leave. In this context, it is important to consider the extent to which SPA should take participation in external leave into account. Stakeholders have argued that, where an offender has been unable to access external leave, SPA should consider the reasons that leave was not granted and whether these were beyond the control of the offender.[114]

4.104 This issue is similar in some ways to the issue of in-custody rehabilitation programs discussed earlier[115] except that there is less evidence that external leave reduces the risk of reoffending. Work release has been shown to reduce reoffending risk[116] but the effects of other types of leave (such as day leave and weekend leave) are not known empirically. It is nonetheless to be expected that the experience of external leave would help to transition a serious offender or other long term inmate to the community and would also provide a test of parole readiness. With these expected outcomes, external leave contributes, albeit indirectly, to the value of parole as a means of reducing the risk of re-offending. The value of external leave will vary from case to case. We, therefore, consider it desirable for there to be some flexibility in the way SPA takes participation in external leave into account. Where a serious offender or other long term inmate has failed to participate in external leave, we recommend that SPA should consider whether the failure has been for reasons beyond the offender's control.

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112. Information provided by the NSW, State Parole Authority (14 March 2014).
113. See Appendix D for more information about our review of parole refusal decisions.
114. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 16; Roundtable: legal practitioners, *Consultation PAC21*; Shopfront Youth Legal Centre, *Consultation PAC22*.
115. Para [4.86]-[4.96].
116. E Drake, *Inventory of Evidence-Based and Research-Based Programs for Adult Corrections* (Washington State Institute for Public Policy, 2013) 7.

4.105 Concerns have been raised more generally about the presumption that external leave is necessary. Legal Aid NSW submitted that "too much emphasis can be placed on pre-release leave, even when an offender hasn't been in custody for an extended period of time".[117] We discuss this problem in Chapter 15.

4.106 We consider that the general presumption that external leave is necessary for serious offenders and other long term inmates should be moderated by guidance about the weight that should be given to the failure to participate in external leave. In our view SPA should focus on the purpose of external leave as a transitional and preparatory experience for the offender. We therefore recommend that where a serious offender or other long term inmate has not been able to access leave, SPA should consider whether leave is necessary or whether an alternative preparatory or transitional experience would be sufficient to prepare the offender for parole.

Recommendation 4.8: The State Parole Authority's consideration of external leave participation

The State Parole Authority's *Operating Guidelines* about serious offenders or other long term inmates having failed to participate in pre-release external leave should be amended to the following effect:

(a) The presumption that serious offenders and other long term inmates should have undertaken pre-release external leave should be removed.

(b) In deciding what weight to give to the failure, the Authority should take into account:

  (i) whether the failure was for reasons beyond the offender's control, and

  (ii) whether the offender's participation in other preparatory or transitional options would be sufficient to prepare the offender for parole.

Accommodation and homelessness

4.107 SPA's *Operating Guidelines* state that, while there will be exceptions, in principle an offender should have suitable post-release plans, including suitable accommodation, before being granted parole.[118] The Community Corrections report must include details of an offender's post-release plans and planned post-release accommodation.[119] Community Corrections will recommend against parole in the report unless the offender has suitable post-release accommodation.

4.108 Many offenders do not have any obvious post-release accommodation options when they are approaching parole eligibility. In the months before SPA considers an offender, Community Corrections officers from the Parole Unit attached to the offender's correctional centre will attempt to arrange accommodation for the offender if he or she has not been able to propose any accommodation options. Any

117. Legal Aid NSW, *Submission PA33*, 10.

118. NSW, State Parole Authority, *Operating Guidelines* (2012) cl 2.3(d).

119. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135A(c).

accommodation identified by an offender or the Parole Unit must pass a suitability assessment carried out by the closest Community Corrections office before being considered "suitable" accommodation.[120] The local Community Corrections office and the Parole Unit must reach agreement about the suitability of any proposed accommodation.[121]

4.109 We discuss the difficulties of finding accommodation for offenders and the problems with the suitability assessment process in Chapter 3 in the context of court based parolees.[122] It is this group that has most difficulty in arranging suitable accommodation. We make some recommendations that may reduce the number of offenders who struggle to find suitable post-release accommodation. In Chapter 14, we discuss ways that the gap between custody and the community could be better bridged through increased "in-reach" by non-government organisations.[123] This could help more offenders arrange accommodation before release.

4.110 Even with these changes, there is always likely to be a shortage of accommodation for ex-prisoners. It is in this light that we must consider SPA's current decision making practice with regard to post-release accommodation.

Stakeholders' views on the way SPA considers homelessness

4.111 The Police portfolio did not support any changes to the way SPA takes accommodation (or lack of suitable accommodation) into account.[124] However, several other stakeholders submitted that lack of suitable accommodation should not be a blanket barrier to achieving parole.[125] These stakeholders generally saw Community Corrections' and SPA's insistence on suitable post-release accommodation as unfairly penalising those offenders with no community support. Stakeholders emphasised that an offender's accommodation situation should be considered on a case by case basis, and that an offender should only be refused parole on the basis of homelessness if it can be shown that, for that particular offender, a lack of suitable accommodation is likely to elevate the risk to the community.[126] Some stakeholders explicitly submitted that homelessness should not be equated with an increased risk of criminality.[127] The Women in Prison Advocacy Network also submitted that SPA's emphasis on accommodation leads some

120. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section K part 3.
121. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section K part 3.
122. Para [3.33]-[3.59].
123. Para [14.65]-[14.68].
124. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 4.
125. Legal Aid NSW, *Submission PA4*, 14; NSW Bar Association, *Submission PA11*, 6; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 11-12; Public Interest Advocacy Centre, *Submission PA1*, 9; Law Society of NSW, *Submission PA5*, 4; Women in Prison Advocacy Network, *Submission PA20*, 11.
126. NSW Bar Association, *Submission PA11*, 6; Legal Aid NSW, *Submission PA4*, 14; Law Society of NSW, *Submission PA5*, 4; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 11-12.
127. Legal Aid NSW, *Submission PA4*, 14; NSW Bar Association, *Submission PA11*, 6; NSW, State Parole Authority, *Submission PA14*, 8.

women to return to undesirable situations, including situations of family violence, so they can be released from custody.[128]

4.112 A majority of SPA members were of the view that there should not be any changes to its practice of refusing parole if an offender does not have suitable post-release accommodation in place. However, SPA did submit that "perhaps the pertinent question that should be answered by both Community Corrections and the Parole Authority is '*can the offender be adequately supervised?*'".[129] On this point, the NSW Department of Justice submitted that a key reason for requiring confirmed post-release accommodation is that accommodation is generally necessary to ensure that Community Corrections can adequately supervise an offender on parole. Without a residence, Community Corrections will have difficulty contacting an offender, keeping track of associates, monitoring behaviour and noting any factors leading to an elevated risk of reoffending. Offenders without a stable address will also have difficulty accessing the government payments and other services that they need.[130]

Our view on the way SPA considers homelessness

4.113 Despite the submissions of stakeholders, for the reasons we discuss in Chapter 3,[131] we consider that knowingly releasing a parolee to primary homelessness presents some difficulties. On the other hand, we acknowledge that offenders who are refused parole due to lack of accommodation may lose their opportunity for parole and so lose the opportunity to be supervised and supported on parole by Community Corrections. This may be a worse outcome than release to homelessness from the perspective both of the offender and of community safety.

4.114 We acknowledge that post-release homelessness is a known risk factor for reoffending.[132] There are a number of reasons for this including decreased opportunity to form pro-social ties and increased risk of antisocial ties as well as increased risk of transience and instability.

4.115 The lack of suitable post-release accommodation is one of a number of factors that contribute to the risk of reoffending. We have recommended that risk to the community should be the primary consideration in determining whether or not to grant parole. Making accommodation a separate consideration in addition to its role in contributing to the overall assessment of risk results in double counting that factor. However, if an offender cannot be properly supervised because of unsuitable accommodation, then this needs to be taken into account separately in assessing whether the offender's risk, however small, can be managed. In this respect, we support SPA's suggestion that a relevant question is "Can the offender be adequately supervised?". Put another way, we consider that SPA should take a risk management approach to post-release accommodation. SPA should consider the

128. Women in Prison Advocacy Network, *Submission PA20*, 11.
129. NSW, State Parole Authority, *Submission PA14*, 8.
130. NSW Department of Justice, *Submission PA32*, 11.
131. Para [3.43]-[3.48].
132. See para [3.47].

risk that the offender poses to community safety, and whether suitable post-release accommodation is necessary to manage that risk.

4.116 In considering the above, SPA should also consider the risk to community safety if, due to lack of suitable accommodation, the offender is refused parole and then released later without parole supervision (and also likely without suitable accommodation). Where the offender has no suitable accommodation, the Community Corrections pre-release report to SPA would need to include an assessment of whether the offender can be adequately supervised and the risks managed.

4.117 We expect that, in most cases, suitable accommodation will be necessary before Community Corrections can report with confidence that an offender can be adequately supervised and risk to the community can be managed. However, this change would introduce some level of flexibility for those offenders who have stable lifestyles in other ways on release but who do not, for whatever reason, have suitable accommodation available to them.

Recommendation 4.9: Assessing the necessity and suitability of post-release accommodation

Where suitable accommodation is not available for an offender:

(1) Corrective Services NSW policy should state that Community Corrections should comment in the pre-release report on whether such accommodation is necessary to supervise the offender adequately and manage any risk to community safety that the offender poses.

(2) The State Parole Authority's *Operating Guidelines* should state that the offender may be released on parole if any risk to community safety can be managed and Community Corrections can provide adequate supervision.

Deportation

4.118 SPA sometimes must make a parole decision about an offender who is likely to be deported upon release from custody. Some of these offenders may be unlawful non-citizens who have come to Australia to commit the crime for which they are imprisoned (for example, drug importation).[133] Other potential deportees may be permanent residents or other visa holders. The Commonwealth Government can cancel any visa if the person does not, or the Minister for Immigration and Border Protection reasonably suspects that the person does not, pass the character test.[134]

133. See, eg, the facts in *R v Shrestha* (1991) 173 CLR 48.

134. *Migration Act 1958* (Cth) s 501. The character test is defined in s 501(6). The Minister *must* cancel a visa that has been granted to a person where that person has a "substantial criminal record" (sentenced to a term of imprisonment of 12 months or more) or has been convicted or found guilty of a sexually based offence involving a child: s 501(3A). There are also powers to deport non-citizens powers convicted of criminal offences in *Migration Act* 1958 (Cth) s 201 and s 203. See also M Grewcock, "Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 *Migration Act 1958*" (2011) 44 *Australian and New Zealand Journal of Criminology* 56.

Current law and practice

4.119 SPA is primarily responsible for dealing with the question of potential deportation because, in NSW, potential deportation is irrelevant to the sentencing exercise. By law the sentencing court must not take potential deportation into account when setting the sentence or the length of the non-parole period.[135] This is because deportation is a decision made under Commonwealth executive power.

4.120 In addition to the public interest test and the other matters it must consider under s 135, SPA's *Operating Guidelines* sets out factors for SPA to consider in relation to deportation before granting parole:

(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

(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.[136]

4.121 This list does not provide principled guidance as to how SPA is to treat likely deportation when it is making a parole decision.

4.122 SPA advises that, currently, the Department of Immigration and Border Protection (DIBP) generally notifies SPA and Corrective Services NSW at a relatively early stage that it has an interest in a sentenced offender who may be released on parole. As the date for possible release approaches (under either a court based order, or a SPA order), DIBP advises whether the offender is no longer of interest or that their visa has been cancelled. Cancelling the visa at this stage is intended to give an offender the opportunity to appeal within the appropriate time frames.[137] If DIBP cancels an offender's visa and the offender is paroled, the offender

135. *R v Latumetan* [2003] NSWCCA 70 [19]; *R v Mirzaee* [2004] NSWCCA 315 [20]-[21]; *R v Pham* [2005] NSWCCA 94 [13]-[14].

136. NSW, State Parole Authority, *Operating Guidelines* (2012) [2.8].

137. See also See Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* [ch 21.1] (v.1.4, 2014). Visa cancellations that fall within the scope of the mandatory cancellation provision in s 501(3A) of the *Migration Act 1958* (Cth) are not reviewable by the Administrative Appeals Tribunal: s 500(4A)(c).

immediately enters immigration detention in accordance with s 253 of the *Migration Act 1958* (Cth). In such situations, SPA will not consider whether the offender will have suitable accommodation when released on parole.[138]

4.123 One practical difficulty that arises under these arrangements is that, once DIBP advises Corrective Services NSW that an offender's visa has been cancelled, the offender is usually taken off programs, and removed from any form of external leave including supervised leave and community work, and is often regressed in classification, making it more difficult to achieve rehabilitation.[139]

4.124 Problems can also arise if an offender on parole is released from immigration detention. This can occur for a number of reasons, including the revocation of the visa cancellation by the Minister,[140] successful appeal,[141] or release by the relevant Minister or Secretary under s 253(9) of the *Migration Act 1958* (Cth). Unless DIBP advises SPA and Community Corrections that an offender will be released from immigration detention, SPA and Community Corrections will not know the offender's new location and address. This makes it impossible for SPA and Community Corrections to supervise the offender and enforce the conditions of the offender's parole. SPA has noted that DIBP does not always communicate when an offender will be released from immigration detention.[142]

4.125 On the other hand, in the past, SPA has reported that sometimes it has no information at the time of the parole decision about whether a particular offender will actually be deported.[143] Others have noted that offenders may sometimes have been on parole for some time before the decision is made to deport them.[144] The difficulty of predicting whether or not an offender will be deported is one reason for the rule that sentencing courts must not take deportation into account when setting the sentence.[145] The introduction of s 501(3A) of the *Migration Act 1958* (Cth), which provides for mandatory visa cancellation in certain circumstances, including where the offender was sentenced to a term of imprisonment of 12 months or more, may reduce uncertainty for a number of offenders. Such cancellations are not subject to merits review, however, it is possible that the Minister may revoke the cancellation.[146] If SPA decides to grant parole to the offender and the offender is then deported, there are no arrangements for the international transfer of parole

138. Information provided by J Wood, Chairperson, NSW, State Parole Authority (1 April 2015).
139. See Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* [ch 21.1] (v.1.4, 2014) for more information about Corrective Services NSW's policy regarding security classification and external leave programs for offenders subject to removal or deportation.
140. *Migration Act 1958* (Cth) s 501C, s 501CA.
141. An offender may apply to the Administrative Appeals Tribunal for review of a decision to cancel a visa under s 501, subject to the exclusion in s 500(4A), or decisions not to revoke a visa cancellation under s 501CA(4): *Migration Act 1958* (Cth) s 500(1)(b)-(ba).
142. Information provided by J Wood, Chairperson, NSW, State Parole Authority (1 April 2015).
143. NSW, State Parole Authority, *Submission PA14*, 8-9.
144. M Grewcock, "Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 *Migration Act 1958*" (2011) 44 *Australian and New Zealand Journal of Criminology* 56, 63.
145. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [4.102]-[4.109]..
146. *Migration Act 1958* (Cth) s 500(4A)(c), s 501CA. A decision not to revoke a visa cancelled under s 501(3A) is reviewable by the Administrative Appeals Tribunal: s 500(1)(ba).

orders and there is therefore no way to ensure parole supervision or to revoke parole in case of breach. In practice, SPA does not take into account the possibility of overseas parole supervision and therefore assumes that, once deported, an offender will be free of any conditions including supervision.[147] For this reason, the NSW Department of Justice submitted that deportation of a parolee effectively extinguishes the offender's parole period in its character as part of a sentence to be served in the community that is subject to enforceable conditions.[148] Accordingly, the community may see granting parole in these circumstances as granting the offender a discounted sentence.[149] On the other hand, academic commentators have argued that deportation after release on parole can be a significant double punishment if the offender was a long term resident of Australia.[150] Such concerns do not apply where the offender entered Australia solely or principally to commit the crime.

4.126 If SPA decides to refuse parole on the grounds of likely deportation, potential deportees will spend longer in custody than otherwise similar offenders. Such disparity of treatment could breach Australia's human rights obligations.[151]

4.127 Refusal to grant parole on the grounds of likely deportation may also have other undesirable consequences. Such an approach may remove an incentive for inmates, who may be subject to deportation, to participate in in-custody programs, if they are made available. In our sample study of the 97 cases in which SPA refused parole between March and June 2014,[152] we found one case where SPA refused parole because the offender had refused to participate in any in-custody rehabilitation programs. However, the offender had refused to participate on the assumption that SPA would refuse parole anyway, because he was liable to be deported. The result was that the offender would remain in custody without assistance to rehabilitate, at considerable cost, and, after eventual release, would be likely to be deported to an overseas community, still with no assistance to rehabilitate and no supervision in that community.

4.128 SPA now reports that it treats potential deportees in the same way as other offenders, except with respect to accommodation arrangements. It takes into account the same reasons for and against parole as apply to other offenders and imposes similar conditions including those that would only apply if the offender is released by DIBP and not deported.[153]

147. Information provided by J Wood, Chairperson, NSW, State Parole Authority (1 April 2015).
148. NSW Department of Justice, *Submission PA32*, 15.
149. See *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223 and *Lim v State Parole Authority* [2010] NSWSC 93; 76 NSWLR 452.
150. M Grewcock, "Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 *Migration Act 1958*" (2011) 44 *Australian and New Zealand Journal of Criminology* 56.
151. *R v Shrestha* (1991) 173 CLR 48, 70-71 (Deane, Dawson and Toohey JJ).
152. See Appendix D for more information about our review of parole refusal decisions.
153. Information provided by J Wood, Chairperson, NSW, State Parole Authority (1 April 2015).

Stakeholders' views and options for reform

4.129 Stakeholders' views were mixed on how SPA should take deportation into account when making a parole decision.

4.130 The Police portfolio submitted that SPA should not grant parole if there is no effective way to monitor or enforce parole conditions.[154] To support this approach, the CAS Act could be amended to state that offenders who are likely to be deported upon leaving custody must not be granted parole. To prevent potential deportees from being treated more harshly than otherwise similar offenders, this option would require sentencing courts to have regard to an offender's immigration status when sentencing. In order to do this, an offender's immigration status would have to be definitively known at the time of sentencing, even though it could be many years before deportation becomes a possibility.

4.131 Under such a provision there would inevitably be cases where deportation was confirmed at the time of parole consideration but the possibility of deportation was not known or considered at sentencing. Implementing this option would give rise to significant sentence disparity for such offenders.

4.132 Justice Action and Legal Aid NSW submitted that SPA should not take deportation into account at all when making a parole decision, although Legal Aid NSW commented that it appreciates the "practical considerations" that likely deportation presents for SPA.[155] This option would not require an offender's immigration status to be confirmed at the time of parole consideration but it would not resolve the perception that deportees have received a discounted sentence through being paroled and then immediately deported. Perceptions of inadequate punishment would only be resolved if the sentencing court took deportation (and so the "extinguishing" of the parole period) into account when setting the sentence. Again, this would require an offender's immigration status to be known at time of sentencing and could result in sentence disparity when it is not known.

4.133 The former chairperson of SORC argued that, at least in the case of offenders who come to Australia specifically to commit the offence for which they are imprisoned, it is impossible for SPA to make the parole decision in the same way as it does for other offenders. He submitted that such offenders have never been part of NSW community life and will not be once they are deported, so SPA cannot assess "the likelihood of the offender being able to adapt to normal lawful community life" as is required by s 135(2) of the CAS Act. He proposed that the sentencing process should be amended so that, at the time of sentence, the court specifies the factors that will justify the offender's release on parole if deportation is likely to be an issue.[156] Again, this option would require the sentencing court to be made aware of an offender's immigration status and would not resolve those cases where this did not occur. Requiring a sentencing court to specify factors that SPA must apply to a potentially complex fact situation many years later presents some difficulties. Such an approach would run counter to our conclusions on the question of setting parole

154. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16,* 4.
155. Justice Action, *Submission PA13*, 4; Legal Aid NSW, *Submission PA4*, 15-16.
156. D Levine, *Submission PA34*, 1.

conditions, that is, that a court is not well placed at the time of sentencing to predict the circumstances that will apply nearer the end of the sentence.[157].

4.134 The NSW Department of Justice and a minority of SPA members proposed instead that, in cases where the offender may be deported, SPA should refer a case back to the court for a redetermination of the sentence.[158] This proposal was previously considered in the 2005 Moss review of the CAS Act. The review recommended that:

> where it is known or suspected that an offender will be deported when released on parole, the offender be remitted to the sentencing court prior to the expiry of the non-parole period for re-sentencing.[159]

4.135 The NSW Department of Justice has informed us that this proposal was discussed at a variety of intergovernmental forums with a view to achieving nationally consistent legislation but no agreement could be reached.[160]

4.136 This option would require offenders to be accurately identified as subject to deportation at the time for decision. Offenders who are paroled where SPA is unaware of their immigration status could be deported at some time during the parole period, frustrating the purpose of such an amendment. This option may also impose a significant workload on courts and be administratively difficult to coordinate within the normal timeframes for parole consideration.

4.137 The Law Society of NSW, the NSW Bar Association and the Police Association of NSW supported dealing with deportation on a case by case basis according the factors listed above at paragraph 4.120.[161] NSW Young Lawyers also supported such an approach but submitted that item (j) should be excluded from the list of factors that SPA should consider and that, when considering item (b), SPA should give particular attention to whether issues such as language difficulties prevented the offender from participating in rehabilitation programs.[162] Likely deportation can also prevent an offender from progressing to the less restrictive security classifications that are necessary for participation in programs such as external leave, which can make it difficult for the offender to satisfy SPA's normal requirements before granting parole.[163]

4.138 A majority of SPA members submitted that:

> The Authority overwhelmingly believes that regardless of what community an offender is being released to, consideration of parole should occur in the same manner. Alternatively, the measure of parole consideration should be somewhat

157. Para [3.8].
158. NSW Department of Justice, *Submission PA32*, 15; NSW, State Parole Authority, *Submission PA14*, 9.
159. I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (Corrective Services NSW, 2005) tabled in the NSW Legislative Assembly on 1 April 2008, 111.
160. NSW Department of Justice, *Submission PA32*, 14.
161. Law Society of NSW, *Submission PA5*, 4; NSW Bar Association, *Submission PA11*, 7; Police Association of NSW, *Submission PA6*, 15-16.
162. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 13.
163. M Grewcock, "Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 *Migration Act 1958*" (2011) 44 *Australian and New Zealand Journal of Criminology* 56, 62-63.

> higher for those offenders being removed from Australia given there is no parole supervision in an alternative jurisdiction.[164]

4.139 But the submission went on to add:

> Consideration should be given as to whether the Judge knew at time of sentencing that the offender was of interest to [DIBP] and whether they came to Australia for the purpose of committing an offence or were a non-citizen at the time of the offence.[165]

Our view on the way SPA considers deportation

4.140 The question of parole and deportation is a complex one. We consider that there are two main issues in play:

- The issue of adequacy (or inadequacy) of punishment, and the possibility of disparity of punishment.
- The issue of community safety, both in NSW and in any overseas community where the offender may travel after deportation.

4.141 Our view is that community safety is the only issue that can be relevant to SPA's decision making. Questions of the adequacy or inadequacy of punishment are beyond the scope of the parole decision maker's role. Our view is that some of the items currently listed in SPA's *Operating Guidelines* as relevant to parole decision making for potential deportees confuse the issue by inviting SPA to consider the adequacy of punishment.

4.142 If SPA is only concerned with community safety, the remaining question is whether SPA should, in addition to considering the safety of the community in NSW, consider the safety of the community in any country an offender will travel to if deported, taking into account that parole supervision will not occur in any such country.

4.143 There are some problems with SPA taking into account the safety of the community in another country. One is that SPA can never, with complete accuracy, predict whether an offender will be deported. Even if SPA has a definite indication from the Commonwealth authorities that they will seek to deport the offender, much can conceivably occur to prevent this happening. Another problem is that considering the safety of the community in the destination country – at least in the sense of taking into account that the offender will not be supervised if granted parole and deported – has an extraterritorial aspect that could sit uncomfortably with SPA's role as the parole decision maker in NSW. On the other hand, it can be argued that it would be irresponsible for SPA to disregard the safety of a community outside of NSW by granting parole in a situation where SPA would not have granted unsupervised parole if the offender were to remain in NSW.

4.144 On balance, we consider that SPA, when it is making a parole decision about an offender who may be deported, should, in addition to considering the risk to community safety in NSW, also have regard to the risk to community safety in any

164. NSW, State Parole Authority, *Submission PA14*, 9.

165. NSW, State Parole Authority, *Submission PA14*, 9.

country to which the offender travels after deportation and to the fact that parole supervision will not occur in any such country. This approach allows SPA effectively to make the parole decision in the same way for offenders who may be deported as it does for Australian citizens under s 135(1) of CAS Act, that is, weighing the risks created by release on parole against the reduction in risk likely to be achieved through a period of parole in this State.

4.145 Under this approach, it would not be necessary for SPA to have definitive information about an offender's immigration status. SPA could take into account how likely it is that an offender will be deported, when it calculates the risk that the offender's release poses to community safety here or overseas and the reduction in risk likely to be achieved through parole supervision in this State if that occurred. This would require an assessment of the likelihood of deportation based on available information.

4.146 We expect that high risk offenders who are very likely to be deported would be refused parole because their parole release would create a large risk to community safety (whether overseas or in NSW) which could not be mitigated through parole supervision. On the other hand, some low risk offenders who are likely to be deported might be granted parole. A very low risk offender who will certainly be deported might be granted parole simply because the risk to community safety is very low irrespective of supervision on release (for example because the offender is physically incapacitated, or because the offender has demonstrated successful rehabilitation in custody). For those cases in between these extremes, SPA might, for example, decide to parole an offender with a medium risk of reoffending but who was likely to be deported on the basis that the offender would be returned to pro-social family and friends, employment and suitable accommodation all of which would help reduce the risk of reoffending. In any case, since it is always possible that the offender may not be deported, SPA could take into account the fact that the offender would be subject to supervision if he or she remains in NSW.

4.147 Approaching the issue of deportation in this way does not resolve the first issues we identified in this section - whether a potential deportee has spent "enough" time in custody or whether parole would be a "discount" on the offender's sentence or result in different treatment. For example, an offender who is highly likely to be deported upon release might not be paroled, when SPA would otherwise have granted parole because parole supervision in NSW would have mitigated the risk to community safety. We acknowledge that, in theory, the option of a mechanism to refer cases back to the court at the time of parole consideration for a redetermination of the sentence would address this. However there are many practical difficulties in implementing such an option.

4.148 Also, our recommendation will not deal with situations where offenders are released from immigration detention and have not been assessed for suitable accommodation. This issue is best addressed by ensuring the Commonwealth communicates effectively with SPA and Corrective Services NSW, so that SPA and Corrective Services NSW can respond appropriately, for example, by taking action to amend an offender's parole conditions.

4.149 We propose that the CAS Act be amended to deal expressly with the situation of offenders who may be deported upon release. It is necessary to amend the CAS

Act because the consideration of community safety might otherwise be construed as being limited to the safety of the community in this country.

4.150 This new provision will render unnecessary the current list in SPA's *Operating Guidelines* of factors that SPA must consider in deportation cases. We have already noted that several of the existing items in that list may cause confusion by inviting SPA to consider the adequacy of punishment rather than community safety. The list should, therefore, be deleted.

Recommendation 4.10: Parole for offenders likely to be deported

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, when considering parole for an offender who may be subject to deportation if released on parole, the State Parole Authority must take into account:

(a) the likelihood that the offender will be deported when released on parole, and

(b) the risk to community safety in any country the offender may travel to during the parole period if deported.

(2) The current list in the Authority's *Operating Guidelines* of factors that the Authority must consider in deportation cases should be deleted.

5. Parole decision making for serious offenders

In brief

The Serious Offenders Review Council (SORC) performs a valuable gatekeeping role in parole decision making for serious offenders. It should use the same decision making test and considerations in carrying out its parole functions as the State Parole Authority (SPA). We recommend no change to the position that SPA may grant parole only in exceptional circumstances, where SORC has advised against parole for a serious offender. We also recommend that a number of small amendments be made to the legislation to clarify the relationship between the parole system and the *Crimes (High Risk Offenders) Act 2006* (NSW).

5.1 This chapter focuses on serious offenders. The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) defines "serious offender" and includes a range of provisions about the management of serious offenders and their release on parole. We consider the definition of "serious offender", the parole decision making process for these offenders and whether the interface between the parole system

and the *Crimes (High Risk Offenders) Act 2006* (NSW) (CHRO Act) can be improved.

The management of serious offenders

5.2 Serious offenders, like other prisoners, are managed in custody day to day by Corrective Services NSW. However, before making decisions about classification, placement and case plans for serious offenders, the Commissioner of Corrective Services must consider advice and recommendations from the Serious Offenders Review Council (SORC). The Commissioner is not bound to follow SORC's recommendations.[1] In 2013, 1360 of 1470 SORC recommendations were followed.[2]

5.3 SORC is an independent statutory body. SORC uses Assessment Committees to interview serious offenders and speak to prison staff about their progress in custody. Committee notes and proposals are tabled at SORC's meetings, as well as other material from the serious offender's file. It may obtain reports from psychiatrists and psychologists to inform its deliberations, and it uses these materials to make recommendations to the Commissioner about a serious offender's ongoing classification, placement and program participation.[3]

5.4 When a serious offender is being considered for parole, SORC's experience and involvement with the offender's management contributes to the parole decision making process through advice and reports to the State Parole Authority (SPA).[4] SPA must take into account a report from SORC before deciding whether to release a serious offender on parole.[5]

5.5 SORC's involvement helps to ensure that the most serious offenders in the correctional system receive more intensive management, intervention and scrutiny than other offenders.

Definition of "serious offender"

5.6 Section 3(1) of the CAS Act defines "serious offenders" as an offender:

- serving a sentence of life imprisonment
- serving a non-parole period of 12 years or more, or several non-parole periods totalling 12 years or more
- who is for the time being required to be managed as a serious offender in accordance with a decision of the sentencing court, SPA or the Commissioner
- serving a sentence for murder, or

1. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 14(2), cl 20(2), cl 29(3).
2. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014).
3. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 12.
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 197(2)(b).
5. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(2)(i).

- classified at the highest level of security classification (AA for males and Category 5 for females) or designated by the Commissioner as an extreme high risk restricted inmate.[6]

5.7 On 31 December 2013 there were 774 serious offenders in custody (7.6% of the total inmate population).[7]

Referral for management as a serious offender

5.8 As of 31 December 2013, 17 of the 774 serious offenders managed by SORC had been referred by the Commissioner. One offender was managed as a serious offender because of a referral by SPA.[8] The definition of "serious offender" in s 3(1) of the CAS Act is the only reference to the Commissioner, SPA or the sentencing court referring an offender to SORC for management as a serious offender. There is no provision that expressly enables such a referral.

5.9 Although courts make recommendations in sentencing remarks about the care and treatment offenders should receive in custody, we are informed that they do not in practice ever refer an offender to SORC for management as a serious offender.[9] Likewise, in recent years, SPA has ceased to refer offenders to SORC.[10] In cases where SPA believes that SORC should manage an offender, SPA may forward a recommendation to the Commissioner, who may then refer the offender to SORC.

5.10 In our view, the practice of the Commissioner referring offenders to SORC should be continued and the CAS Act should be amended to reflect this practice. We recommend that paragraph (d) in the definition of "serious offender" in s 3(1) of the CAS Act, which refers to an offender being managed by SORC in accordance with a decision of the sentencing court, SPA or the Commissioner, should be deleted. The CAS Act should expressly authorise the Commissioner to declare an offender to be a serious offender and the definition of "serious offender" should include an offender subject to such a declaration.

Recommendation 5.1: Power to declare an offender a "serious offender"

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should expressly authorise the Commissioner of Corrective Services to declare an offender to be a serious offender and the definition of "serious offender" in s 3(1) of the Act should be amended accordingly.

(2) The definition of "serious offender" in s 3(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended

6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1) (definition of "serious offender") and *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 24(3), cl 25(3), cl 27(5).
7. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 5.
8. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 22.
9. Corrective Services NSW, *Consultation PAC24*; Roundtable: legal practitioners, *Consultation PAC28*.
10. NSW, State Parole Authority, *Consultation PAC27*; Roundtable: legal practitioners, *Consultation PAC28.*

by deleting paragraph (d) which refers to an offender being managed as a serious offender in accordance with a decision of the sentencing court, State Parole Authority or the Commissioner.

Should the definition include high risk offenders?

5.11 The CHRO Act seeks to protect the community from recidivist sexual and violent offenders by detaining or supervising them after their sentences expire. Under the CHRO Act, the Attorney General may apply to the Supreme Court for a continuing detention order (CDO) or an extended supervision order (ESO) for a high risk violent or sex offender.[11] An application can only be made during the last six months of the offender's sentence.[12] The Supreme Court can make an order if it is satisfied that there is a high degree of probability that the offender poses an unacceptable risk of committing a serious violence offence or serious sex offence if he or she is not kept under supervision.[13] CDOs and ESOs can be made for up to five years and offenders can be subject to multiple consecutive orders.[14]

5.12 Offenders amenable to an order under the CHRO Act are those who have been sentenced for:

- offences where the offender intentionally or recklessly caused the death or grievous bodily harm of the victim
- serious sex offences against children punishable by at least seven years imprisonment, or
- serious sex offences against adults punishable by at least seven years imprisonment and committed in circumstances of aggravation.[15]

5.13 Amendments made to the CHRO Act (but not yet commenced)[16] will establish a High Risk Offenders Assessment Committee. One of the functions of this committee will be to review offenders' risk assessments and make recommendations to the Commissioner of Corrective Services NSW for action under the CHRO Act.[17]

5.14 The CHRO Act has a similar ultimate aim to the "serious offender" stream of the parole system in as much as it focuses attention on protecting the community from the highest risk offenders. Ideally, successful management by SORC of a serious offender would lead to rehabilitation and remove the need for an order under the CHRO Act at the end of the sentence. However, some potential high risk offenders have committed offences that fall outside the current definition of "serious offender"

11. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5H-5J,s 13A-13C. Offenders must have committed a violent offence that resulted in the death or grievous bodily harm of a person recklessly or with intent, or have committed a serious sex offence.
12. *Crimes (High Risk Offenders) Act 2006* (NSW) s 6(2), s 13C(3).
13. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5B, s 5E.
14. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10, s 18.
15. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5, s 5A.
16. *Crimes (High Risk Offenders) Amendment Act 2014* (NSW).
17. *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AC.

in the CAS Act.[18] These potential high risk offenders will, therefore, not receive the benefit of SORC supervision and management during their time in custody.

Stakeholder submissions on expanding the definition of "serious offender"

5.15 Some stakeholders supported expanding the definition of "serious offender" to include "high risk offenders" to improve the interface between parole and the CHRO Act. NSW Young Lawyers submitted that if SORC managed "high risk offenders", SORC could recommend applications under the CHRO Act, notify SPA of any such applications, and provide the Supreme Court with more detailed analysis of the offender's progress.[19] The Aboriginal Legal Service and the Police Association of NSW submitted that SORC management might improve the system for managing high risk offenders and making applications under the CHRO Act.[20]

5.16 Other stakeholders were opposed to aligning the definition of "serious offender" with the types of offenders who could be subject to the CHRO Act.[21] The NSW Department of Justice and the NSW Bar Association submitted that the parole system and the CHRO Act are separate schemes involving different considerations, rules of procedure and jurisdictions.[22] Some stakeholders supported alternative ways of expanding the definition of "serious offender" such as lowering the sentence length threshold[23] or removing sentence length from the definition.[24]

Our view: referral mechanism should be used

5.17 SORC management of high risk sexual and violent offenders (who do not currently fall within the definition of "serious offender") could bring additional focus to these offenders and make it more likely that they participate in in-custody programs to reduce their likelihood of reoffending. In addition, because of its role in continually managing and reviewing offenders over a number of years, SORC might foresee the need for applications under the CHRO Act well in advance of the date for making an application and ensure that all relevant recommendations and instructions were made before the last six months of the offender's sentence. This may address dissatisfaction with delays in making applications under the CHRO Act that has at times been expressed by the Supreme Court.[25] However, placing all violent and sexual offenders who might possibly be subject to the CHRO Act under SORC's management would significantly increase its workload.

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18. *Attorney General (NSW) v Tillman* [2007] NSWSC 605; *Attorney General (NSW) v Cornwall* [2007] NSWSC 1082; *Attorney General (NSW) v Winters* [2007] NSWSC 1071; *Attorney General (NSW) v Quinn* [2007] NSWSC 873; *NSW v Brookes* [2008] NSWSC 473.
19. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 18.
20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 9; Police Association of NSW, *Submission PA6*, 19.
21. NSW, State Parole Authority, *Submission PA14*, 13; NSW Bar Association, *Submission PA11*, 9; Legal Aid NSW, *Submission PA4*, 19; Justice Action, *Submission PA13*, 6.
22. NSW Department of Justice, *Submission PA32*, 21-22; NSW Bar Association, *Submission PA11*, 9.
23. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 5.
24. Victims of Crime Assistance League Inc NSW, *Submission PA18*, 2-3.
25. *NSW v Phillips* [2014] NSWSC 205 [3]–[18]; *Attorney General (NSW) v Tillman* [2007] NSWSC 356 [53]-[54].

5.18 As an alternative to expanding the definition of "serious offender", we consider that the Commissioner of Corrective Services should refer high risk sexual and violent offenders who are identified early as candidates for an application under the CHRO Act to SORC for management as serious offenders. The group most likely to benefit from SORC's management could be those offenders who have sentences of a length that would put them close to meeting the definition of "serious offender". For example, an offender who might usefully be referred to SORC could be an offender who has committed serious sex offences, is serving a non-parole period of nine years and has an offending history that makes them a likely candidate for a CHRO Act application if they fail to address their offending behaviour. We recommend that Corrective Services NSW develop a policy that delineates the relevant group of offenders and facilitates their referral to SORC substantially before the end of the non-parole period.

Recommendation 5.2: Referring high risk sexual and violent offenders to the Serious Offenders Review Council

(1) Corrective Services NSW should develop a policy to identify those sexual and violent offenders who are likely candidates for an application under the *Crimes (High Risk Offenders) Act 2006* (NSW).

(2) The Commissioner of Corrective Services should declare such offenders to be serious offenders as early in their sentences as is possible.

Parole decision making for serious offenders

5.19 As we have already noted, when SPA is deciding whether to release a serious offender on parole it must take into account advice from SORC. Other than SORC's advice, SPA considers the same matters for serious offenders as it does for non-serious offenders.

No separate test for serious offenders

5.20 The Police Association of NSW submitted that:

> special provision should be made in respect of parole for violent offenders and serious sexual offenders including pedophiles. These offenders need special and more careful consideration before they are released on parole than other offenders.[26]

5.21 The 2013 Callinan review of the parole system in Victoria recommended that a stricter test should be applied to parole decision making for serious offenders compared to other 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".[27] Instead of pursuing this recommendation, Victoria

26. Police Association of NSW, *Submission PA6*, 18.

27. I Callinan, *Review of the Parole System in Victoria* (2013) 64, 90-91. Though note that this proposal was aimed at a group of offenders ("potentially dangerous parolees") that would not be

has created a new "Serious Violent Offender or Sexual Offender Parole division" of the Parole Board. All serious sex or violent offenders must be recommended for parole by a regular division of the Board and then also approved by the Serious Violent Offender or Sexual Offender Parole division.[28] This new structure is analogous to the role of SORC.

5.22 Many stakeholders opposed SPA using a different test for serious offenders. NSW Young Lawyers noted that the complexity of the decision making process should not be exacerbated by adding different categories of tests.[29] The NSW Bar Association shared the concern about complicating SPA's task with extra tests and also opposed a different test for serious offenders.[30] The Aboriginal Legal Service submitted that SORC and Corrective Services NSW's recommendations are already a highly rigorous and sufficient process of assessment.[31] Other stakeholders, notably SPA, were also opposed to a separate test for serious offenders.[32]

5.23 In 2013, SPA granted parole to 24 serious offenders and refused parole to 62 serious offenders. In other words, SPA granted parole to about 28% of the serious offenders it considered. For non-serious offenders, SPA granted about 77% of applications (947 non-serious offenders granted parole and 278 non-serious offenders refused parole).[33] This large difference in grant rate indicates that SPA already distinguishes appropriately between serious and non-serious offenders, when using the same parole decision making framework. We agree with those stakeholders who submitted that a separate test for serious offenders would needlessly complicate SPA's decision making process. SORC already ensures that serious offenders receive additional scrutiny. SPA should continue to apply the same test to parole decision making for all offenders.

Considerations for serious offenders serving redetermined life sentences

5.24 In 1989, sentencing legislation was amended to apply "truth in sentencing" principles to offenders who had previously received a life sentence. Under the new provisions, offenders could apply to the Supreme Court to set a non-parole period for the life sentence, or a non-parole period combined with a new specified head sentence.[34]

5.25 Under s 154 of the CAS Act, when these offenders are eligible for parole, SPA must make its decision giving "substantial weight to any relevant recommendation, observations and comments made by the sentencing court" and "must, in particular, have regard to the need to preserve the safety of the community". In effect, s 154

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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.

28. *Corrections Act 1986* (Vic) s 74AAB.
29. NSW Young Lawyers Criminal Law Committee, *Submission PA8,* 15.
30. NSW Bar Association, *Submission PA11*, 8
31. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 8.
32. NSW, State Parole Authority, *Submission PA14*, 11; Law Society of NSW, *Submission PA5*, 5; Legal Aid NSW, *Submission PA4*, 18; Justice Action, *Submission PA13*, 6.
33. NSW, State Parole Authority, *Annual Report 2013* (2014) 14.
34. *Sentencing Act 1989* (NSW) s 13A – now *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1.

adds to the matters that SPA must consider when making the parole decision for this particular group of serious offenders.

5.26 Under s 199 of the CAS Act, SORC must also consider the same matters when providing advice and reports to SPA concerning the release of these offenders on parole. As at October 2014, there were 17 offenders in NSW serving redetermined life sentences to whom these provisions would apply, and 15 offenders serving life sentences that have not yet been redetermined.[35]

5.27 Section 154A applies specially to serious offenders serving redetermined sentences where, at the time the original life sentence was imposed, the sentencing court recommended that the offender should never be released. As at October 2014, there was only one offender in this situation.[36] The provision prohibits SPA from paroling these offenders unless the offender:

- is in imminent danger of dying, or is incapacitated to such an extent that he or she no longer has the physical ability to do harm to any person, and
- has demonstrated that he or she does not pose a risk to the community.

5.28 This amounts to a prohibition on parole for this group other than in very exceptional circumstances.

Our view: simplify the test

5.29 As discussed in the previous section, our view is that there should be one test that SPA applies to both serious and non-serious offenders which, under our recommendations, would put the interests of community safety at the centre of decision making. SPA has demonstrated that it is well able to differentiate the risks posed by serious offenders.

5.30 In this context, we have reached the following views about the provisions relating to people serving life sentences and redetermined life sentences:

- We consider that s 154 is unnecessary and should be repealed. Our proposed general test requires SPA to determine release on parole in the interests of community safety, and SPA must consider the sentencing court's remarks. The requirement that SPA particularly consider these factors in this kind of case is superfluous, and adds unnecessary complexity to SPA's task. In recommending repeal, we do not think this would change in practice the way SPA currently deals with this small group of offenders.
- We also consider that s 199 is superfluous and should be repealed. In the following paragraphs, we recommend that SORC approach the task of making recommendations to SPA on the same basis as SPA makes the parole decision.[37] This approach would render s 199 unnecessary, for the same reasons that s 154 is unnecessary. Again, we think this repeal would make no difference to SORC's approach in practice.

35. Information provided by Corrective Services NSW (29 October 2014).
36. Information provided by Corrective Services NSW (29 October 2014).
37. See para [5.34] and Recommendation 5.4.

- However, we consider s 154A should be retained. This section operates as a rule against parole, other than in some very exceptional circumstances, for a very small group of the most serious offenders, who are subject to a statement by the sentencing court to the effect that they should never be released from imprisonment.

Recommendation 5.3: Offenders serving redetermined life sentences – repeal of s 154 and s 199

Sections 154 and 199 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.

SORC and SPA should consider the same factors

5.31 In preparing advice and reports for SPA on releasing serious offenders on parole, SORC must currently consider:

(a) the public interest

(b) the offender's security classification history

(c) the offender's conduct in custody

(d) the offender's participation in and success in rehabilitation programs

(e) any relevant reports, and

(f) any other relevant matter.[38]

5.32 When considering the public interest, 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,

(i) the need to maintain public confidence in the administration of criminal justice,

38. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(2A).

(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,

(m) such other factors as are prescribed by the regulations.[39]

5.33 These two lists overlap to some extent. They also have significant similarities with the existing test and considerations that apply to SPA when deciding whether to release an offender on parole.

5.34 In Chapter 4 we discussed SPA's decision making and the current public interest test. We recommended that a new test should be adopted, framed around risk to community safety.[40] Several stakeholders supported SORC using the same test and factors that SPA considers when making the parole decision.[41] We agree with this position. Our proposed new test for SPA focuses attention on risk to community safety, balanced against the possibility of managing this risk and the likely gains of releasing the offender on parole. SORC should apply this test (and the associated considerations) when it formulates its recommendation to SPA about a serious offender's parole.

Recommendation 5.4: Matters the Serious Offenders Review Council should take into account when making recommendations to the State Parole Authority

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that, when reporting to and advising the State Parole Authority, the Serious Offenders Review Council must have regard to the considerations that the Authority takes into account when it makes a parole decision.

SORC's advice to SPA and "exceptional circumstances"

5.35 Section 135(3) of the CAS Act provides:

> Except in exceptional circumstances, the Parole Authority must not make a parole order for a serious offender unless the Review Council advises that it is appropriate for the offender to be considered for release on parole.

5.36 If SPA finds exceptional circumstances and rejects SORC's advice, it must provide SORC with its reasons and give SORC 21 days to make submissions before making a final decision to grant parole to the offender.[42]

39. *Crimes (Administration of Sentences) Act 1999* (NSW) s 198(3).
40. Recommendation 4.1.
41. NSW, State Parole Authority, *Consultation PAC27*; Roundtable: legal practitioners, *Consultation PAC28.*
42. *Crimes (Administration of Sentences) Act 1999* (NSW) s 152.

5.37 We understand that since the exceptional circumstances provision was introduced in 2005, SPA has not released a serious offender on parole without SORC recommending that it is appropriate to consider releasing the offender. In effect, the restriction has made SORC a gatekeeper that determines whether a serious offender is ready for parole.

5.38 Although supporting SORC's role in providing advice and reports to assist SPA's decision making, Legal Aid NSW and the Aboriginal Legal Service submitted that the restriction on SPA's discretion should be removed.[43] These stakeholders argued that SPA is the ultimate parole decision maker and should have greater discretion to grant parole to serious offenders.

5.39 SPA took a different view, submitting that SORC needs to be able effectively to prevent SPA granting parole "if in their experience/s the offender is not ready to be considered for parole". SPA observed:

> SORC plays an important role in case managing offenders through the custodial system and acts as a filtering process by ensuring that a number of significant factors have been met, prior to SPA considering parole.[44]

5.40 We agree with SPA that SORC makes an important contribution to parole decision making and has invaluable knowledge from years of case management and monitoring of serious offenders. SORC's involvement in case management and its other functions in the correctional system give it experience in dealing directly with offenders that SPA does not have. The "exceptional circumstances" provision gives pre-eminence to SORC's assessment of readiness for parole. It is a crucial safety mechanism that helps to ensure that serious offenders are not released before they are properly prepared.

5.41 In preserving SORC's role, however, we consider that the existing provision should be amended to clarify that SORC's advice to SPA should be about whether the serious offender should be released on parole and not about whether SPA should consider whether the offender should be released as the current drafting suggests.

Recommendation 5.5: The Serious Offenders Review Council's recommendation to the State Parole Authority

Section 135(3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be redrafted to state that, except in exceptional circumstances, the State Parole Authority must not make a parole order for a serious offender unless the Serious Offenders Review Council advises that the offender should be released on parole.

SORC's procedures for making recommendations to SPA are adequate

5.42 We describe SPA's decision making process in Chapter 6. There are some procedural protections for offenders in that they:

43. Legal Aid NSW, *Submission PA4*, 17; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 8.
44. NSW, State Parole Authority, *Submission PA14*, 11.

- are entitled to receive the reports and documents underpinning SPA's decision if SPA intends to refuse parole
- are invited to apply for a review hearing if SPA intends to refuse parole, and can make written submissions to SPA as part of this application, and
- can be legally represented if a review hearing is held and make written and oral submissions to SPA.[45]

5.43 There are no similar procedural protections in place for offenders in regard to SORC decisions. SORC's meetings are closed to the public unless it determines in a particular case that the proceedings are to be conducted wholly or partly in public.[46] The CAS Act does not give serious offenders a right to appear before SORC or make submissions when SORC is formulating its recommendation to SPA. On the other hand, serious offenders are given copies of SORC's report if SPA forms an intention to refuse parole. Offenders can make written submissions to SPA about the contents of the report as part of their application for a review hearing.[47]

5.44 SORC works in a different way to SPA. It gains knowledge of offenders through face to face meetings with offenders, careful monitoring and liaison with prison authorities. Offenders can speak to SORC members in person through its Assessment Committees throughout their sentence. Serious offenders have the opportunity to put their views about their case management and parole to assessment committee members. This is a hands on process suitable for managing serious offenders.

5.45 In light of the different ways in which the two bodies operate, we do not consider that the same procedural protections that apply to SPA's deliberations should be applied to SORC's deliberations. No change needs to be made to SORC's existing procedures.

Attendance of SORC representative at SPA meetings

5.46 A SORC member is entitled to attend SPA meetings whenever a serious offender is being considered.[48] Legal Aid NSW noted that SORC used to exercise this right and submitted that the practice should be revived because the SORC representative can give SPA up to date information about offenders and advice about SORC's next sitting date.[49] SPA and SORC's submissions did not raise this as an issue.

5.47 It is important for SPA to have up to date information about offenders available to it. A SORC representative may be able to provide further insight where obstacles, such as lack of external leave, have made granting parole inappropriate. While SORC does not currently exercise its right to be represented at SPA meetings, SORC may wish to revive this practice in future. In our view, this provision should be retained for possible future use.

45. *Crimes (Administration of Sentences) Act 1999* (NSW) s 146.
46. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 2 cl 11(4)(a).
47. *Crimes (Administration of Sentences) Act 1999* (NSW) s 146.
48. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 12.
49. Legal Aid NSW, *Submission PA4*, 18.

Parole and the Crimes (High Risk Offenders) Act

5.48 We have already discussed whether the definition of "serious offender" should be extended to include offenders who are eligible at the end of their sentences for an ESO or CDO under the CHRO Act. We concluded that these offenders should not be automatically categorised as serious offenders. Instead, the Commissioner should be able to declare selected offenders to be "serious offenders", if they are not otherwise covered by the definition of "serious offender" in the CAS Act, once it becomes apparent that they are likely to be candidates for a CHRO Act application.[50]

5.49 In this section, we consider how parole decision making should work if it occurs in the last 6 months of an offender's head sentence which is the time when the State can lodge an application under the CHRO Act.[51]

5.50 The intention of the CHRO Act is that it apply to "high risk, hard core offenders" who do not make an attempt to rehabilitate in custody, who never qualify for or obtain parole and remain a very high risk at the end of their sentence.[52] However, it is possible that SPA could be considering a parole issue while a HRO application is underway and the interaction between the two systems can cause issues for SPA. SPA might be considering whether to:

- release the offender on parole
- re-release the offender on parole (if the offender had previously been on parole and had the parole order revoked), or
- rescind a revocation of parole (which would mean the offender would be re-released on parole).

5.51 During the 6 month period, at the same time that SPA is making its decision, the following scenarios may arise under the CHRO Act:

- an application might seem likely but not yet have been made
- an application might have been made but not yet determined
- an interim CDO or ESO might have been made but the application for a final order has not yet been determined, or
- a final CDO or ESO might have been made but not yet commenced.

5.52 There is one limitation. The State cannot apply for a CDO for an offender who is on parole, although the State can apply for a CDO for an offender who has been paroled but returned to custody (for breach) and can also apply for an ESO while an offender is on parole.

5.53 The Supreme Court can make an interim ESO or CDO if an application for a CHRO Act order has been made but the Court decides that there is not sufficient time to

50. Recommendation 5.2.
51. *Crimes (High Risk Offenders) Act 2006* (NSW) s 6, s 13C(3).
52. NSW, *Parliamentary Debates*, Legislative Assembly, 29 March 2006, 21730.

determine the application for a final order before the offender's sentence ends. The Court must be satisfied that the matters alleged in the application, if proved, would justify a final CDO or ESO.[53] The Supreme Court can make interim orders in a series up to a maximum total length of three months.[54] The Supreme Court has made at least one interim order in response to the 13 CHRO Act applications filed in 2013-14.[55]

5.54 If SPA was considering an offender for parole (or considering rescinding a revocation) after an interim order has been made but before a final order has been determined, it would be in the final months of an offender's head sentence.

Interface between parole system and Crimes (HRO) Act is unclear

5.55 The interrelationship between the CHRO Act and the parole system is not fully resolved in the legislation, and some issues arise that affect SPA decision making within the last 6 months of the sentence. Four particular questions arise:

- Can SPA take future or existing CHRO Act orders into account?
- How does parole interact with a CDO?
- How does a parole order interact with an ESO?
- What happens when SPA rescinds a revocation?

Can SPA take future or existing Crimes (HRO) Act orders into account?

5.56 The likelihood or reality of a CHRO Act order materially affects the decision that SPA must make. When it is deciding whether to grant parole, SPA must balance the following risks:

- the risk of releasing the offender on parole, and
- the risk of *not* releasing the offender, and instead allowing the offender to be released at the end of the sentence with no parole supervision or monitoring.

If the Supreme Court makes a CDO or ESO, the offender will be kept in custody or supervised beyond the end of the head sentence. This will eliminate or minimise the risks of refusing parole to the offender.

5.57 However, it is not currently clear whether SPA can take into account the fact that a CHRO Act application is likely, or has been made, or that the Supreme Court has granted an interim or final order.

5.58 Both the CAS Act and the CHRO Act are silent on the issue, although SPA has a general power, under the CAS Act, to consider "such other matters" as it "considers relevant".[56] An offender has argued in the Supreme Court that the possibility of a

53. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10A, s 10B, s 18A, s 18B.
54. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10C, s 18C.
55. Interim ESOs were imposed in 12 of 13 matters. An interim CDO was made in one matter: *NSW v Scott* [2013] NSWSC 1834.
56. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(2)(k).

future CHRO Act order is an irrelevant consideration for SPA, but the Court did not determine the point.[57]

How does parole interact with a CDO?

5.59 In the case of CDOs, the State can only make an application if an offender is still in custody.[58] As a result, if SPA paroles an offender before the State applies for a CDO, SPA has effectively ruled out the possibility of a CDO. If SPA subsequently revokes parole and returns the offender to custody, the possibility of a CDO application is revived.

5.60 There is some ambiguity in the legislation about how parole and CDOs interact once an application is made. Under the Crimes (HRO), the State can only *apply* for a CDO if the offender is in custody. The legislation does not specify whether the application remains valid if the offender is paroled before the application has been determined. Some weeks or months may pass between the application being filed and the Supreme Court making or refusing an order. This may occur because the Court must order specialist assessments of an offender's mental health and reoffending risk.[59]

5.61 On one interpretation, if SPA grants parole during this period, the CDO application would be invalidated. However, the more straightforward reading is that the CDO application would remain valid even if SPA grants parole before it is determined. This could lead to the undesirable result of an offender being released to a short period on parole and then returned to custody after the court imposes a CDO.

5.62 The provisions of the CHRO Act governing when interim and final CDOs commence are also somewhat obscure. Section 18 states that a CDO commences when it is made "or when the offender's current custody expires", whichever is the later.[60] If release on parole amounts to an offender's custody "expiring", then releasing an offender would activate any interim or final CDO that had already been made. The parole would be revoked immediately upon commencing and the offender would remain in custody.[61] This leads to waste of resources if SPA still considers parole in full, including any parole conditions because it is not sure if it can take the existence of the interim or final CDO into account.

5.63 Activating an interim CDO in this way may also significantly shorten the timeframe the State has to prepare materials for the Supreme Court to consider granting a final CDO.

5.64 If release on parole is not characterised as an offender's current custody "expiring", then an existing interim or final CDO would not commence until the end of the head sentence, even if SPA grants parole in the meantime. Again, this could have the undesirable result of an offender spending some time on parole and then returning to custody under an interim or final CDO.

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57. *Boatswain v State Parole Authority* [2014] NSWSC 501 [65]-[73].
58. *Crimes (High Risk Offenders) Act 2006* (NSW) s 13B, s 13C.
59. *Crimes (High Risk Offenders) Act 2006* (NSW) s 15(4).
60. *Crimes (High Risk Offenders) Act 2006* (NSW) s 18(1)(a).
61. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160A(3).

How does a parole order interact with an ESO?

5.65 The State can apply for an ESO when the offender is in custody or on parole,[62] so SPA granting parole cannot prevent the State from applying for an ESO.

5.66 Some complexity arises about the commencement of ESOs. An ESO commences when it is made or "when the offender's current custody or supervision expires", whichever is the later.[63] This would conceivably cover any period in custody as well as any period of supervision on parole. However, the period of supervision may be less than the period during which the offender is out on parole. For example, there may be no period of supervision, if one has not been imposed in accordance with s 128(3) of the CAS Act, or, if one has been imposed, the period of supervision may have expired after three years and SPA may not have renewed it under cl 218 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW). This means that an interim or final ESO could commence as soon as the offender is released on parole in cases where no supervision has been imposed, or could commence as soon as the supervision period expires and is not renewed.

5.67 Section 160A of the CAS Act provides that "an offender's obligations under a parole order are suspended while the offender is subject to" an interim or final ESO. It also provides that "the offender's obligations under the extended supervision order or interim supervision order are taken to be obligations under the parole order". These provisions may operate in a number of scenarios, including:

- where no supervision has been imposed, or where supervision has expired and not been renewed (in such cases the remaining parole obligations would be suspended in favour of the ESO)
- where an ESO has been imposed and commenced at the end of the head sentence for an offence, the offender has reoffended while subject to the ESO, is returned to custody, convicted for the second offence, and subsequently released on parole, thereby reactivating the original ESO; and
- where an interim ESO has been imposed and the court has fixed its commencement date before the end of any period of supervision during the parole period.[64]

5.68 All three scenarios, although possible in theory, are unlikely to occur very often. In the third scenario, the court is more likely to fix the commencement date of an interim ESO at the end of the supervision period in order to allow the maximum time for an application for a final ESO. The first scenario could only arise in the small proportion of cases where supervision is not imposed as a parole condition, or where the supervision period expires before the end of the parole period (and it is unlikely that this would occur for offenders who are candidates for an ESO). However, this scenario will not arise at all if our recommendations in Chapter 9 are adopted to make supervision a standard condition of parole and to remove the three year limit.[65]

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62. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5I, s 5J.
63. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10(1).
64. *Crimes (High Risk Offenders) Act 2006* (NSW) s 10C(1).
65. Para [9.8]-[9.17]; Recommendation 9.1(2).

5.69 There may be uncertainty about SPA's jurisdiction to deal with breaches of the parole order. Whether or not parole activates the order, if the conditions attached to an interim or final ESO supersede the parole conditions, it would be a clear waste of SPA's resources to consider what conditions should attach to the parole order.

What happens when SPA rescinds a revocation?

5.70 Nothing in the CAS Act or the CHRO Act addresses situations where an offender has been on parole and parole has been revoked but SPA is now considering whether to rescind the revocation. SPA's decision to rescind a revocation can change the end date of the offender's head sentence by several months (or more) depending on whether "street time" applies.[66]

5.71 For example, an offender has 3 months left to serve of the head sentence when he or she breaches and SPA revokes parole. If the offender is not returned to custody until, say, after 2 months of "street time" (that is, with one month left of the original head sentence to serve), the 2 months will be added to the end of the original term. About four weeks later, SPA will hold a review hearing to reconsider the revocation decision. Now the offender has reached the end of the original head sentence but has two months still to serve once street time is added on.

5.72 If SPA confirms the revocation, there is no change to the sentence and the offender remains in custody. At this point, the State could apply for a CHRO Act order, or continue to pursue an existing (but not yet determined) application over the next two months.

5.73 However, if SPA rescinds the revocation, the street time is not added on, the offender's head sentence will expire immediately and the offender will be released. The State cannot apply for a CHRO Act order now and any existing application will be defunct. Even if an interim order has already been made, it may be activated by SPA's rescission decision, which could give the State limited time to prepare for a final order hearing. It is not clear whether SPA can take these effects into account when deciding whether to rescind parole.

Options for reform

5.74 There are a number of ways to resolve these difficulties and to clarify the relationship between the parole system and the CHRO Act. Table 5.1 summarises the options that we have considered.

66. On street time, see para [11.4].

Table 5.1: Options to clarify the interface between parole and the Crimes (HRO) Act

Scenarios	Options				
Application for a CDO or ESO likely but not yet made	SPA must not take into account the possibility of a CHRO Act order for any eligible offender considered during the last 6 months of the head sentence.			SPA may take into account the possibility of a CHRO Act order for an eligible offender who is in the last 6 months of the head sentence.	
Application made but not yet determined	SPA must not take into account the possibility of a CHRO Act order	SPA may take into account the possibility of a CHRO Act order	SPA must not cause offender to be released from custody, either by granting parole or rescinding a revocation	CDO application: SPA must not release an offender from custody, either by granting parole or rescinding a revocation ESO application: SPA must not take into account possibility of a future order. Any order made commences at the end of the offender's parole period (or head sentence if parole if refused).	CDO application: SPA must not release an offender from custody, either by granting parole or rescinding a revocation ESO application: SPA may take into account possibility of a future order. Any order made commences at the end of the offender's parole period (or head sentence if parole if refused).
Interim CDO granted, final order not yet determined	SPA must not cause offender to be released from custody, either by granting parole or rescinding a revocation				
Interim ESO granted; final order not yet determined	SPA must not cause offender to be released from custody, either by granting parole or rescinding a revocation	SPA must not take possibility of a future order into account. Interim order commences at the end of the offender's parole period (or head sentence if parole is refused).	SPA may take possibility of a future order into account. Interim order commences at the end of the offender's parole period (or head sentence if parole is refused).		
Final CDO or ESO imposed but not yet commenced	SPA must not cause offender to be released from custody, either by granting parole or rescinding a revocation			If order is a CDO, SPA must not cause offender to be released from custody, either by granting parole or rescinding a revocation. If order is an ESO, SPA must take order into account. Order commences at the end of the offender's parole period (or head sentence if parole if refused).	

Our conclusions

5.75 The following paragraphs outline our recommendations for dealing with the interaction between parole and the CHRO Act. We have confined ourselves to the parole jurisdiction, and have not proposed amendments to the CHRO Act. We consider, however, that there may be value in the Government considering the issues we raise above about lack of clarity in the legislation.

5.76 None of these recommendations completely resolves the issue of street time when SPA rescinds a revocation.

Application not yet made

5.77 In our view, SPA should not consider the possibility of a CHRO Act order when an application has not yet been made.

5.78 This is the most straightforward option. It is fair and would remove the need for SPA to attempt to predict whether (and what type) of order might be made. SPA could then make its decision in the normal way for these offenders, with all participants being aware that SPA cannot take the possibility of an order into account in its assessment of risks before an application is actually made. In the interests of clarity, the CAS Act should include a provision to this effect.

Application made but not yet determined

5.79 If an application has been made but not yet determined, SPA does not have solid information about whether a CHRO Act order will in fact be made.

5.80 We recommend that the CAS Act specify that SPA may take the CHRO Act application into account. This would allow SPA to take into account a very significant factor in its assessment of the risks of not granting parole.

5.81 We note the high success rate of these applications. Of the 13 applications made in 2013-14, 10 resulted in ESOs and one in a CDO. Only two did not result in the Supreme Court making a final order. In these two cases, the Supreme Court made an interim ESO but the State did not pursue the matter to the final hearing.[67]

5.82 This solution might create an incentive for the State to make applications earlier, rather than later, within the final six month period, so that SPA can take such applications into account.

5.83 We have also considered making it a rule that SPA be prevented from paroling offenders who are subject to a CDO application. This option would prevent uncertainty about an application's viability if the offender is paroled and it would prevent offenders being released on parole and then later returned to custody if an application for an interim or final CDO is successful. A disadvantage of this approach would be that the State could prevent an eligible offender being granted parole at any time during the last six months of the head sentence by making a CHRO Act application. Offenders subject to a CDO application that was subsequently refused would then have lost an opportunity of several months of supervised reintegration on parole.

Interim CDO made

5.84 Once an interim CDO has been made, we consider that SPA should have no jurisdiction to parole an offender or to rescind a revocation of parole. Where an interim CDO is in place, the Supreme Court has reached a view that the matters alleged in support of the application would, if proved, justify a CDO. It could be argued that, in such cases, the offender is unlikely to be a realistic candidate for parole. This approach would also alleviate any uncertainty about the fate of the

67. *NSW v Baker* [2014] NSWSC 699; *NSW v Phillips* [2014] NSWSC 205.

interim CDO, and of the still pending application for a final CDO, if the offender is released.

Final CDO made

5.85 If a final CDO is in place, the Supreme Court has decided that the offender poses a risk that can only be managed through further detention.[68] SPA should not be able to release such offenders. This rule would avoid SPA having to make a useless determination. A decision favourable to the offender would have no effect because of the CDO, and a decision adverse to the offender would be unnecessary because of the CDO.

Interim or final ESO made

5.86 We take a different view on ESOs. In some sense, these orders are an extension of parole or a replacement for a parole period.

5.87 The State can make an application for an ESO when an offender is on parole, and this effectively extends the offender's parole supervision. It seems possible that an offender who is in custody might be both a good candidate for release to a period of parole and subject to an interim or final ESO. For this reason, we recommend that SPA should take any existing interim or final ESO into account when making its decision.

5.88 This would allow SPA to consider a highly relevant factor when it assesses the risks of paroling and not paroling an offender. Under these circumstances, SPA is likely to assess the risks of not paroling the offender as minimal, as the offender will be supervised and managed in the community even without a period on parole. SPA would probably grant parole to very few offenders in this situation. However, it would create more flexibility than a blanket ousting of SPA's jurisdiction

5.89 If SPA grants parole, or rescinds a revocation, in these circumstances, the offender can be managed in the community through a combination of parole and the ESO. If SPA refuses parole, the offender can be kept in custody until the interim or final ESO is activated at the end of the head sentence.

Recommendation 5.6: Parole and the *Crimes (High Risk Offenders) Act 2006* (NSW)

The *Crimes (Administration of Sentences) Act 1999* (NSW) should state:

(a) The State Parole Authority, in deciding whether to:

(i) grant parole to an offender, or

(ii) rescind a revocation of parole

must not take into account the fact that an order under the *Crimes (High Risk Offenders) Act 2006* (NSW) might be made regarding the offender in future unless the State has made an application for such an order.

68. *Crimes (High Risk Offenders) Act 2006* (NSW) s 5D(1), s 5G(1).

(b) If the State has made an application under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, but the application has not yet been determined, the Authority may take the application into account.

(c) If the Supreme Court has imposed an interim continuing detention order or a final continuing detention order under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, the Authority must not make a parole order, or rescind any revocation of the offender's parole.

(d) If the Supreme Court has imposed an interim supervision order or a final extended supervision order under the *Crimes (High Risk Offenders) Act 2006* (NSW) in relation to an offender, the Authority may take the existence of such an order into account.

SORC's role in revocation decision making

5.90 SORC resumes managing serious offenders if they are returned to custody after revocation of parole.[69]

5.91 Some stakeholders were in favour of SORC having a role in revocation decision making.[70] One way to do this would be for SORC to receive all Community Corrections breach reports for serious offenders, and if SPA revokes parole, be invited to make submissions to SPA at the subsequent review hearing. An alternative suggestion from the former Chairperson of SORC was to require SPA to seek SORC's advice on whether the revocation of a serious offender's parole should be rescinded.[71]

5.92 Other stakeholders submitted that SORC's lack of involvement in community management is a significant impediment to its involvement in revocation matters.[72] SORC's involvement could increase decision making timeframes. The time between initial revocation and review hearing is time spent by an offender in custody without being heard. The process already takes about four weeks and SORC's involvement may lengthen this time.[73] The NSW Department of Justice submitted that while the notion of providing additional expertise to SPA in the revocation or rescission decision making process appears to be sound, it could add a further layer of administration that causes unnecessary complexity, delay and duplication.[74]

5.93 We are persuaded that SORC should have no role in the decision to revoke parole. SORC does not have experience in dealing with offenders after they are released on parole. Its involvement would add time to the decision making process but little value to SPA's deliberations. If an offender's parole is revoked, it is important that a

69. For breach and revocation, see Chapter 10.
70. NSW Young Lawyers, *Submission PA21*, 22; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 9; NSW Bar Association, *Submission PA31*, 13;
71. D Levine, *Submission PA34*, 2.
72. NSW, State Parole Authority, *Submission PA19*, 10; Justice Action, *Submission PA29*, 4; Legal Aid NSW, *Submission PA33*, 33; NSW Department of Justice, *Submission PA54*, 26.
73. Legal Aid NSW, *Submission PA33*, 33.
74. NSW Department of Justice, *Submission PA54*, 26.

decision be made quickly whether the revocation should be confirmed or rescinded. Involving SORC in the process could unnecessarily increase the time an offender spends in custody.

6. A new parole decision making process

In brief

The State Parole Authority's decision making process should be simplified so there is a single process that applies to both serious and non-serious offenders. The legislation should be streamlined and redrafted to ensure that all key processes are apparent on the face of the legislation and unnecessary powers and rules are removed.

6.1 Our terms of reference require us to consider the "need to provide for a process of fair, robust and independent decision making" in the parole system. In this chapter, we examine the decision making processes of the State Parole Authority (SPA); both the procedures stipulated in the *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act) and SPA's processes in practice. Our recommendations aim to make sure that the decision making process is efficient and transparent as well as fair, robust and independent.

6.2 In the first part of the chapter, we outline the decision making process that SPA uses in practice and its intersection with the provisions of the CAS Act. Next, we outline the problems with this state of affairs: the processes are too complicated, not transparent and involve too many technical rules. In the middle part of the chapter we set out our proposal for a new parole decision making process.

6.3 In Chapter 7, we discuss other procedural issues including: participants' access to documents and information, provision of reasons for SPA's decisions, and parole in exceptional circumstances. In Chapter 10 we discuss SPA's decision making procedure when it is considering whether to revoke an existing parole order. We discuss the rules surrounding applications that SPA reconsider parole decisions in Chapter 12.

Current parole decision making process

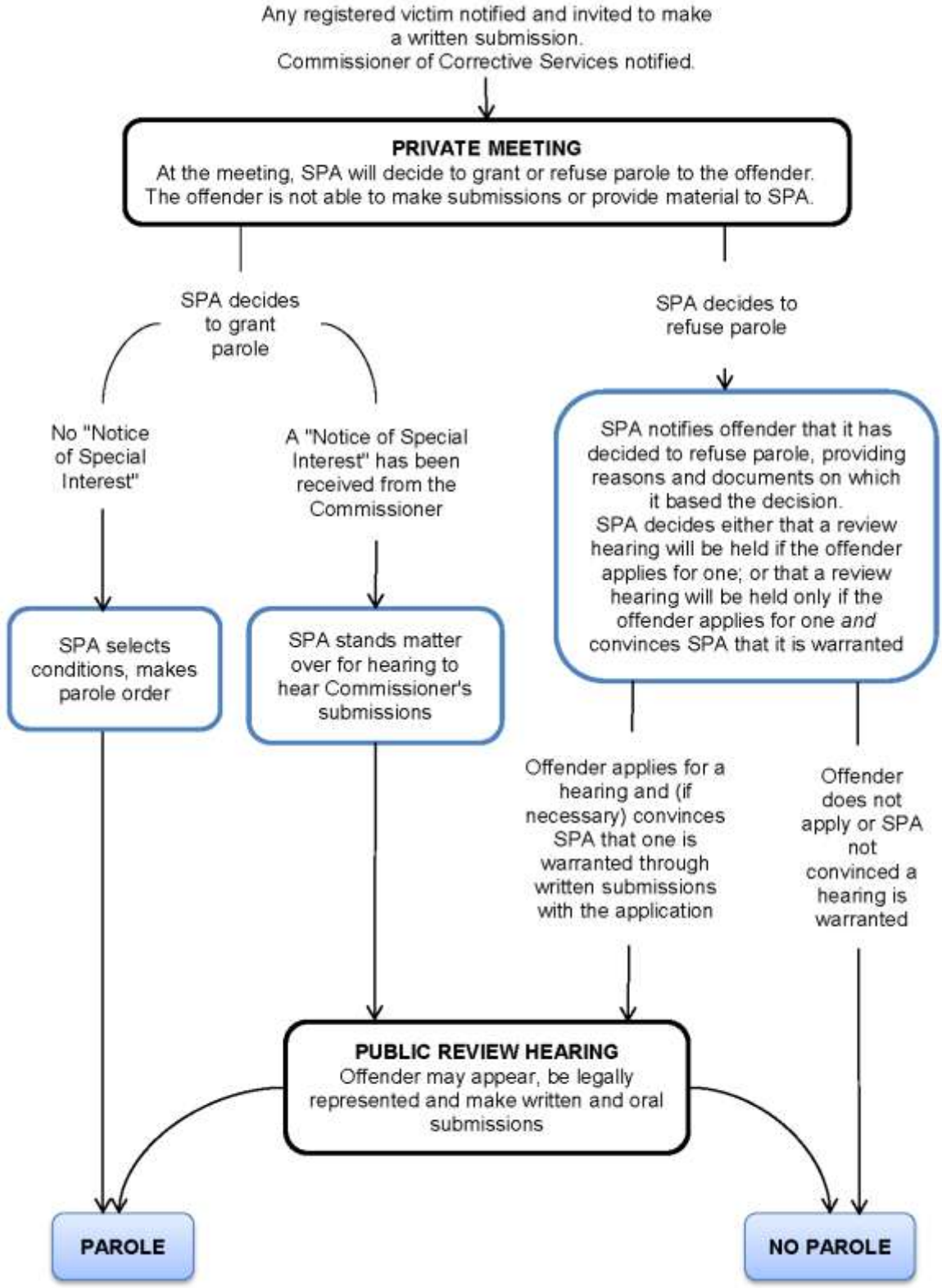
6.4 SPA is responsible for granting or refusing parole to offenders who have reached the end of their non-parole period and are serving a head sentence of more than three years. SPA considers all of these offenders for parole at the expiry of their non-parole periods without the need for an application.[1] SPA's decision making process is different depending on whether the offender is a "serious offender" as defined in the CAS Act.[2] Both processes are complex and generally take place in two stages.

Process for non-serious offenders

6.5 Figure 6.1 outlines the decision making process for non-serious offenders that SPA follows when it considers an offender for parole at least 60 days before the end of the non-parole period.

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137, s 143.
2. Serious offenders are those serving sentences of life imprisonment; convicted of murder; serving a non-parole period of 12 years or more; serving cumulative non-parole periods adding to 12 years or more; declared to be a serious offender by the sentencing court, SPA or the Commissioner of Corrective Services; or classified at the highest level of security classification at any point during their time in custody: *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 24(3), cl 25(3). See also Chapter 5.

Figure 6.1: SPA's decision making process for non-serious offenders



Initial stage

6.6 The CAS Act requires SPA to "consider" an offender for parole at least 60 days before the end of the offender's non-parole period but there are no details about

what this consideration should involve.[3] In practice, SPA decides at a private meeting whether to grant the offender parole. The decision made at this stage is subject to other processes which may follow.

6.7 At the meeting, SPA will consider a pre-release report from Community Corrections, victims' submissions (if any) and other relevant materials. The CAS Act does not require SPA to involve victims in its decision making for non-serious offenders, but in practice SPA will liaise with the Victims Register (kept by Corrective Services NSW) to ensure that any registered victim of the offender is notified and invited to make a written submission before the private meeting.

6.8 There is no provision in the CAS Act for the offender to make submissions to SPA at the private meeting stage, although SPA may "examine" the offender if it wishes.[4] In practice SPA rarely uses this power, although it does consider written submissions from offenders if any are provided. However, this relies on offenders taking the initiative, as SPA does not formally advise them that their parole will be considered or invite them to make written submissions before the private meeting.[5]

6.9 **Granting parole**. On the face of the legislation, if SPA has decided to grant parole as a function of its "consideration" of the offender's case at the private meeting, SPA must make the parole order "as soon as practicable" after deciding to release the offender on parole and the matter is ended.[6]

6.10 However, the CAS Act states that SPA must take into account any submissions made by the Commissioner of Corrective Services, and that these submissions may be made at any time.[7] The Commissioner will generally only want to make submissions in some cases where SPA might grant parole. There is no clear procedure in the legislation for these submissions or for SPA to consider them. For this reason, SPA has developed the "Notice of Special Interest" mechanism. The Commissioner will send SPA a "Notice of Special Interest" about an offender when the offender is due to be considered for parole at the private meeting. The Notice indicates to SPA that the Commissioner will want to make submissions if SPA is inclined to grant parole to the offender.

6.11 If SPA does not receive a Notice and has decided to grant parole, it simply makes the parole order at the private meeting. If SPA receives a Notice, instead of making a parole order, it will adjourn its consideration of the case to a review hearing so that the Commissioner's submissions can be openly considered and the offender can respond to them.

6.12 **Refusing parole**. If SPA decides to refuse parole at the private meeting, it must decide whether:

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3. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137.
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137C.
5. NSW, State Parole Authority, *Submission PA14*, 13; NSW Department of Justice, *Submission PA32*, 24.
6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 138.
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A, s 185.

- a review hearing will be held to reconsider the refusal whether or not the offender requests one, or
- a review hearing will be held only if the offender requests one *and* can convince SPA that a hearing is warranted through written submissions accompanying the application.

6.13 SPA then notifies the offender in writing of its decision to refuse parole and whether a review hearing may or will be held. The notice includes copies of the documents on which the decision was based and invites the offender to apply for a hearing.[8]

Review hearing stage

6.14 If a review hearing is held to reconsider a refusal, the CAS Act specifies that the offender can appear, be legally represented and make written and oral submissions.[9] If the Commissioner wishes to make submissions, he or she can also be legally represented and make written or oral submissions.[10] In practice, SPA will also notify any registered victim that a review hearing will be held and invite them to attend the hearing. SPA sometimes also permits an attending victim to make written or oral submissions at the hearing under its general power to conduct its procedures as it sees fit.[11]

6.15 There are no specific provisions about hearings in cases where SPA has decided to grant a non-serious offender parole but the Commissioner wishes to make submissions. In practice, however, SPA treats these hearings in the same way as hearings to reconsider refusals. The offender is permitted to appear, be legally represented and make written and oral submissions. Registered victims are also notified and may be permitted to make submissions.

6.16 The CAS Act contains some confusing provisions about how SPA is to conduct a review hearing. Section 140 states that SPA may postpone or adjourn a hearing held to reconsider a refusal for any reason. SPA also has a more general power to adjourn its proceedings as it wishes.[12] However, s 141 (titled "decision following review") states that, after reviewing all the relevant reports and information, SPA must decide whether the offender should be released on parole or whether the question should be deferred, although the question may only be deferred once for a maximum of two months. In practice, SPA generally adjourns the hearing as many times as is necessary to ensure that all relevant submissions have been made and reports updated, and then makes and announces its decision at a final hearing.

6.17 If SPA decides to grant parole at a private meeting or after a review hearing, the CAS Act states that SPA must make a parole order authorising the offender's release on a day within 35 days of the decision or the end of the non-parole period (whichever is later).[13]

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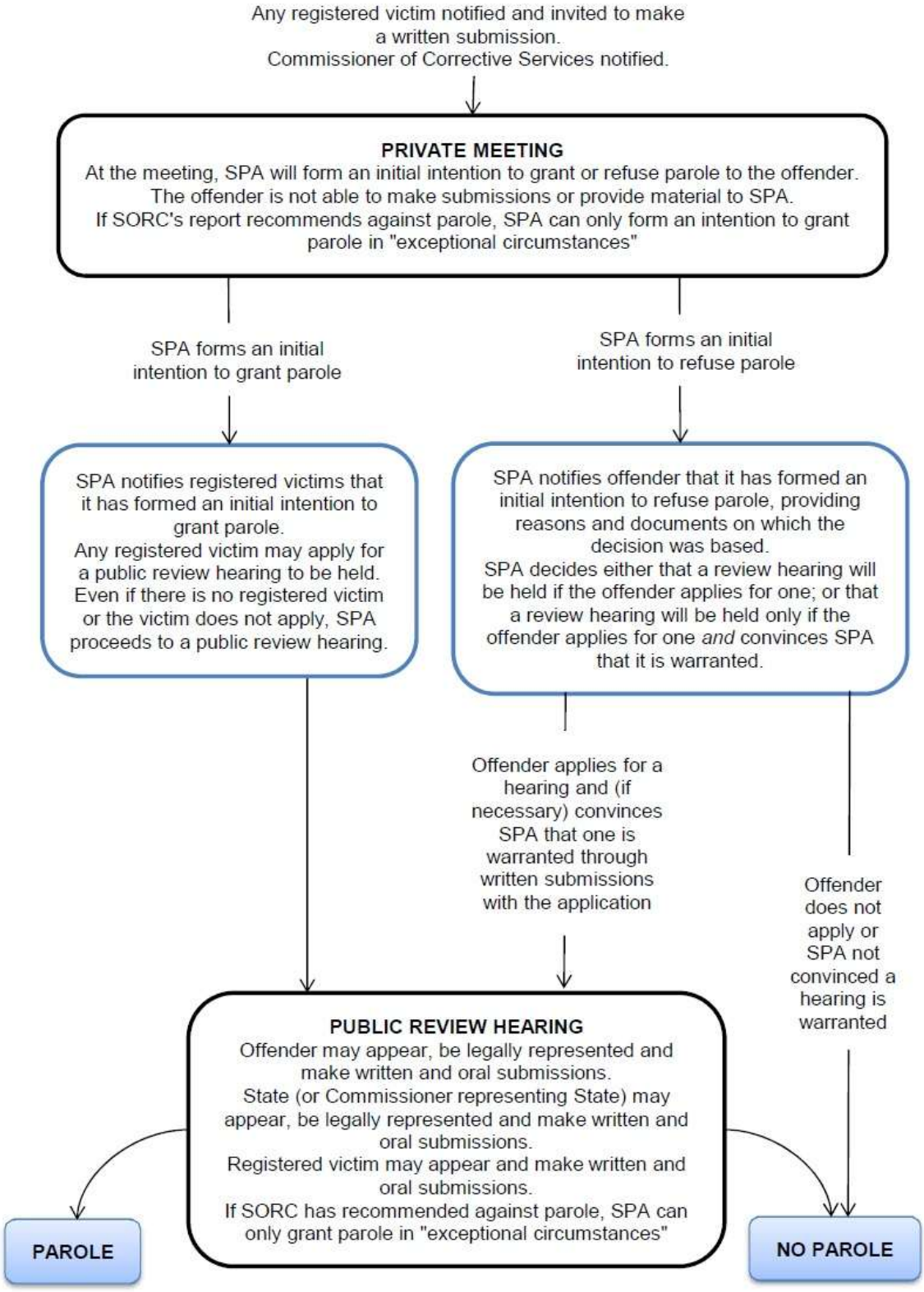
8. *Crimes (Administration of Sentences) Act 1999* (NSW) s 139.
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 140, s 190(1).
10. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 226.
11. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 11(1).
12. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 11.
13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 138.

Process for serious offenders

6.18 Figure 6.2 sets out SPA's decision making process for serious offenders. The process is similar to the process for non-serious offenders but includes more scope for registered victims' involvement.

Figure 6.2: SPA's decision making for serious offenders



Initial stage

6.19 As with non-serious offenders, SPA first considers parole for serious offenders at a private meeting. The offender is not able to appear or make submissions to SPA at the private meeting stage but SPA may "examine" the offender if it wishes.[14] SPA is not required to notify registered victims before the private meeting but, as is its practice with non-serious offenders, it uses the Victims Register to ensure that victims are notified and invited to make written submissions that it can consider at the private meeting.

6.20 For serious offenders, the CAS Act requires SPA as part of its initial consideration to form an intention (but not a final decision) to grant or refuse parole.[15]

6.21 **Intention to grant**. If SPA's initial intention is to grant parole to a serious offender, it is required to notify any registered victim on the Victims Register of this intention. The CAS Act states that SPA must hold a hearing to reconsider its initial intention if a registered victim applies for one.[16] Section 145(7) states that if there is no registered victim, SPA may immediately confirm its initial intention and make a parole order for the offender. However, in practice, SPA always lists the matter for a public review hearing, whether or not there is a registered victim or the victim has applied. SPA does this to ensure that there is a forum for the State to make submissions before it makes a final decision to release a serious offender on parole. The State (or the Commissioner representing the State) has the right to make submissions at any time about a serious offender's parole and SPA must take these into account.[17] However, as with Commissioner submissions about non-serious offenders, the CAS Act does not contain any clear procedure for SPA to hear and consider the submissions in a forum where the offender can respond to them.

6.22 **Intention to refuse**. If SPA's initial intention is to refuse parole to a serious offender, it must notify the serious offender of this intention and provide the offender with the documents or reports on which its decision was based.[18] As with non-serious offenders, SPA will decide whether:

- a review hearing will be held if the offender applies for one, or
- a review hearing will only be held if the offender applies for one *and* convinces SPA that a hearing is warranted.

If the offender does not apply or does not convince SPA that a review hearing is warranted, no hearing is held and SPA will confirm its refusal of parole.

Review hearing stage

6.23 SPA must notify the offender, the Commissioner and any registered victim of any review hearing that is held to reconsider an intention to grant or refuse parole.[19]

14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 143C(1).
15. *Crimes (Administration of Sentences) Act 1999* (NSW) s 144.
16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 145.
17. *Crimes (Administration of Sentences) Act 1999* (NSW) s 153.
18. *Crimes (Administration of Sentences) Act 1999* (NSW) s 146.
19. *Crimes (Administration of Sentences) Act 1999* (NSW) s 145, s 146.

Both the offender and any registered victim are entitled to appear and make written or oral submissions at any hearing.[20] The State (or the Commissioner representing the State) may also make submissions at the hearing or at any other time.[21]

6.24 As with non-serious offenders, the CAS Act contains conflicting provisions about decisions at the hearing. The legislation states that SPA may postpone or adjourn a review hearing regarding a serious offender for any reason.[22] However, s 149 provides that, after reviewing all the relevant information, SPA must decide whether to release a serious offender on parole or to defer the question, and that the question may only be deferred once for a maximum of two months. For serious offenders, the CAS Act also contains extra rules that seem to constrain the decision SPA can make. Section 148 states that SPA must confirm an initial intention to grant parole if there are no submissions to the contrary and that SPA must confirm its intention to refuse parole if the offender does not make any submissions. In practice, however, SPA freely reconsiders its decision and takes into account any fresh information or updated reports that it receives at a review hearing.

6.25 In addition, unless there are exceptional circumstances, SPA may make a parole order for a serious offender only if the Serious Offenders Review Council (SORC) advises SPA that it is appropriate to consider the offender for release on parole.[23] We discuss SORC's role in providing this advice in Chapter 5. The CAS Act does not explicitly provide any role for SORC's advice in the decision making process for serious offenders except to say that, if SPA rejects SORC's advice, it must give SORC its reasons for doing so and allow SORC 21 days to make submissions about the rejection of its advice before making a final decision.[24]

6.26 Section 151 states that:

- If SPA makes a parole order earlier than 14 days before the end of a serious offender's non-parole period, it must fix the day of release as a day between the end of the non-parole period and 21 days after that date.
- If SPA makes a parole order later than 14 days before the end of a serious offender's non-parole period, or after the end of the non-parole period, it must fix the day of release as a day between 14 days and 35 days after the date of the order.

6.27 These rules ensure that a serious offender must wait at least 14 days before actually being released after SPA has decided to grant parole. The waiting period gives the State time to apply to SPA to revoke the order[25] or apply to the Supreme Court for a review of SPA's decision.[26]

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20. *Crimes (Administration of Sentences) Act 1999* (NSW) s 147.
21. *Crimes (Administration of Sentences) Act 1999* (NSW) s 153.
22. *Crimes (Administration of Sentences) Act 1999* (NSW) s 147(3).
23. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135(3).
24. *Crimes (Administration of Sentences) Act 1999* (NSW) s 152.
25. See *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1); *Crimes (Administration of Sentences) Act 1999* (NSW) s 172. We recommend the repeal of s 72: Para [6.103] and Recommendation 6.6(2).
26. See *Crimes (Administration of Sentences) Act 1999* (NSW) s 156 and s 177. We recommend the repeal of these provisions: Para [13.19] and Recommendation 13.1.

Problems with the current process

6.28 It is clear from the previous discussion that the existing decision making procedure is complicated. The CAS Act as it stands contains an unnecessarily convoluted set of procedures that make SPA's task more difficult but add little in terms of procedural fairness for the offender. It also contains technical provisions that are impractical to implement or difficult to fit together. For example:

- one provision states that SPA may adjourn its proceedings as it sees fit[27] but another states that the question of whether an offender should be released on parole may only be "deferred" once for a maximum of two months[28]
- for serious offenders, one provision states that SPA may immediately confirm an initial intention to grant parole if there are no registered victims[29] but another states that SPA *must* confirm an initial intention to grant parole if there are no victim submissions, no other "submissions to the contrary", or no registered victims[30]
- the legislation states that SPA must "consider" an offender's case at least 60 days before the end of the non-parole period[31] but it is not clear what part of the decision making process the word "consider" refers to, and
- SPA may defer consideration until 21 days before the end of the non-parole period if it does not have all the required reports[32] but it is not clear how SPA is to proceed without the reports the legislation requires[33] even if this time limit passes.

6.29 SPA does the best it can to navigate conflicts and difficulties like these but, in our view, many provisions impede or obscure rather than assist its decision making.

6.30 Because the CAS Act does not set out clearly and comprehensively the decision making process SPA is to follow, it has been necessary for SPA to develop its own processes to meet the deficiencies in the legislation. Examples include:

- the procedures for the private meeting stage of decision making for both serious and non-serious offenders
- the Notice of Special Interest mechanism that SPA has developed for non-serious offenders, and
- SPA's practice of always proceeding to a review hearing if its initial intention is to grant parole in the case of serious offenders.

6.31 Beyond this, SPA has also chosen to give registered victims a broader role in its processes than is required by the CAS Act. By notifying all registered victims and inviting them to make written submissions before the private meeting, SPA ensures

27. *Crimes (Administration of Sentences) Act 1999* (NSW) s 140(3), s 147(3).
28. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141(2), s 149(2).
29. *Crimes (Administration of Sentences) Act 1999* (NSW) s 145(7).
30. *Crimes (Administration of Sentences) Act 1999* (NSW) s 150(1).
31. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(1), s 143(1).
32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(2), s 143(2).
33. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.

that victims have a voice before a decision is made and that registered victims' concerns can be taken into account when setting parole conditions if SPA decides to grant parole. This approach is commendable, but such a role for victims is not apparent in the legislation.

Reforming the parole decision making process

6.32 The existing parole decision making process (both in legislation and in practice) should be reworked to resolve the problems identified above. A new parole decision making process should:

- be transparent
- be simpler and easier to understand with fewer burdensome technical rules
- reduce delays and the number of hearings that are resource intensive
- ensure that relevant parties – the offender, registered victims, the Commissioner and the State – can participate adequately, and
- provide procedural fairness for offenders.

6.33 In the paragraphs that follow, we set out our proposal for reform and then discuss each of its features. As part of our proposal, we recommend that the relevant parts of the CAS Act[34] be entirely redrafted. New provisions should closely reflect our proposed process and ensure that all key procedural steps are apparent on the face of the legislation.

Recommendation 6.1: Redraft procedural provisions

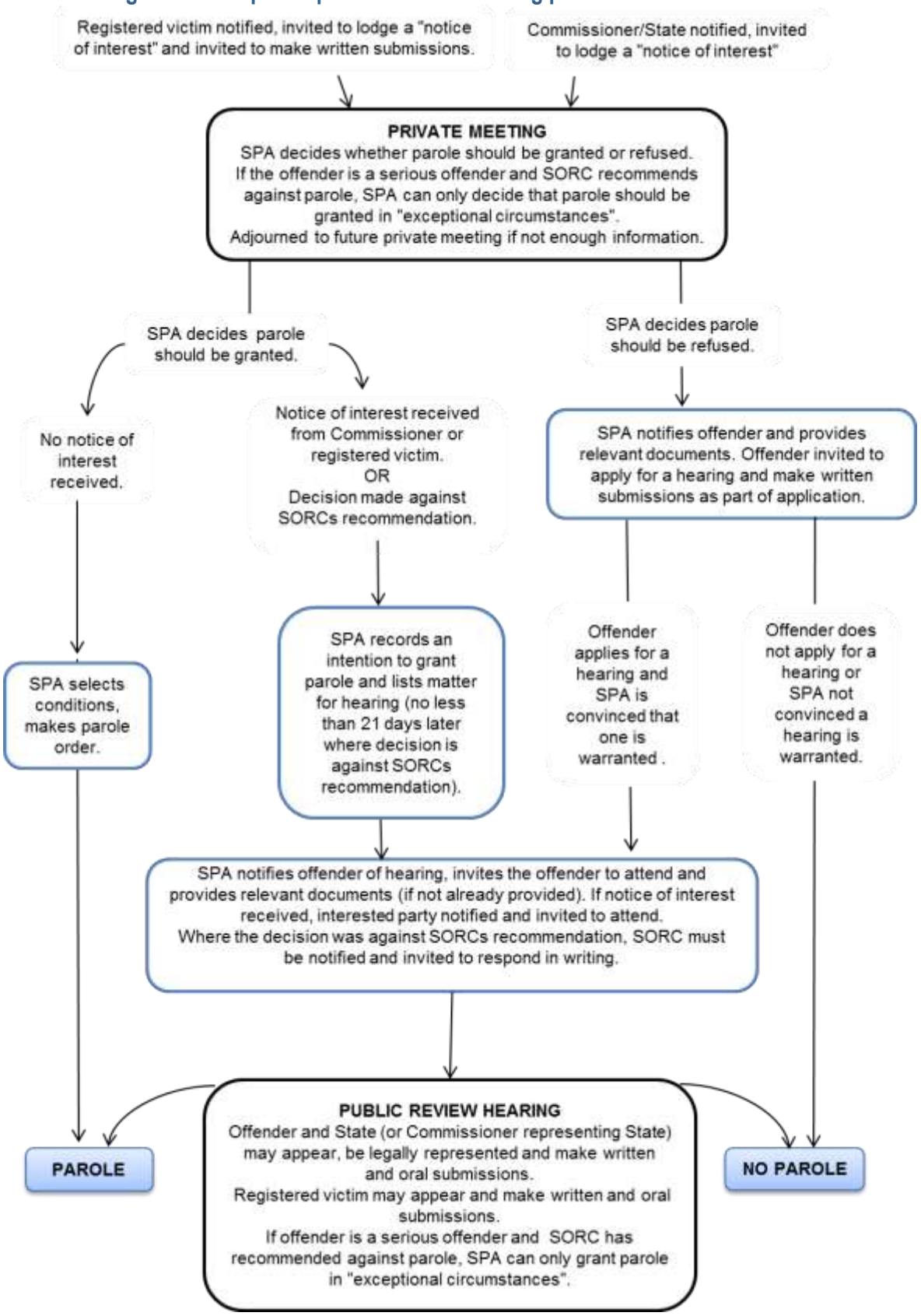
The provisions of the *Crimes (Administration of Sentences) Act 1999* (NSW) that set out the State Parole Authority's decision making process (Part 6, Division 2, Subdivisions 2 and 3) should be entirely redrafted. The new provisions should more clearly and fully set out the decision making process that the Authority should follow.

Our proposed new process

6.34 Figure 6.3 sets out our proposed new process. It is a single process that would apply to both serious and non-serious offenders and is a simplified version of SPA's existing processes.

34. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6 div 2(2) and (3).

Figure 6.3: Proposed parole decision making process



6.36 Registered victims, the Commissioner of Corrective Services and the Attorney General (representing the State) should be notified when SPA is about to consider an offender for parole at a private meeting and should be invited to lodge a "notice of interest" in the case. The "notice of interest" should be a simple form to be signed and returned to SPA. Registered victims should also be invited to make a written submission at this stage. SPA could notify the relevant parties itself or it could agree with Corrective Services NSW that the Victims Register would contact registered victims and the Corrective Services NSW officers would notify the Commissioner and the Attorney General.

6.37 SPA should then hold a private meeting to consider the offender's case. If SPA decides to grant parole and no notice of interest has been lodged, SPA should make the parole order and impose such conditions as it may determine. If a notice of interest is lodged, SPA should instead record a decision to grant parole and list the matter for a review hearing. SPA would invite the offender and the party (or parties) who lodged a notice of interest to attend the hearing to make submissions.

6.38 This notice mechanism would mean that, for both serious and non-serious offenders, SPA can grant parole in one step (at the private meeting) if there are no further issues or submissions that need to be heard. In cases where SPA decided to grant parole, SPA's decision making would only proceed to a second step (a public hearing) if submissions opposing parole needed to be heard and responded to by the offender. The notice mechanism would formalise and make more transparent SPA's current "notice of special interest" procedure for non-serious offenders and make sure there is a forum for Commissioner and Attorney General submissions. This would likely increase the number of hearings SPA currently holds for non-serious offenders as interest from registered victims could also trigger a hearing. However, it would reduce the number of hearings SPA currently holds for serious offenders when it decides to grant parole because SPA currently always holds a hearing in these cases but this would no longer be necessary.

6.39 If SPA decides to refuse parole at a private meeting, it should notify the offender, provide the offender with the documents underpinning its decision and invite the offender to apply for a review hearing. Our proposed process removes the current distinction between cases where SPA will hold a review hearing if the offender applies for one, and cases where SPA will hold a review hearing if the offender applies for one *and* convinces SPA one is warranted. Instead, the offender would be able to apply and make submissions with the application. SPA would assess the application in the context of the case and decide if a review hearing is warranted. If SPA decides no hearing is warranted, it should confirm the refusal and notify the offender. If SPA proceeds to a hearing, only the offender and those parties who had initially lodged a notice of interest should be notified of their right to attend to make submissions.

6.40 At any review hearing held, the offender should be able to appear, be legally represented and make written and oral submissions. If a registered victim has lodged a notice of interest, he or she should also be able to appear and make written and oral submissions. If the Commissioner or the Attorney General has lodged a notice of interest, he or she should be able to appear, be legally represented and make written and oral submissions.

Recommendation 6.2: A new parole decision making process

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that in deciding whether to grant or refuse parole, the State Parole Authority uses the following process:

(1) The Authority should notify any registered victim of the offender, the Commissioner of Corrective Services and the Attorney General that the offender is due to be considered for parole. The Authority should make arrangements with Corrective Services NSW to achieve this on a day to day basis.

(2) Registered victims, the Commissioner and the Attorney General should be able to lodge a "notice of interest" in the case. Any registered victim should also be invited to make a written submission for the Authority to take into account.

(3) The Authority should then consider the offender's case at a private meeting and decide whether parole should be granted or refused.

(4) If the Authority decides to grant parole and no "notice of interest" has been lodged, it may make a parole order at the private meeting and impose such conditions as it may determine.

(5) If the Authority decides to grant parole and a "notice of interest" has been lodged, it should record its decision and list the case for a public review hearing.

(6) If the Authority decides to refuse parole at a private meeting, it should notify the offender, provide the offender with the documents on which its decision was based, and advise the offender of his or her right to apply for a review hearing. The offender should be able to make written submissions to the Authority as part of the application. After it has considered the application, the Authority should list the case for a public review hearing only if it considers that a hearing is warranted. If the Authority does not consider that a review hearing is warranted, it should confirm the refusal and notify the offender.

(7) If the case is listed for a review hearing, the Authority should notify the offender and any party who has lodged a "notice of interest" in the case. The offender should be entitled to appear at the hearing, be legally represented, and make written and oral submissions. Any registered victim who has lodged a "notice of interest" should be entitled to appear and make written and oral submissions. If the Commissioner of Corrective Services or the Attorney General has lodged a "notice of interest", the Commissioner or the Attorney General should be entitled to appear, be legally represented and make written and oral submissions.

Serious Offenders Review Council's role

6.41 We propose that SPA use this single decision making process for both serious and non-serious offenders. The only difference between the two groups would be SORC's involvement for serious offenders. For serious offenders, we propose that,

if SORC recommends against parole, SPA should be able to grant parole only in "exceptional circumstances", as is presently the case.[35]

6.42 If, at a private meeting, SPA considers that "exceptional circumstances" exist and decides to grant parole against SORC's advice, we propose that it should notify SORC of its decision and reasons and should list the matter for a hearing (whether or not a notice of interest had been lodged by the Commissioner, the Attorney General or a registered victim). SPA should be required to allow at least 21 days between notifying SORC of its decision and holding the review hearing, so that SORC can submit a written response to SPA before the hearing is held. This requirement is a version of the current rule in s 152. Even if the Commissioner and the Attorney General have not previously lodged a notice of interest, they should also have the right to appear, be represented and to make submissions at any hearing held in these circumstances.

6.43 If SPA decides at a review hearing that there are exceptional circumstances to reconsider an initial refusal of parole (contrary to SORC's advice), SPA should adjourn the hearing and provide SORC with its reasons. SPA should give SORC 21 days to respond in writing before resuming the hearing. Even if they have not previously lodged a notice of interest, the Commissioner and the Attorney General should have the right to appear, be represented and to make submissions at the hearing when the matter resumes.

Recommendation 6.3: The Serious Offenders Review Council's role

(1) If the offender is a serious offender and the Serious Offenders Review Council has recommended against parole for the offender, the State Parole Authority should grant parole only in exceptional circumstances.

(2) If the Authority at a private meeting decides to grant parole to a serious offender against the Council's advice:

  (a) The Authority should list the case for a public review hearing.

  (b) The Authority should provide the Council with reasons for its decision and allow at least 21 days before holding the hearing for the Council to respond in writing to the decision.

  (c) The Commissioner and the Attorney General should be notified of the hearing and have the right to appear, be represented and to make submissions, regardless of whether they have previously lodged a notice of interest.

(3) If, at a review hearing held to reconsider a decision to refuse parole, the Authority decides to grant parole to a serious offender against the Council's advice:

  (a) The Authority should adjourn the hearing and provide the Council with its reasons for reversing the initial decision to refuse parole.

  (b) The Authority should give the Council at least 21 days to respond in writing before resuming the hearing.

35. See Para [5.35]-[5.41].

(c) The Commissioner and the Attorney General should be notified of the resumed hearing and have the right to appear, be represented and to make submissions, regardless of whether they have previously lodged a notice of interest.

Role of registered victims

6.44 We propose that registered victims' official role in parole decision making be expanded.

All registered victims have equal rights to participate

6.45 As we outlined earlier, the CAS Act only provides for registered victims of "serious offenders" to be actively involved in SPA's parole decision making. One practical difference in victim involvement is that, if SPA forms an intention to grant parole, registered victims of serious offenders can apply for a review hearing and SPA must hold it.

6.46 We propose that registered victims have the same procedural rights whether the offender is a serious or a non-serious offender. Parole decision making is an area where victims should have a voice in the criminal justice process. The serious offender category was established to ensure that the offenders who pose the highest risk to the community are managed more actively in custody and scrutinised more closely before they are granted parole. We do not think, however, that this should be a reason for differentiating the rights of access to a hearing for registered victims.

6.47 The legislation should require SPA (in cooperation with the Victims Register) to notify any registered victims, before the private meeting, that SPA will consider the offender for parole. Registered victims should be invited to make written submissions for SPA to consider at the private meeting as part of the notification. This new provision would formalise SPA's existing practice. We note that registered victims of non-serious offenders might not be as motivated as victims of serious offenders to update their contact details on the Victims Register and do not suggest that the Victims Register should be required to follow up registered victims beyond attempting to contact them at their last known address.

6.48 Further, any registered victim should be invited to lodge a "notice of interest" in the case before the private meeting. This would retain the rights of registered victims of serious offenders and extend those rights to victims of non-serious offenders, giving registered victims of all offenders equal access to hearings.

6.49 The only drawback we see to this change is the potential burden it may impose on SPA in hearings for non-serious offenders. Counts of the written submissions made by registered victims show that these have steadily increased, from 43 in 2009 to 112 in 2013.[36] This indicates that registered victims are increasingly interested in parole decision making and this could further increase SPA's workload.

36. NSW, State Parole Authority, *Annual Report 2013* (2014) 18.

6.50 However, we would expect that any increase in SPA workload would be offset by SPA making a parole order following a private meeting in serious offender matters where no notice of interest has been lodged. There would be no review hearing in those cases. At the same time, we acknowledge that SPA's costs may still increase overall. Nevertheless, we consider it important for all registered victims to have equal rights to be involved in parole decision making. This position is reflected in Recommendation 6.2, above.

No formal limits on permitted content of victims' submissions

6.51 Some Australian jurisdictions limit the content of victim submissions. In WA, 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 parole order.[37] In Tasmania, victim submissions are limited to describing the initial and ongoing impact of the offence on the victim.[38] 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".[39]

6.52 The NSW Department of Justice said it would be "concerned about any proposals to wind back the rights of victims or to restrict their voice, as victims have few opportunities to participate in the criminal justice process".[40] Other stakeholders submitted that the purpose and recommended content of victim submissions should be clarified.[41]

6.53 We do not think that there should be any restriction on the content of victim submissions. Parole decision making is an important avenue for victims to contribute to the criminal justice process and express their feelings and concerns.

6.54 The Victims Register provides an information package to victims. It includes the following information:

> **What should I write about in my submission?**
> The written submission is the opportunity for you to state how you feel about an offender's proposed presence in the community. The submission also provides you with an opportunity to suggest conditions, which you would like to be considered if the offender is granted parole. For example, if you are fearful about coming into contact with the offender you might request that a condition be imposed excluding the individual from your neighbourhood. For most registered victims a written submission will be their only opportunity to bring matters to the attention of the State Parole Authority and make suggestions of conditions. The submission should not include any additional evidence or fresh allegations. The State Parole Authority cannot vary a sentence imposed by a

37. *Sentence Administration Act 2003* (WA) s 5C(1).
38. *Corrections Act 1997* (Tas) s 72(2B)(b).
39. New Zealand, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) 61, Recommendation 32.
40. NSW Department of Justice, *Submission PA32*, 17.
41. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 14; NSW Bar Association, *Submission PA11*, 7.

court, nor can they refuse parole because there is a perception that the sentence imposed was lenient.[42]

We consider that this information is sufficiently clear about the role and content of victim submissions.

Right to oppose parole independently of the Commissioner or the Attorney General

6.55 One submission raised some issues about victims' involvement in review hearings when representatives of the Commissioner or the State are also present opposing parole at the hearing. The Victims of Crime Assistance League submitted that, in such cases, victims' effectively lose their right to make oral submissions at the hearing as it is assumed that the Commissioner or Attorney General's opposition to parole represents their views. However, the experience of the Victims of Crime Assistance League is that counsel for the Commissioner or the Attorney General can adopt a different approach against release that does not necessarily reflect the concerns of victims.[43]

6.56 We recommend that SPA ensures that registered victims are given sufficient opportunities to make oral submissions and voice their concerns in cases where the Commissioner or the Attorney General is also making submissions.

Recommendation 6.4: Victim submissions at hearings

The State Parole Authority should ensure that a registered victim who has lodged a notice of interest is given sufficient opportunity to make oral submissions at any hearing, regardless of whether the Commissioner of Corrective Services or the Attorney General makes submissions opposing parole.

Offender's role and procedural fairness

6.57 The parole decision making process must be procedurally fair for offenders and ensure that they are able to participate adequately. An offender's ability to make submissions and challenge the decision maker's information is one of the five aspects of a fair parole decision making process identified by the Victorian Sentencing Advisory Council.[44]

Input at the first stage of decision making

6.58 Like the current process, our proposed process involves SPA making a decision at the private meeting without hearing from the offender. If the decision were to refuse parole, the offender could then make submissions and challenge SPA's decision as part of the application for a review hearing.

42. Corrective Services NSW, *Submissions Concerning Offenders In Custody – Parole Consideration Information Package and Submission Template* (2010) 3; Corrective Services NSW, *Submissions Concerning Offenders In Custody – Parole Consideration for Serious Offenders Information Package and Submission Template* (2010) 3.
43. Victims of Crime Assistance League Inc NSW, *Submission PA18*, 2.
44. Victoria, Sentencing Advisory Council, *Review of the Victorian Adult Parole System* (2012) ch 4.

6.59 One preliminary submission 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?[45]

6.60 Other Australian jurisdictions vary on the question of offender involvement when the parole decision maker first considers a case. In the ACT, offenders must apply for parole and they can make written submissions with the application or at a later time, before the ACT Sentence Administration Board first considers their case.[46] In SA, offenders need to apply for parole and can make written submissions.[47] 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.[48] 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.[49] WA makes no provision for the offender to make submissions before the parole decision maker considers the case.

6.61 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. They then have the opportunity to make written submissions to the decision maker that address the material that will be presented.[50] At the same time, commentary on the UK system has noted that offenders need significant assistance to understand the material and make relevant and persuasive submissions.[51]

6.62 Submissions from stakeholders were mixed on the question of whether there should be a formal avenue for offenders to have input into SPA's decision making at the private meeting stage. Some thought that any right for offenders to make submissions to the private meeting would be too resource intensive and unwieldy.[52] Others supported more scope for offenders' involvement.[53]

6.63 On balance, we have concluded that it is not necessary for offenders to have a formal right to make submissions to SPA in advance of the private meeting. Under our proposed process, if there is an adverse outcome for an offender, the offender is given the relevant documents and has an opportunity to challenge SPA's

45. N Beddoe, *Preliminary submission PPA1*, 2.
46. *Crimes (Sentence Administration) Act 2005* (ACT) s 121, s 125.
47. *Correctional Services Act 1982* (SA) s 67, s 77(2)(c).
48. *Corrective Services Act 2006* (Qld) s 180, s 189; *Corrections Act 1997* (Tas) s 72(2).
49. *Parole Act* (NT) s 3G.
50. *Parole Board Rules 2011* (UK) SI 2011/2947, r 7, r 9.
51. R Hood and S Shute, *The Parole System At Work: A Study of Risk Based Decision-Making*, Research Study 202 (Home Office, 2000) 15.
52. NSW, State Parole Authority, *Submission PA14*, 13; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6; NSW Bar Association, *Submission PA11*, 9.
53. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 18; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 10; Women in Prison Advocacy Network, *Submission PA20*, 11; F Johns and D Hertzberg, *Submission PA12*, 4; Justice Action, *Submission PA13*, 7.

conclusions by written submissions accompanying the application for a hearing. If SPA decides to grant parole but parole is opposed by a registered victim, the Commissioner, or the Attorney General, the offender is then invited to the resulting review hearing, can be legally represented and can make both written and oral submissions. In this way, no final adverse decision can be made without offenders having an opportunity to answer the case against them. In our view, there are sufficient procedural protections for offenders without the additional step of them being entitled to make submissions at the private meeting stage.

Right to apply for a review hearing

6.64 We propose that, if SPA decides to refuse parole at a private meeting, an offender should be entitled to apply for a review hearing and make written submissions as part of the application, but that SPA should only hold a hearing if it considers that one is warranted.[54]

6.65 Until 2005, all offenders were entitled to a review hearing if SPA decided to refuse parole.[55] 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".[56] 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 undertook that offenders would have access to application assistance.[57]

6.66 Legal Aid NSW and the Aboriginal Legal Service (ALS) between them represent most offenders at public review hearings. Both organisations strongly advocated for a return to the pre-2005 position of an automatic right to a review hearing if parole is refused. Both organisations pointed to the low levels of literacy and educational attainment among offenders, and the difficulty that offenders might have in making persuasive applications for review hearings.[58] Legal Aid and the ALS can provide little or no assistance to offenders in preparing applications because of resource constraints.[59] Some limited assistance might be available from welfare or case officers at the offender's correctional centre but there seem to be chronic problems with access to these officers.[60] The ALS also noted that welfare officers may have little knowledge of the relevant legal issues.[61]

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54. Recommendation 6.2(6).
55. The *Crimes (Administration of Sentences) Act 1999* (NSW) was amended by the *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW), commenced October 2005.
56. See the second reading speech to the Crimes (Administration of Sentences) Amendment (Parole) Bill 2004 (NSW): NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12101.
57. NSW, *Parliamentary Debates*, Legislative Assembly, 27 October 2004, 12101.
58. Legal Aid NSW, *Submission PA4*, 20; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 10.
59. Legal Aid NSW, *Submission PA4*, 21; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 10, 12.
60. L Schetzer and StreetCare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 19-23.
61. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA2*, 10.

6.67 Legal Aid and the ALS submitted that, due to these limitations, providing a review hearing automatically to all offenders (and thus also legal representation and an opportunity to make persuasive submissions) is the only way to achieve procedural fairness. Legal Aid also argued that all offenders need access to a review hearing due to the current operation of the 12 month rule.[62] We discuss the 12 month rule and our proposal for reform in Chapter 12.

6.68 Other stakeholders disagreed with this position. NSW Young Lawyers and the Police portfolio supported the current system remaining unchanged.[63] SPA submitted that there is no need to return to automatic review hearings because offenders are provided with relevant documents, reasons for SPA's decision at the private meeting, and an opportunity to make a submission about why a review hearing should be held.[64] SPA and the NSW Department of Justice both commented that holding review hearings in cases where there is no chance of parole gives false hope to offenders and could create unnecessary stress for victims.[65] The Law Society of NSW also supported not returning to automatic review hearings as long as the 12 month rule is changed.[66] The NSW Bar Association suggested a compromise, agreeing that offenders do not receive sufficient assistance to apply for hearings and proposing that a review be held in all cases unless the application is "frivolous or vexatious".[67]

6.69 The NSW Department of Justice has informed us that, in 2012, SPA proceeded to a review hearing without requiring offenders to justify the hearing in 52% of parole refusal cases. Of the remaining offenders, about half applied for a review hearing, with an application success rate of approximately 35%.[68] In total, SPA held a public review hearing in about 60% of parole refusal cases in 2012.

6.70 A return to a public review hearing in 100% of cases would have significant resource implications for SPA, Legal Aid and the ALS. We also accept the points made by SPA and the NSW Department of Justice about hearings in hopeless cases unnecessarily distressing victims and giving offenders false expectations.

6.71 The arguments put forward by Legal Aid and the ALS about the need for review hearings in all cases seem to be mainly based on the need to ensure that offenders have legal representation and a chance to make proper and potentially persuasive submissions. Our view is that, instead of providing for more review hearings, resources would be better directed towards providing proper assistance for offenders to make applications for review hearings and written submissions at that stage. We recognise that Legal Aid and the ALS have resource constraints and that provision of a service like this may not currently be a priority within the resources they have. If extra funding were provided to ensure that offenders had access to

62. Legal Aid NSW, *Submission PA4*, 20.
63. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 18; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6.
64. NSW, State Parole Authority, *Submission PA14*, 14.
65. NSW, State Parole Authority, *Submission PA14*, 14; NSW Department of Justice, *Submission PA32*, 24.
66. Law Society of NSW, *Submission PA5*, 6.
67. NSW Bar Association, *Submission PA11*, 9.
68. NSW Department of Justice, *Submission PA32*, 24.

legal assistance with their applications, the concerns raised by Legal Aid and the ALS about procedural fairness would be addressed. All offenders would have had a chance to have informed and assisted input into the decision either through an application for a review hearing, a review hearing, or both. We leave this matter for consideration by the agencies and the governments that fund them.

6.72 We also recommend in Chapter 7 that SPA develop plain language resources to guide offenders through the parole decision making process.[69] The information should include the kind of information they should put in their submissions. This would help offenders to make persuasive submissions to SPA, and also help non-expert correctional staff to better assist offenders.

Commissioner and State involvement

6.73 Currently, 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 of Corrective Services or any other authority of the State.[70] The Commissioner can also make submissions to SPA in his or her own right about the parole of a non-serious offender.[71]

Removing the distinction between the Commissioner and the State

6.74 In our proposal, the distinction between Commissioner and State submissions has been removed. Both the Commissioner and the Attorney General (as representative of the State) are notified before SPA considers an offender at a private meeting. Both are invited to lodge a notice of interest and make submissions at a review hearing, although we expect in practice that only one would do so in any particular case.

6.75 The current distinction between Commissioner submissions and State submissions has little practical significance, as the Commissioner of Corrective Services generally makes submissions on behalf of the State. In 2013, in 14 of the 15 matters where the State made submissions, the submissions were made on behalf of the Commissioner of Corrective Services representing the State. In the remaining one case, the submissions were made on behalf of the Attorney General. In the first half of 2014, in six of the eight cases in which the State made submissions, the submissions were made by the Commissioner representing the State and in two cases the submissions were made on behalf of the Attorney General.[72]

6.76 We have been informed that SPA notifies the Commissioner shortly before it plans to consider the parole of a serious offender either at a private meeting or a public hearing.[73] SPA also provides copies of the documents that it will consider. The

69. Recommendation 7.4(1).
70. *Crimes (Administration of Sentences) Act 1999* (NSW) s 153.
71. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A.
72. Information provided by NSW, State Parole Authority (17 July 2014).
73. Information provided by NSW, State Parole Authority (3 September 2013).

Serious Sex Offender and Violent Offender Review Group within Corrective Services NSW reviews this information, relevant case notes and any intelligence and makes a recommendation to the Commissioner as to whether a submission should be made. Corrective Services NSW has advised 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.[74] 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 on behalf of the State. Otherwise, in practice, the decision to make submissions rests with the Commissioner.[75]

Reducing delays and adjournments

6.77 The CAS Act allows the Commissioner and the State to make submissions at any time about an offender's release on parole. SPA must consider such submissions either before it makes a final decision or, if it has made a final decision but the offender has not yet been released, SPA must consider such submissions in deciding whether to revoke parole before release under s 130 of CAS Act.[76] In practice, SPA is reluctant to proceed when a foreshadowed Commissioner or State submission has not yet been made. This seems to lead to multiple adjournments while the Commissioner or the Attorney General briefs counsel and prepares submissions.

6.78 Legal Aid suggested that the Commissioner and the State should be required to give notice of their intention to make submissions in a matter 14 days before it is listed for a review hearing, and to serve those submissions on the offender's legal representative seven days before the hearing. Legal Aid proposed that, if this is not done, the matter should proceed and a further adjournment allowed only in exceptional circumstances.[77]

6.79 We do not think it advisable to restrain the timing and ambit of Commissioner or State submissions in this way. It is important for the Commissioner or the Attorney General to be able to give pertinent information to SPA whenever that information becomes available. For example, fresh advice might be received from the NSW Police Force about activities at the offender's proposed address the day before the hearing. It would be undesirable for SPA not to receive and consider this information.

6.80 At the same time, we agree with SPA and Legal Aid NSW that any submissions should be made in a timely way and that delays need to be minimised.[78] We propose that both the Commissioner and the Attorney General should be able to make submissions to SPA at any time before a final decision has been made. SPA

74. Information provided by Corrective Services NSW (11 September 2013).
75. Information provided by Corrective Services NSW (11 September 2013).
76. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A, s 153, s 185(2).
77. Legal Aid NSW, *Submission PA4*, 18.
78. NSW, State Parole Authority, *Submission PA14*, 12.

should be required to take such submissions into account. A final decision would be:

- the making of a parole order (either at a private meeting or a review hearing)
- a decision to refuse to hold a review hearing (where parole has been refused at a private meeting)
- a decision to confirm refusal of parole because the offender has not applied for a review hearing, or
- a decision to refuse parole that is made at a review hearing.

6.81 We intend this change to encourage the Commissioner and the Attorney General to make timely submissions, and to discourage lengthy delays and multiple adjournments. Later in this chapter, we recommend that SPA should have a separate power where new material or issues have come to light to revoke its own parole order after a final decision is made but before an offender is released.[79] At this point, the Commissioner or the Attorney General would have to apply to SPA to revoke parole before the offender is released.

6.82 We also propose that the Commissioner and Attorney General's right to make submissions at any time before a final decision be limited to a right to make *written* submissions. The Commissioner or the Attorney General would only have a right to make submissions at a hearing if:

- they have lodged a notice of interest (in accordance with Recommendation 6.2(7)), or
- they have another specific right to attend and be heard at a hearing, for example if SPA has found exceptional circumstances and proposes to reject SORC's recommendation against parole.[80]

6.83 This would ensure that SPA is able to receive any relevant information whenever it becomes available, but multiple time consuming hearings and adjournments would be limited.

Policy for Commissioner submissions

6.84 Beyond the problem of delays, some stakeholders raised serious concerns about the role of Commissioner submissions in the parole decision making process. Only NSW and SA have legislative provision for submissions from the State or the head of corrections.[81] Stakeholders noted that when the Commissioner makes submissions to SPA (either in his or her own right or on behalf of the State), the submissions can contradict the advice provided to SPA by Community Corrections, a division of the Commissioner's own organisation. SPA submitted that:

> It is difficult to reconcile how the Commissioner can make a submission against the release of an offender when [Corrective Services NSW] employees write

79. Recommendation 6.6(1).
80. Recommendation 7.7.
81. *Correctional Services Act 1982* (SA) s 77(2).

> reports to the Parole Authority recommending release. Further, two [Corrective Services NSW] representatives (appointed by the Commissioner) sit on both SORC and the Parole Authority and participate in the decision making process.
>
> It is also difficult to reconcile that the Commissioner can argue against the release of an offender, citing reasons such as lack of external leave or program participation when the opportunity for the offender to participate in such things can often be determined by the Commissioner or the business unit operated under their authority.[82]

6.85 The former chairperson of SORC had a similar view, stating that the decision making process becomes "perverted" when the Commissioner intervenes before SPA, as the Commissioner controls many of the variables that influence the parole decision, such as security classification progression, access to rehabilitative programs and access to external leave. Mr Levine submitted that it would be more appropriate for this power to be reserved entirely to the State in the case of serious offenders.[83] In consultations, offenders suggested that there was an inherent unfairness in the Commissioner being able to oppose parole on the basis of factors that were within the Commissioner's control.[84]

6.86 Some stakeholders also noted that Commissioner submissions seem to be made in an increasing number of cases. The number of Commissioner and State submissions are set out in Table 6.1.

Table 6.1: Commissioner and State submissions to SPA

	2009	2010	2011	2012	2013	2014 (Jan-Jun)
Matters with Commissioner submissions (non-serious offenders)	7	5	1	0	13	14
Matters with State submissions (serious offenders)	18	13	8	12	15	8
Total:	**25**	**18**	**9**	**12**	**28**	**22**

Source: Information provided by NSW, State Parole Authority (17 July 2014).

6.87 Other stakeholders either did not comment on this issue or did not see any need to change the current situation,[85] noting that the power of the Commissioner to make submissions provides an important safeguard mechanism.[86] SPA also submitted that, on the whole, "State submissions should remain as is currently the practice".[87]

6.88 Corrective Services NSW has advised us that submissions contradicting the recommendation from Community Corrections may sometimes be made because of

82. NSW, State Parole Authority, *Submission PA14*, 12.
83. D Levine, *Submission PA9*, 6-7.
84. Dawn de Loas Correctional Centre inmates, *Consultation PAC6*.
85. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 5; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 9; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 17.
86. NSW Department of Justice, *Submission PA32*, 21; Police Association of NSW, *Submission PA6*, 19.
87. NSW, State Parole Authority, *Submission PA14*, 12.

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.[88]

6.89 We appreciate stakeholders' objections to Commissioner submissions but consider that this paradox is unavoidable in the interests of robust parole decisions and will ensure that SPA has the benefit of the Commissioner's views in these important cases. The Commissioner may also have access to intelligence information not available to other parties. If a Commissioner/State submission opposing parole has little merit, SPA does not need to agree with it.

6.90 We suggest that Corrective Services NSW should develop (and publish) a clear policy about cases when Commissioner submissions opposing parole should be made. This might increase transparency about the operation of Commissioner submissions and the issues which they should address. It may also lead to a reduced need to make such submissions.

Recommendation 6.5: Commissioner and State submissions

(1) The Commissioner of Corrective Services and the Attorney General should have the right to make written submissions to the State Parole Authority at any time when it is considering the parole of any offender until a final decision is made. The Authority must consider any such submission.

(2) A final decision by the Authority may be any of the following:

  (a) making a parole order

  (b) refusing to hold a review hearing (where parole has been refused at a private meeting)

  (c) confirming a refusal of parole because the offender has not applied for a review hearing, or

  (d) refusing parole at a review hearing.

(3) Corrective Services NSW should develop and publish a policy about the situations when the Commissioner should make a submission.

Revoking SPA parole orders before the offender is released

6.91 Section 130(1) of the CAS Act provides that SPA "may, by order in writing and in such circumstances as may be prescribed by the regulations, revoke a parole order at any time before the offender to whom the order relates is released under the order".

6.92 The circumstances set out in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation) are as follows:

- the offender requests that the order be revoked

88. Information provided by Corrective Services NSW (11 September 2013).

- SPA decides, before releasing the offender, that the offender is unable to adapt to normal lawful community life
- SPA decides that satisfactory accommodation arrangements or post-release plans have not been made or are not able to be made, or
- in the case of a serious offender, the Attorney General or the Director of Public Prosecutions requests SPA to revoke a parole order on the grounds that SPA made the order on the basis of false, misleading or irrelevant information and SPA decides that the order should be revoked on these grounds.[89]

6.93 As we have already noted, the CAS Act also currently requires SPA to consider submissions from the Commissioner or the State that are made after SPA has reached a final decision but before the offender has been released. The relevant provisions state that, in these circumstances, SPA must consider whether to use its revocation power under s 130.[90]

6.94 As it is currently drafted, the pre-release revocation power applies not only to SPA parole orders, but also to court based parole orders. In Chapter 3, we discuss SPA's pre-release revocation power in the context of statutory parole and suggest some significant amendments.[91]

6.95 By contrast, pre-release revocation of one of SPA's own parole orders is really a reopening of SPA's decision making. For this reason, we see several problems with the structure and scope of the current power as it applies to SPA parole orders.

6.96 First, the grounds in the CAS Regulation are not confined to cases where new information is available or matters that have arisen since SPA made its original decision. Combined with the provision that requires SPA to consider Commissioner and State submissions even after its decision is made, this drafting effectively means that the Commissioner or the State can require SPA to consider revocation even when nothing has changed. The possibility that the Commission or the State can effectively require SPA to reconsider the matter even after a final decision has been made does little to encourage timely submissions and thorough preparation and is potentially unfair for the offender.

6.97 A second more practical problem is that, although SPA must consider *all* Commissioner and State submissions after its final decision is made, SPA does not have any clear power to revoke on the basis of a Commissioner or State submission that does not fit into the circumstances set out by the CAS Regulation. This is because s 130(1) states that the revocation order is conditional upon there being "such circumstances as may be prescribed by the regulations". Additionally, there is no clear provision for SPA to hold a hearing to receive a Commissioner or State submission, or to consider counter arguments from an offender, before making a decision to revoke before an offender is released, although if SPA revokes

89. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(1); *Crimes (Administration of Sentences) Act 1999* (NSW) s 172.
90. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141A(3), s 153(3).
91. Para [3.18]-[3.59] and Recommendation 3.2.

a parole order before the offender is released on the basis of a Commissioner or State submission, a review hearing may then be held.[92]

6.98 Thirdly, we cannot see why, if SPA decides that it has made a parole order based on false, misleading or irrelevant information, it should only be able to revoke the order pre-release if the offender is a serious offender.

6.99 To resolve these problems, we propose that SPA have a separate and differently drafted power to revoke its own parole orders. SPA should be able to revoke one of its parole orders before an offender is released where:

- since the order was made, new information is available or the situation has materially changed such that SPA considers it appropriate to revoke the order
- SPA is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or
- the offender requests that the order be revoked.

6.100 Drafted this way, the power would be limited to situations where new information is available or circumstances have changed since the original decision was made, or to situations that are to the offender's advantage (where the offender wants the order to be revoked or the offender's safety is at risk). We consider that such a provision is necessary to ensure that this power is used only in unusual circumstances and that, normally, the regular decision making process takes into account all the relevant issues.

6.101 The CAS Act should clearly provide that the offender, the Commissioner or the Attorney General can apply to SPA to use this pre-release revocation power. Applicants should be entitled to make written submissions as part of the application.

6.102 SPA should consider the application in a private meeting. If SPA decides to revoke its own parole order on application from the offender, it should formally record that parole is now refused. If SPA decides to revoke its own order on application from the Commissioner or the Attorney General, it should list the matter for a review hearing. The offender, the Commissioner, the Attorney General and any registered victim who has lodged a notice of interest should be notified and able to make submissions at the review hearing. At the review hearing, it should be clear that SPA is now considering anew its decision to grant parole.

6.103 Our proposed new power makes s 172 of CAS Act unnecessary. Section 172 provides that the Attorney General or the Director of Public Prosecutions may request that SPA "exercise its powers to revoke a parole order in relation to a serious offender on the ground that the order has been made on the basis of false, misleading or irrelevant information". If SPA discovers or is convinced that it relied on false, misleading or irrelevant information in making the order, it would be able to revoke the order on the basis that new information has come to light or that the situation has materially changed since the order was made. We recommend that s 172 be repealed.

92. In accordance with pt 7 div 4: *Crimes (Administration of Sentences) Act 1999* (NSW) s 130(2).

Recommendation 6.6: Revoking discretionary parole orders pre-release

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that:

(a) the State Parole Authority has the power to revoke its own parole order before the offender is released only if:

(i) since the order was made, new information is available or the situation has materially changed such that the Authority considers it appropriate to revoke the order

(ii) the Authority is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(iii) the offender requests that the order be revoked.

(b) the following procedures apply to proceedings for such a revocation:

(i) the offender, the Commissioner of Corrective Services and the Attorney General may apply to the Authority to exercise this power

(ii) applicants may make written submissions as part of the application

(iii) the Authority should consider the application and decide whether to exercise the power in a private meeting

(iv) if the Authority decides to exercise the power on application from the offender, the Authority should formally record a refusal of parole

(v) if the Authority decides to exercise the power on application from the Commissioner or the Attorney General, the Authority should list the matter for a review hearing and notify the offender, the applicant and any party who has lodged a notice of interest, and

(vi) at the review hearing, the Authority should consider whether to grant or refuse parole without regard to the previous decision.

(2) Section 172 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be repealed.

Time limits and technical rules

6.104 We propose that most of the existing time limits and technical rules that constrain SPA's decision making be repealed. The powers that SPA does not currently use and that are unnecessary should also be removed.

6.105 During our review of the provisions that deal with the decision making process, we found that some processes are not clearly or simply described and there are some gaps and overlapping provisions. As we have already recommended in Recommendation 6.1, these provisions should more clearly and fully set out the decision making process that SPA should follow.

Timing of consideration

6.106 Currently, SPA is required to consider an offender's case at least 60 days before the end of the offender's non-parole period.[93] The CAS Act specifies that SPA may defer consideration of an offender's case until not less than 21 days before the end of the non-parole period if it does not yet have all the necessary reports and relevant information.[94] It is not clear what SPA is to do if it does not have necessary information within 21 days of the end of the non-parole period. SPA should simply be required to consider an offender's case at a private meeting at least 21 days before the end of the non-parole period, subject to a limited power to defer set out in the following paragraphs.

Adjournment and deferral

6.107 As we have noted already, SPA may currently defer considering a case at a meeting under specified circumstances, until not less than 21 days before the parole eligibility date.[95] SPA also has the power, at a review hearing, to defer the question of whether or not the offender should be released on parole, once only and for no more than two months.[96] SPA can also postpone or adjourn a previous hearing "for any reason that seems appropriate to it".[97] The provisions allowing deferral in limited circumstances would appear to overlap with those allowing an apparently unlimited power to postpone or adjourn a hearing. It is also not clear whether these provisions apply to subsequent considerations of parole.[98]

6.108 We propose that the current rules which deal with SPA's powers to defer its consideration at a meeting or a review hearing or postpone or adjourn a review hearing should be amended and made more consistent.

6.109 We have already proposed that SPA should be required to consider an offender's case at a private meeting at least 21 days before the parole eligibility date. We propose that SPA should be able to defer deciding whether or not to grant parole to a future private meeting whenever it considers it necessary, but in any case for not more than one month from the date of the first deferral. This will allow a degree of flexibility to take account of changing circumstances or unavoidable delays, while still ensuring that an offender is subject to a decision that he or she can apply to be reviewed.

6.110 Similar rules should apply when SPA defers, adjourns or postpones a matter it is considering at a review hearing. SPA should be able to defer a review hearing whenever it considers it necessary, but in any case for not more than three months from the date of the first deferral. Such a power should also replace SPA's current power to postpone or adjourn which effectively overrides any deferral limitations.

6.111 The rules limiting SPA to one deferral of a maximum of two months may have been intended to protect offenders by ensuring that timely decisions are made. However,

93. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(1), s 143(1).
94. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(2), s 143(2).
95. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(2), s 143(2).
96. *Crimes (Administration of Sentences) Act 1999* (NSW) s 141(2), s 149(2).
97. *Crimes (Administration of Sentences) Act 1999* (NSW) s 140(3), s 147(3).
98. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137A, s 143A.

SPA needs a greater degree of flexibility so it can respond to changing circumstances, allow barriers to parole (for example, difficulties with post-release accommodation) to be resolved, and ensure that it has all the necessary information before it makes a decision. We considered the possibility of an unlimited power to defer (as can currently be achieved through the power to postpone or adjourn) but considered that the unfairness and uncertainty that could arise would be best ameliorated by limiting the total duration of all deferrals to no more than three months after the date of the first deferral at a review hearing. In our view, this strikes a balance between flexibility for SPA to deal with uncertain circumstances and ensuring that a decision is made. Any need for a deferral period of longer than three months could be met by SPA refusing parole and overriding the 12 month rule as we propose in Recommendation 12.1.

6.112 It should also be made clear that these new provisions apply to any subsequent considerations of parole.

"Examining" an offender

6.113 We propose that the provisions which enable SPA to "examine" an offender during the private meeting stage[99] be repealed. SPA rarely uses this power and we consider it unnecessary. If SPA is not sure about a particular issue, it can refuse parole to the offender and then grant the offender a review hearing (where the offender can be represented and make submissions) in order to have the matter fully aired.

Nature of the reconsideration at the review hearing

6.114 The provision that attempts to tie SPA's final decision to the initial intention in cases involving serious offenders is unnecessarily complex and limiting and should also be dropped.[100] In our view, SPA should reconsider its private meeting decision in full at a review hearing based on the submissions, information and reports it receives and the changing circumstances of the case over time without regard to any view taken of the case at the earlier private meeting.

Operation of parole orders

6.115 Finally, the provisions dealing with the timing of the operation of parole orders should be simplified and aligned for both serious and non-serious offenders.

6.116 For any offender, if SPA grants parole, it should be able to make a parole order authorising the offender's release on a day within 35 days of the making of the order or the end of the non-parole period, whichever is the later. This would remove the current 14 day waiting period for serious offenders. The waiting period can create unnecessary problems with offenders' accommodation placements, as providers are often unable to guarantee a bed so far in advance.

6.117 The waiting period may have been put in place to ensure that the Commissioner or the State has enough time to submit that SPA should revoke the order before a

99. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137C, s 143C.

100. *Crimes (Administration of Sentences) Act 1999* (NSW) s 148.

serious offender is actually released. Alternatively, the waiting period may have been intended to give the State enough time to apply to the Supreme Court for a direction that SPA relied on false, misleading or irrelevant information in making the order. However, we consider that, as far as is possible, procedures should encourage participants to be prepared in advance. The Commissioner or the State should only need to make submissions after SPA has made a final decision in exceptional circumstances. We do not consider that there needs to be any special provision to allow time for this process. Similarly, if the Commissioner or the State considers that SPA is relying on false, misleading or irrelevant information, this should be fully canvassed at the review hearing stage. In any case, in Chapter 13, we recommend removing the statutory avenue for the State to apply to the Supreme Court for a direction (while retaining the process of judicial review).

Recommendation 6.7: Minimising technical rules

(1) The State Parole Authority must consider whether to grant parole at a private meeting at least 21 days before the end of the offender's non-parole period.

(2) The Authority (whether on an initial or subsequent consideration of parole) should be able to defer deciding whether to release an offender on parole:

(a) at a private meeting, to a future private meeting, whenever it considers it necessary, but in any case for not more than one month from the date of the first deferral

(b) at a review hearing, to a future review hearing, whenever it considers it necessary, but in any case for not more than three months from the date of the first deferral.

The separate power to postpone or adjourn a review hearing should no longer be available.

(3) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove the power of the Authority to "examine" an offender.

(4) The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, at a review hearing, the Authority must consider whether or not to grant parole without regard to any view taken of the case at the private meeting.

(5) A parole order must authorise the offender's release on a day within 35 days of:

(a) the making of the order, or

(b) the end of the non-parole period,

whichever is the later day.

7. Other issues in the parole decision making process

In brief

Providing information and reasons to both registered victims and offenders should improve participants' understanding of, and engagement with, the parole decision making process. The State Parole Authority's power to withhold documents from participants should be clarified and simplified. The Authority's power to grant parole in "exceptional circumstances" should be supported by a simplified decision making process included in the legislation.

7.1 In Chapter 6, we outlined a new parole decision making process that we propose the State Parole Authority (SPA) should follow for all offenders when it is deciding whether to grant or refuse parole. In this chapter, we look at three further procedural issues:

- participants' access to information and documents during the parole decision making process
- provision of reasons for SPA's decisions, and
- the decision making process for parole in exceptional circumstances.

Access to information and documents

7.2 In this part of the chapter, we discuss the access that registered victims and offenders should have to information and documents during the parole decision making process.

Registered victims' access to relevant documents

7.3 The *Crimes (Administration of Sentences) Act 1999* (NSW) (the CAS Act) entitles registered victims of serious offenders to access any documents held by SPA that indicate the steps that an offender has taken "to address his or her offending behaviour".[1] When it is notifying registered victims of serious offenders that the offenders are to be considered for parole, the Corrective Services NSW Restorative Justice Unit also advises these victims that they can access these documents. However, registered victims of non-serious offenders have no statutory right of access to documents about an offender.

7.4 In submissions and consultations, victims' groups emphasised that accessing such documents is important to allow registered victims to prepare informed and relevant submissions to SPA. They suggested that all registered victims should have the same rights of access to documents.[2] SPA also supported this change.[3]

7.5 The extension of document access rights to all registered victims would be a logical extension of our recommendation that all registered victims have the same rights to make submissions and access hearings.[4] Access to documents about an offender's progress in custody is important to allow a victim to make relevant submissions to SPA. As noted by the NSW Department of Justice, access to documents about an offender's rehabilitation may also partially allay any concerns a victim might have about the offender's parole.[5]

7.6 Currently, the SPA secretariat works with the Victim Register to prepare and redact the relevant documents to be provided to victims. Secretariat officers also sometimes dedicate time to explaining the context of the documents to the recipient and clarifying technical information. Extending access rights to all registered victims could significantly increase SPA's workload in this regard.

7.7 In 2013, only seven victims of serious offenders accessed documents, although 30 victims of serious offenders made submissions to SPA.[6] This indicates that far fewer registered victims are likely to access documents than are involved in the decision making process in other ways. Although we appreciate that extending access rights may still have negative resource implications for SPA and the Victims Register, we consider this potential disadvantage is outweighed by the importance of giving all registered victims equal opportunities to participate in parole decision making.

7.8 Currently, victims of serious offenders are entitled to access documents that "indicate the measures the offender has taken, or is taking, to address his or her offending behaviour".[7] The expression "address his or her offending behaviour" is

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193A(2).
2. Victims of Crime Assistance League Inc NSW, *Submission PA18*, 2; K Marslew, *Submission PA15*; Homicide Victims Support Group, *Consultation PAC12*; Roundtable: victims representatives, *Consultation PAC13*.
3. NSW, State Parole Authority, *Submission PA14,* 10.
4. Para [6.45]-[6.50] and Recommendation 6.2.
5. NSW Department of Justice, *Submission PA32*, 17.
6. NSW, State Parole Authority, *Annual Report 2013* (2014) 19.
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193A(2).

somewhat anachronistic and unclear. We prefer the term "rehabilitation". We recommend that all registered victims be entitled to access documents that indicate the steps the offender has taken, or is taking, in custody towards his or her rehabilitation.

Recommendation 7.1: Victims' access to documents

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that a registered victim of an offender being considered for parole (whether or not the offender is a serious offender) is entitled to access documents indicating the steps that the offender has taken, or is taking, in custody towards his or her rehabilitation.

Keeping registered victims informed

7.9 Beyond their rights to access official documents about an offender's progress in custody, registered victims, once they have been notified that parole consideration will take place, also need to be kept informed of the progress of the parole decision making process. In consultations, some victims' groups maintained that SPA does not always keep registered victims informed of the outcome of the process.[8]

7.10 If SPA grants an offender parole, the CAS Act should require SPA to notify any registered victim that the offender has been paroled and provide a copy of the offender's parole conditions. If SPA refuses an offender parole, SPA should notify any registered victim that the offender has been refused parole and indicate when the offender is likely to be next considered for parole.

Recommendation 7.2: Keeping registered victims informed

The *Crimes (Administration of Sentences) Act 1999* (NSW) should require the State Parole Authority to notify a registered victim of an offender that the offender:

(a) has been granted parole, and provide a copy of the offender's parole conditions, or

(b) has been refused parole, and indicate when the offender is likely to be next considered for parole.

Timely provision of relevant documents and reports to offenders

7.11 When it notifies an offender that it has refused parole or intends to refuse parole, SPA must also provide the offender with copies of the reports and other documents underpinning its decision.[9] These documents are essential to enable offenders to make an informed decision whether to apply for a review and to make relevant submissions in any such application or at the review hearing itself.

8. Homicide Victims Support Group, *Consultation PAC12*; Roundtable: victims' representatives, *Consultation PAC13*.

9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(3)(b), s 146(3)(b).

7.12 Legal Aid NSW suggested that it would be helpful if SPA provided offenders with these documents before (rather than after) the private meeting takes place.[10] We do not think that this is necessary, given that material will still be provided before an offender's main opportunity to make submissions. Legal Aid stated that relevant material is sometimes provided to the offender and the offender's legal representative on the day of the review hearing or even at the review hearing. Legal Aid submitted that "legal representation can be of limited assistance if papers are not provided to the legal representatives in a timely fashion" and proposed that the CAS Act be amended to require all material to be supplied at least one week before a review hearing is held.[11]

7.13 We agree with Legal Aid about the importance of the offender and the offender's legal representative having access to key documents a reasonable time before a hearing takes place. However, we do not think it would be helpful for the CAS Act to contain a requirement for all documents to be provided at least one week in advance. To some extent, the timing for delivery of documents (such as updated Community Corrections reports) is out of SPA's control. Some documents need to be up to date as they relate to accommodation places and other information that needs to be ascertained immediately before an offender is released. We have already recommended that SPA be able to defer a review hearing whenever necessary up to a limit of 3 months.[12] SPA should use this power in appropriate cases in order to ensure procedural fairness for the offender.

Withholding reports and other documents

7.14 Section 194 of the CAS Act provides that nothing in the Act or regulations requires SPA to provide a copy of all or part of a report or other documents to any person (except the Minister) if a judicial member considers that providing it may:

- adversely affect the discipline or security of a correctional centre
- endanger any person
- jeopardise an investigation
- prejudice the public interest
- adversely affect the supervision of any offender on parole, or
- disclose the contents of an offender's medical, psychiatric or psychological reports.[13]

7.15 An amendment made in 2014 states that nothing in the Act or regulations requires SPA to provide a participant with information about the contents of any withheld document if:

10. Legal Aid NSW, *Submission PA4*, 20.
11. Legal Aid NSW, *Submission PA4*, 16, 21.
12. Recommendation 6.7(2)(b).
13. *Crimes (Administration of Sentences) Act 1999* (NSW) s 194(1)-(2). The Serious Offender's Review Council may also withhold documents on the same bases under *Crimes (Administration of Sentences) Act 1999* (NSW) s 209A.

- not providing the information is necessary in the public interest, and
- that public interest outweighs any right to procedural fairness that might be denied by not providing the information.[14]

7.16 This amendment was in response to a Supreme Court judgment that held that SPA must apply s 194 in a way that is, as far as possible, consistent with the principles of procedural fairness and explained that this may involve notifying the offender that material has been withheld and briefly indicating the nature of the material.[15]

7.17 The CAS Act currently requires SPA to provide offenders with copies of reports or other documents as follows:

- As soon as practicable after deciding not to make a parole order for an offender, SPA must give notice of its decision to the offender and the notice, "subject to section 194, must be accompanied by copies of the reports and other documents intended to be used by [SPA] in making its final decision".[16]
- When SPA decides to revoke parole, a revocation notice must be accompanied by "copies of the reports and other documents used by the Parole Authority in making the decision to revoke the ... parole order and, if appropriate, the decision to specify the earlier day".[17]

The *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation) also sets out two situations where SPA must provide reports and other documents that it intends to use in its decision making:

- where the State notifies SPA that it may wish to make a submission about the release on parole of a serious offender,[18] and
- where the Commissioner of Corrective Services notifies SPA that he or she may wish to make a submission about any matter.[19]

It is not clear how s 194 currently interacts with any broader procedural fairness requirements that may require SPA to provide copies of all or parts of documents or other information to offenders in contexts not covered by the above provisions.[20]

7.18 SPA has advised that "attempts are made on all occasions where appropriate to provide summaries of s 194 material to allow for procedural fairness".[21] SPA's *Operating Guidelines* (which have not been updated to take account of the 2014 amendments) state:

> Information prejudicial to the public interest includes issues relating to privacy and third-party references and material.

14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 194(1A), inserted by *Crimes (Administration of Sentences) Amendment Act 2014* (NSW) sch 1 [15].
15. *Dib v State Parole Authority* [2009] NSWSC 575 [16]-[17], [25].
16. *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(3)(b).
17. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(2)(d)(ii).
18. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 228(1).
19. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 325.
20. For example, a request for access to documents before SPA at a s 169 enquiry.
21. NSW, State Parole Authority, *Submission PA14*, 15.

> Such information may not be provided to the offender or his/her lawyer, nor may it be referred to in the course of a review hearing. However, it must be taken into account when the Authority makes its determination….
>
> Procedural fairness and natural justice need to be considered in all matters before the Authority, as such, a meaningful summary must be provided to an offender's legal representative if and when requested. In providing such summaries, it is imperative that public interest does not outweigh procedural fairness.[22]

7.19 Although they emphasise procedural fairness, these guidelines assume that providing a victim submission ("third-party references and material") will always be prejudicial to the public interest and, accordingly, that such submissions should routinely be withheld under s 194. The guidelines also do not mention the need to notify an offender's legal representative that s 194 has been used. A legal representative will not be able to request a "meaningful summary" of withheld material if he or she is not aware that such material exists.

7.20 SPA has informed us that, in practice, when registered victims are invited to make a submission, they are also invited to apply for the submission to be withheld from the offender under s 194. If a victim applies for the submission to be withheld, SPA will always withhold the submission. If the victim does not want SPA to withhold the submission, SPA will provide it to the offender. It seems that, effectively, SPA allows the victim to decide whether the submission will be withheld under s 194.

Stakeholders' views about withholding documents

7.21 Legal Aid NSW has submitted that SPA routinely withholds material without notifying the offender or his or her legal representative that it exists. Legal Aid argues that SPA's practice is not consistent with the decision in *Dib v Parole Authority of NSW* and lacks procedural fairness.[23] The NSW Bar Association agreed, stating that "the existence of such material is often not made known unless an offender's legal representative makes a direct and specific enquiry".[24]

7.22 NSW Department of Justice submitted that:

> SPA, victims and offenders may benefit from clearer guidelines concerning victim submissions. In line with the goal of involving victims in the justice process, and in the interests of providing clarity to all parties about when victim submissions may be disclosed and to what extent, the issue of whether there should be a presumption of non-disclosure of victim submissions, unless otherwise indicated by the victim … may need to be addressed.[25]

7.23 Legal Aid NSW proposed that, if material is withheld under s 194, the offender and the offender's legal representative should be provided with a written notification that s 194 has been used, which should include an outline of the nature of the material

22. NSW, State Parole Authority, *Operating Guidelines* (2012) [7].
23. Legal Aid NSW, *Submission PA4*, 22; see also W Hutchins and K Waters, "Parole, 'Normal Lawful Community Life', and Other Mysteries" (paper presented at Aboriginal Legal Service (NSW/ACT) Ltd, Western Zone Conference, 2013) 19.
24. NSW Bar Association, *Submission PA11*, 10.
25. NSW Department of Justice, *Submission PA32*, 18.

withheld.[26] Such a practice would serve procedural fairness but may discourage submissions from victims, if the victim does not want the offender to know that the victim has an ongoing interest in the offender's case. The Police portfolio argued that there should be no changes that would discourage victims from making submissions and that offenders should not be provided with the victim statement.[27] Similarly, the NSW Department of Justice submitted that:

> Most victims choose to make only a written submission, and not an oral submission, and most apply for a direction under section 194 of the Act … for the content of their written submission to be withheld from the offender and his/her representatives. A section 194 direction on the basis that disclosure may endanger the victim accords with the general thrust of the Charter of Victims Rights.[28]

7.24 The Parole Board for England and Wales 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.[29] The NSW Bar Association supported this compromise[30] but neither Legal Aid nor the Aboriginal Legal Service were in favour of it, arguing that it would compromise their ability to represent the interests of their clients properly.[31]

Our view

7.25 In any situation where s 194 might be used to withhold a document from an offender (and, by extension, any representatives of the offender), there are two competing public interests in play:

- The public interest in procedural fairness, including an offender being considered for parole. For the process to be procedurally fair, the offender is entitled to know the evidence against him or her and is entitled to have the opportunity of challenging it.
- An opposing public interest which will vary depending on the nature of the document to be withheld. If the document contains secret police intelligence, the relevant interest may be the public interest in effective law enforcement investigation. If the document is a victim submission, it will be the public interest in ensuring that victims are able to participate in the parole decision making process safely and privately.

7.26 In some cases, the importance of procedural fairness will outweigh the competing public interest. In other cases, the competing public interest will be more important than procedural fairness. When this conflict arises, SPA can act to mitigate the effect that withholding a document would otherwise have on procedural fairness.

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26. Legal Aid NSW, *Submission PA4*, 17, 22.
27. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6.
28. NSW Department of Justice, *Submission PA32*, 17-18.
29. *Parole Board Rules 2011* (UK) SI 2011/2947, r 8(3)-(4).
30. NSW Bar Association, *Submission PA11*, 10.
31. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 10; Legal Aid NSW, *Submission PA4*, 22.

For example, as is suggested in *Dib*,[32] SPA could provide the offender with limited information about the contents of the document instead of the document itself.

7.27 In our view, s 194 is drafted in a way that makes it difficult for SPA to navigate these conflicts adequately. In particular, the provision does not accommodate victims' submissions under the grounds listed with any certainty or clarity. It is also not clear what SPA must currently do in circumstances where the CAS Act is silent about the provision of reports and other documents. We propose two provisions to deal with these issues.

7.28 First, we recommend a new provision that deals exclusively with the disclosure of victims' submissions to offenders. In our view, victims have a compelling interest in safety and privacy that may be compromised by making the contents of their statements available to offenders. Victims should be protected as necessary to encourage their participation in SPA's proceedings. The provision should state that SPA must not disclose a submission from a registered victim unless the victim has consented in writing. This would match the legislation with SPA's current practice (with which we agree) and create clarity for SPA, victims and offenders. Victims could then have confidence that their submissions would not be provided to offenders without their consent.

7.29 We consider that the provision should ensure a level of procedural fairness by requiring that SPA inform the offender if a victim's submission has been withheld. At a minimum, the offender would then be aware that there is one document which he or she has not received that SPA will take into account.

7.30 Secondly, a new provision should substitute s 194 to deal with withholding other kinds of documents. Section 194 currently covers requests for documents from anyone who has a right under the CAS Act or the Regulation. Rather than stating that "nothing in this Act or the regulations requires a person to be provided with a copy of a report or other document", the provision should:

- allow SPA to withhold a document (or part of a document) if, in the opinion of a judicial member, there is a public interest in withholding it
- state that there is a public interest in withholding a document (or part of a document) if a judicial member considers that providing it would:
  - adversely affect the discipline or security of a correctional centre
  - endanger any person
  - put at risk an ongoing operation by a law enforcement or intelligence agency
  - adversely affect the supervision of any offender on parole, or
  - disclose the contents of the offender's medical, psychiatric or psychological reports
- if SPA is considering withholding a document (or part of a document) from the offender (or the offender's legal representative), require that the judicial member

32. *Dib v State Parole Authority* [2009] NSWSC 575 [25]-[26].

must be satisfied that the public interest in withholding it outweighs the public interest in procedural fairness for the offender

- if SPA withholds a document (or part of a document), require SPA to inform the person from whom it is withholding it that SPA has done so under s 194
- if SPA withholds a document (or part of a document) from an offender, require SPA, regardless of any request for access, to provide the offender with as much information about the contents of the document as would enable the offender to understand and respond to the substance of the facts, matters and circumstances which will affect the parole decision and is, in the opinion of a judicial member, consistent with the public interest in withholding it
- state that it applies, subject to the exceptions listed here, where SPA must, under any law, provide anyone with access to a report or other document, or where a person requests access to a report or other document in SPA's possession
- state that it applies notwithstanding any law to the contrary, and
- state that it does not apply to registered victims' submissions or to the Minister's entitlement to access all documents held by SPA under s 193A(1).

7.31 This substituted provision should cover all situations where SPA might otherwise be required to provide or accede to a request for access to documents, and should be drafted in a way that does not create a new general right of access to documents. The provision sets out a general scheme that applies to all people and makes special provision for those cases where the person is also the offender.

7.32 We have considered the views of Legal Aid NSW and the ALS against a provision allowing an offender's legal representatives to access material if the offender has been denied access.[33] We are also concerned about the potential for inadvertent misuse of such material which might give rise to serious harm. We consider that, if SPA has withheld, or would withhold, a document (or part of a document) from an offender, SPA should be required to withhold the document (or part of the document) from any legal representative of the offender.

7.33 The proposed provisions would ensure that SPA always communicates, at a minimum, the fact that a document exists and has been withheld. Except in the case of victims' statements, it would also put the onus on SPA to communicate as much about the contents of a withheld document as it can reasonably do, in the interests of procedural fairness to the offender.

Recommendation 7.3: The State Parole Authority's power to withhold documents

(1) A new provision should be inserted into the *Crimes (Administration of Sentences) Act 1999* (NSW) to address the disclosure of submissions from registered victims to offenders, stating that:

(a) the State Parole Authority must not disclose such submissions to an offender unless the victim has consented in writing, and

33. Para [7.24].

(b) if a victim's submission is withheld from an offender, the Authority must notify the offender or the offender's legal representative that the submission has been withheld.

(2) Section 194 of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be substituted by a new provision stating that:

(a) the Authority may withhold any material (including any document or part of a document) if, in the opinion of a judicial member, there is a public interest in withholding the material

(b) there is a public interest in the Authority withholding material if a judicial member considers that providing the material would:

(i) adversely affect the discipline or security of a correctional centre

(ii) endanger any person

(iii) put at risk an ongoing operation by a law enforcement agency or intelligence agency

(iv) adversely affect the supervision of any offender on parole, or

(v) disclose the contents of the offender's medical, psychiatric or psychological reports

(c) if the Authority is considering withholding material from an offender (or the offender's legal representative), the judicial member must be satisfied that the public interest in withholding it outweighs the public interest in procedural fairness for an offender

(d) if the Authority withholds material from any person, the Authority must inform the person from whom it is withholding the material that it has done so

(e) regardless of whether there has been a request for access to material, the Authority must provide an offender from whom such material has been withheld with as much information about the contents of the material as would enable the offender to understand and respond to the substance of the facts, matters and circumstances which may affect the parole decision and is, in the opinion of the judicial member, consistent with the public interest in withholding the material

(f) requires the Authority to withhold the material from any legal representative of any offender, if the Authority withholds, or would withhold, the material from the offender,

(g) applies, subject to the exceptions listed here, where the Authority must, under any law, provide any person with access to a report or other material, or where any person requests access to a report or other material in the Authority's possession

(h) applies notwithstanding any law to the contrary, and

(i) does not apply to registered victims' submissions or to the Minister's entitlement to access all documents held by the Authority under s 193A(1).

Plain language information for offenders

7.34 Beyond providing offenders with the documents on which SPA bases its decisions, we see a broader need to provide plain language information to offenders about the parole decision making process. The CAS Act requires SPA to conduct its proceedings with as little formality and technicality as possible.[34] SPA submitted in relation to review hearings that:

> it is important that the Authority members ensure that offenders understand the process as much as possible, with an introduction as to why the offenders are appearing before the Authority and the use of little technical language or jargon. The offender should not have to rely on their legal representative or Community Corrections to explain the process of review hearings or the decisions of the Authority after their matter.[35]

7.35 At the same time, Legal Aid NSW submitted that:

> There is scope to better assist an offender to understand what happens at review hearings … It would also assist if offenders could be provided with general information about review hearings to help them understand the process and the factors taken into account by SPA. [Legal Aid] solicitors explain the outcome of a review hearing to their client. However, it would assist clients to receive this information from a variety of sources to assist them to fully comprehend, or in some cases, accept the information. [36]

7.36 Lack of knowledge about the parole decision making process and lack of understanding about SPA's actions at any particular time can limit an offender's ability to participate meaningfully in the decision making process. It can also undermine the effectiveness of SPA's decision if it fails adequately to explain what an offenders needs to do to obtain parole.

7.37 Legal Aid suggested that SPA give offenders a plain language information package before it considers parole at a private meeting. The package would outline the main steps in the decision making process, and the nature and purpose of review hearings.[37] We support this proposal and recommend that such a package be as simple as possible and emphasise the points in the process where offenders can have input, such as in applying for a review hearing or at a review hearing. It should be translated into other common languages for offenders whose first language is not English. It should address common issues and misunderstandings that may arise for offenders, such as the differences between the NSW parole system and parole for federal offenders held in NSW correctional centres.[38]

7.38 We also recommend that SPA review the forms and notices that it routinely sends to offenders. In our view, although these forms and notices are generally written in a straightforward style, they say too much and are organised in a way that is potentially overwhelming and confusing.

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34. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 11(4)(c).
35. NSW, State Parole Authority, *Submission PA14*, 14.
36. Legal Aid NSW, *Submission PA4*, 21.
37. Legal Aid NSW, *Submission PA4*, 20.
38. This issue was raised in consultations: Dawn de Loas Correctional Centre inmates, *Consultation PAC6*.

7.39 Even if information is written plainly and conveyed as simply as possible, some offenders will need assistance to understand the parole decision making process and their role in it. About 8% of prisoners have an intellectual disability and almost half have an acquired brain injury.[39] Many offenders struggle with literacy. As we noted earlier, offenders have recurring problems accessing welfare officers who can help them understand the process and the documents. We have recommended that legal assistance be assured when offenders are applying for review hearings, but some offenders are likely to need more intensive support.

7.40 The CAS Regulation currently requires the general manager of the offender's correctional centre to explain, in language an offender is capable of understanding:

- any parole conditions imposed on the offender[40]
- any decision to revoke the offender's parole order before the offender is released,[41] and
- any decision to refuse parole (made at either a private meeting or a public hearing).[42]

7.41 We recommend that Corrective Services NSW also provide more assistance to offenders immediately before and during the parole decision making process to ensure that they are able to understand the process. To make sure that offenders with limited literacy can also access relevant information, the assistance and information provided by Corrective Services NSW should be oral where possible. For example, program facilitators could explain SPA's information package to offenders as part of the Nexus pre-release program.[43] Corrective Services NSW could also consider changing its Community Corrections policies so that the Community Corrections officer assigned to prepare a pre-release report also explains the parole decision making process to the offender.

Recommendation 7.4: Plain language information for offenders

(1) The State Parole Authority should develop an information package for offenders about the parole decision making process and the Authority's procedures. The package should be written in plain language and be as simple as possible. It should be available in English and other relevant languages.

(2) The Authority should review the standard forms and notices it provides to offenders to ensure that the forms and notices are as simple and easy to understand as possible.

(3) Corrective Services NSW should consider how to provide offenders with more non-written information about the parole decision making process, for example by discussion with the offender's assigned

39. R McCausland and others, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion* (Australian Human Rights Commission, 2013) 3-4.
40. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 217(1)(a)-(b).
41. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222(3).
42. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 224(2), cl 225(2).
43. Para [14.58].

Community Corrections officer or as part of a pre-release preparation program.

Reasons for decisions

7.42 The CAS Act requires SPA to record in its minutes the reasons for any decision to grant or refuse parole.[44] SPA's recorded reasons must be provided on request to the Attorney General, the Commissioner of Corrective Services and Community Corrections.[45] This requirement to record reasons applies to the decisions that SPA makes both at private meetings at review hearings.

7.43 When the requirement to record reasons was introduced, further amendments were proposed that would require SPA to provide its reasons to the offender and any registered victims as well, and to publish the reasons online.[46] These further amendments were not passed. At common law, the principles of natural justice or procedural fairness do not generally require administrative decision makers to provide reasons for decisions.[47]

Providing reasons to participants

7.44 In practice, SPA goes beyond the limited legislative requirement to record its reasons. Where SPA decides to refuse parole at a private meeting, it provides the offender with a written summary of its reasons. Where a review hearing is held, the judicial member chairing the SPA panel will verbally advise the offender of the reasons for the decision to grant or refuse parole. In cases where a registered victim has made a submission, SPA will advise the victim in writing of the decision and may include brief reasons.[48] Registered victims, assisted by the Corrective Services NSW staff who manage the Victims Register, can also apply to SPA informally for reasons for a decision.[49]

7.45 In SA, Queensland and Tasmania, the parole decision maker must give an offender written reasons for refusing parole.[50] 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".[51]

7.46 Some have argued that providing reasons is unnecessary, increases the workload of the parole decision maker and increases the likelihood of review applications.[52] Although providing reasons does have resource implications, reasons for refusing

44. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C(1)(a).
45. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C(3).
46. NSW, *Parliamentary Debates*, Legislative Council, 24 June 2003, 1876; NSW, *Parliamentary Debates*, Legislative Assembly, 1 July 2003, 2484.
47. *Public Service Board of NSW v Osmond* (1986) 159 CLR 656.
48. Information provided by NSW, State Parole Authority (15 August 2013).
49. NSW Department of Justice, *Submission PA32*, 25.
50. *Corrective Services Act 2006* (Qld) s 193(5)(a); *Corrections Act 1997* (Tas) s 72(8); *Correctional Services Act 1982* (SA) s 67(9).
51. *Correctional Services Act 1982* (SA) s 67(9)(b).
52. I Callinan, *Review of the Parole System in Victoria* (2013) 74.

parole are currently provided to offenders in NSW as a matter of practice and in at least three other Australian parole systems, seemingly without undue difficulty. The Supreme Court has indicated that, although SPA need not provide reasons, in cases where SPA does give reasons, they must adequately explain the decision.[53] Despite SPA routinely providing offenders with reasons for refusing parole, the inadequacy of those reasons has been rarely challenged in the Supreme Court.[54]

7.47 The Administrative Review Council has argued that a requirement to give reasons:

- helps to overcome the real grievance people experience when they are not told why a decision affecting them has been made
- promotes the ideal of justice being done and being seen to be done
- leads to a better standard of decision making, and
- allows an affected person see what was taken into account and whether an error was made.[55]

7.48 Giving reasons also contributes significantly to consistency in decision making.

Providing reasons to offenders

7.49 All stakeholders who made submissions on this issue supported SPA providing written reasons to offenders.[56]

7.50 The CAS Act should be amended to require SPA to provide offenders with written reasons for decisions to refuse parole made at a private meeting. This change will simply formalise SPA's existing practice. The Aboriginal Legal Service suggested that the CAS Act should require SPA's reasons to include comments on matters that may assist the offender in making a future application for parole.[57] We consider this extra stipulation unnecessary. SPA's reasons for refusing parole are generally specific and point the offender to matters that must be addressed for a future application to be successful.

7.51 In our view, the CAS Act should also be amended to require SPA to provide brief written reasons to offenders when granting parole. SPA does not currently provide offenders with written reasons for granting parole, but it has suggested that it could begin doing this.[58] Providing reasons when granting parole would provide important documentation in the case of later revocations, appeals or submissions from the State or the Commissioner. The Public Interest Advocacy Centre also supported

53. *Al Qatrani v State Parole Authority* [2007] NSWSC 1270 [36]-[45]; *Murray v State Parole Authority* [2008] NSWSC 962 [20]-[25].
54. In *Al Qatrani v State Parole Authority* [2007] NSWSC 1270; *Murray v State Parole Authority* [2008] NSWSC 962; compare *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223.
55. Administrative Review Council, *Review of Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991) 2-3.
56. F Johns and J Hertzberg, *Submission PA12*, 4; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19; Public Interest Advocacy Centre, *Submission PA1*, 14; NSW Bar Association, *Submission PA11*, 10; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 11; Legal Aid NSW, *Submission PA4*, 22.
57. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 11.
58. NSW, State Parole Authority, *Submission PA14*, 9-10, 15.

this change.[59] Providing reasons in these cases would serve the purposes outlined in paragraph 7.47.

7.52 Whether parole is granted or refused, we would expect that SPA's written reasons would be brief. A few sentences are likely to be sufficient to specify the reasons why SPA considers the offender is ready or not ready for parole.

7.53 If a review hearing is held, SPA should provide fresh written reasons to the offender. These fresh reasons could be in the form of a transcript of the relevant comments by the presiding member, or simply restate the original reasons if the decision and the reasons for it are the same. Legal Aid NSW reported that, currently, at review hearings SPA will say that its decisions are for "the reasons stated", referring back to the reasons for the decision made at the private meeting.[60] We agree with Legal Aid that it would be more helpful for SPA to provide a written copy of the reasons for decision again, even if they are the same as previously.

Providing reasons to registered victims

7.54 We consider that the CAS Act should be amended to require SPA to provide to any registered victim who has lodged a notice of interest the same statement of reasons as is provided to an offender. These registered victims have an interest in SPA's decision and the reasons for it. By providing reasons for SPA's decision at the private meeting stage and review hearing stage, registered victims would be kept fully informed of SPA's reasoning. If SPA is simply required to provide the same statement of reasons to registered victims as it provides to offenders, this requirement should add little to SPA's workload.

Recommendation 7.5: Providing written reasons for the State Parole Authority's decisions

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to require the State Parole Authority to provide to offenders, and any registered victims who have lodged a notice of interest, written reasons for its decisions to grant or refuse parole at a private meeting or review hearing.

Online publication of reasons for decision

7.55 Where a decision to grant or refuse parole is made after a review hearing and the case has elicited considerable community interest, SPA sometimes prepares detailed written reasons for its decision and publishes them on its website. SPA has published detailed reasons of this kind in five cases since 2008.[61] SPA also publishes one page "media statements" in some cases that have attracted media interest. These statements include background information on the offender and brief

59. Public Interest Advocacy Centre, *Submission PA1*, 14.
60. Legal Aid NSW, *Submission PA4*, 21.
61. NSW, State Parole Authority, "Parole Determinations", <http://www.paroleauthority.nsw.gov.au/publications/media-releases/parole-determinations>.

reasons for SPA's decision to grant or refuse parole. SPA published 12 media statements online in 2013 and 3 media statements in 2014.[62]

7.56 Parole decision makers in Tasmania and WA publish detailed reasons online in all cases where parole has been granted.[63] 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 (although declining) proportion of cases compared to SPA, with detailed reasons published in 35 cases in 2011, 18 cases in 2012 and 10 cases in 2013.[64]

7.57 One way for SPA to increase transparency and public confidence in its decisions would be to publish reasons for a greater range of decisions online.[65] In its submission, SPA supported publishing reasons online as a way of "informing and educating the community about SPA decision making" and "demonstrating SPA's transparency in decision making".[66] Several other stakeholders also favoured publishing more reasons online, both to improve public understanding of and confidence in the parole system[67] and to assist practitioners and offenders to make more relevant submissions to SPA.[68] No stakeholder specifically opposed publishing SPA's reasons online, although the Public Interest Advocacy Centre, the Police portfolio and the NSW Department of Justice noted that reasons might need to be de-identified in some cases.[69] Justice Action also expressed general concern about media exposure for offenders being released on parole.[70]

7.58 More stakeholders were concerned about the resource implications of publishing reasons online.[71] SPA suggested that a dedicated communications officer could be funded to manage online publication of reasons for all SPA decisions.[72] Legal Aid

62. NSW, State Parole Authority, "Media Statements", <http://www.paroleauthority.nsw.gov.au/publications/media-releases/media-statements>.
63. 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>.
64. NZ Parole Board, "Decisions of Public Interest" < http://www.paroleboard.govt.nz/decisions-of-public-interest.html>.
65. L Bartels, "Parole and Parole Authorities in Australia: A System in Crisis?" (2013) 37 *Criminal Law Journal* 357, 376.
66. NSW, State Parole Authority, *Submission PA14*, 15.
67. Legal Aid NSW, *Submission PA4*, 22; Public Interest Advocacy Centre, *Submission PA1*, 14; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19; Police Association of NSW, *Submission PA6*, 20; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6; NSW Department of Justice, *Submission PA32*, 25.
68. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19; NSW Young Lawyers Criminal Law Committee, *Preliminary submission PPA10*, 3; Legal Aid NSW, *Submission PA4*, 22.
69. Public Interest Advocacy Centre, *Submission PA1*, 14; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6; NSW Department of Justice, *Submission PA32*, 25.
70. Justice Action, *Submission PA13*, 5.
71. NSW, State Parole Authority, *Submission PA14*, 15; Legal Aid NSW, *Submission PA4*, 22; NSW Department of Justice, *Submission PA32*, 25; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6.
72. NSW, State Parole Authority, *Submission PA14*, 10.

NSW submitted that not all decisions might need to be published, and that the NZ approach of publishing a wider category of decisions that were of public interest could be adopted in NSW.[73] NSW Young Lawyers proposed that all decisions about offenders imprisoned for offences carrying a maximum penalty of 25 years imprisonment or more should be published. SPA could have a discretion to publish decisions about less serious offences depending on the level of public and media interest in the case.[74]

7.59 We accept that publishing reasons online in more cases would have resource implications for SPA. However, we agree with stakeholders that publication has important benefits in terms of transparency, public confidence in SPA's decision making, and legal practitioners' knowledge of SPA's practices. Ideally, publishing reasons online should be the rule rather than the exception. This state of affairs was envisaged when the issue was last considered by the statutory review of the CAS Act in 2005.[75]

7.60 SPA should work towards publishing reasons online for all its decisions to grant or refuse parole. We recommend that SPA prioritise publishing reasons for decisions about serious offenders, as these are likely to be of most concern to the community. We do not intend that SPA should publish judgment-style reasons as it has in the five published cases since 2008. Rather, we would expect that its published reasons would be the same short statement of reasons that it has, in practice, provided to offenders and registered victims.

7.61 SPA should also develop a privacy policy to govern when the reasons might need to be de-identified or redacted to protect the identity of a victim or to mitigate any security concerns.

Recommendation 7.6: Publishing reasons for State Parole Authority decisions

Subject to privacy and security considerations, the State Parole Authority should publish reasons online for all of its decisions to grant or refuse parole. The Authority should prioritise publishing reasons in cases involving serious offenders.

Parole in exceptional circumstances

7.62 Under s 160 of the CAS Act, SPA has a discretion to release an otherwise ineligible offender on parole in exceptional circumstances.[76] This power has a narrow scope, with the discretion limited to situations where an offender is either dying or there are "exceptional extenuating circumstances".[77] In practice, this provision has been interpreted strictly and has been rarely used, as the Government envisaged when

73. Legal Aid NSW, *Submission PA4*, 22.
74. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19.
75. I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) 112.
76. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160.
77. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160(1).

the bill for the amendment was introduced.[78] Between 2010 and 2013, only 32 offenders applied and only 12 offenders were granted parole under this power.[79]

7.63 Although s 160 is rarely used, there are a number of other mechanisms available. The Commissioner of Corrective Services can order an offender be transferred to a hospital for medical treatment,[80] and can authorise leave permits for an offender to attend events of special family significance or to visit a family member suffering serious illness or disability.[81] In addition, although offenders serving life sentences are not eligible for release under s 160,[82] the prerogative of mercy can operate to release an offender from custody in exceptional circumstances, including one serving a life sentence.[83]

7.64 The majority of stakeholders identified no problems with SPA's power to grant parole in exceptional circumstances.[84]

Meaning of "exceptional circumstances" and "dying"

7.65 Some stakeholders highlighted the lack of legislative guidance in interpreting what constitutes "exceptional extenuating circumstances" and "dying".[85] There are currently no formal guidelines or policies interpreting these terms. The Aboriginal Legal Service indicated that "dying" has often been interpreted as a prognosis of six months or less to live for the offender.[86]

7.66 We recognise stakeholders' concerns about the vagueness of "dying" and "exceptional extenuating circumstances" but we do not support introducing legislative definitions. It has not been suggested that the provision has failed to operate satisfactorily because of its vagueness. Also, as s 160 operates as a compassionate exception to the normal parole process, it is designed to apply only in rare and unusual cases. Any attempt to define the terms could limit the section's scope and usefulness. We recommend that SPA continue to consider each situation on a case by case basis.

Procedure for applications under s 160

7.67 Currently, the CAS Act does not outline how an offender is to make an application under s 160 or how SPA is to consider it.[87] Subsection 160(2) provides that SPA is

78. See the second reading speech for the Sentencing (Life Sentences) Amendment Bill 1989 (NSW): NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 1989, 14055-14056.
79. NSW Department of Justice, *Submission PA32*, 23.
80. *Crimes (Administration of Sentences) Act 1999* (NSW) s 24.
81. *Crimes (Administration of Sentences) Act 1999* (NSW) s 26.
82. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160(4).
83. *Crimes (Administration of Sentences) Act 1999* (NSW) s 270.
84. Law Society of NSW, *Submission PA5*, 6; NSW Bar Association, *Submission PA11*, 9; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 18; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6.
85. NSW, State Parole Authority, *Submission PA14*, 13; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 9.
86 Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 9.
87. Legal Aid NSW, *Submission PA4*, 19.

not required to consider an application, or to conduct a hearing, if it decides not to grant the application. That provision appears to be designed to make it unnecessary to process an application under the section in the way required for regular parole determinations. Subsection 160(3) explicitly excludes those parts of the legislation that prescribe procedures for regular parole determinations. Section 160AA, which allows the Commissioner of Corrective Services to make a submission to SPA at any time, is of general application and would apply to applications under s 160.

7.68 We consider that s 160(2) and (3) should be repealed and that a new subsection be inserted that sets out a simple decision making procedure for applications under s 160 that applies independently of other procedural provisions. The procedure should be a simplified version of the regular parole decision making process. This will help to limit the resources SPA must expend on considering s 160 applications.

7.69 Offenders should have a clearly stated right to apply to SPA for parole under s 160. SPA should be entitled to refuse to consider an application if satisfied that it is frivolous, vexatious or has no prospect of success. This is important to discourage and avoid wasting resources on meritless applications.

7.70 SPA should be able to decide the case at a private meeting or at a hearing, in its discretion. If a private meeting is held, the offender should not be able to apply for a hearing to review the decision. If a hearing is held, the offender, the Commissioner, the Attorney General and any registered victim should be notified and invited to attend to make submissions.

7.71 If SPA decides to refuse the application either at the private meeting or at a hearing, the offender should be provided with reasons for the decision.

7.72 We would expect that, in a clear case for parole under s 160, SPA would proceed by way of private meeting only and, in a more difficult case, would make its decision after a hearing.

Recommendation 7.7: Parole in exceptional circumstances

Subsections 160(2) and (3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) should be replaced by new provisions that set out a simplified procedure for s 160 applications that is to operate independently of all other procedures relating to the State Parole Authority's decisions whether to grant parole. The new provisions should provide that:

(a) offenders have a right to apply for parole under s 160

(b) the Authority is not required to consider the application if it is satisfied that the application is frivolous, vexatious or has no prospect of success

(c) the Authority may, in its discretion, consider the application at a private meeting or at a hearing

(d) if the Authority decides to refuse the application at a private meeting, the offender should not be entitled to apply for a hearing to review the decision

(e) if the Authority decides to hold a hearing, the Authority must invite the Commissioner, the Attorney General, any registered victim and the offender to make submissions, and

(f) if the Authority decides, at a private meeting or at a hearing, that the application should be refused, the Authority must notify the offender of its decision and provide reasons.

Offenders serving life sentences

7.73 Parole in exceptional circumstances is not available to offenders serving life sentences.[88] In 1996, we recommended removing this restriction in order to allow such offenders to make an application for parole in exceptional circumstances.[89] In this reference, Justice Action supported increasing the scope of this provision to offenders serving life sentences.[90]

7.74 The barrier for offenders serving life sentences is not found in other Australian jurisdictions with provisions for parole in exceptional circumstances.[91] The exclusion was introduced into the predecessor of the CAS Act to coincide with the introduction of s 19A into the *Crimes Act 1900* (NSW) which defined life imprisonment as "the term of the person's natural life".[92] The sections were introduced to calm concerns regarding the early release of life sentence prisoners by executive action, and thus protect truth in sentencing.[93]

7.75 It is difficult to draw a principled distinction between offenders serving life sentences and offenders serving set terms of imprisonment for the purposes of access to s 160. As s 160 is generally used only to parole offenders who are dying, successful applicants will still effectively serve the term of their natural life in prison.

7.76 On the other hand, in the case of a life sentence, a court has specifically intended that the offender will remain in custody until death. In these circumstances, we are not persuaded that there is sufficient reason to remove the exclusion of offenders serving life sentences from accessing parole in exceptional circumstances under s 160.

88. *Crimes (Administration of Sentences) Act 1999* (NSW) s 160(4).
89. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) Recommendation 67.
90. Justice Action, *Submission PA13*, 6.
91. *Corrective Services Act 2006* (Qld) s 194(1)(a); *Corrections Act 1997* (Tas) s 70.
92. *Crimes Act 1900* (NSW) s 19A.
93. See the second reading speech for the Sentencing (Life Sentences) Amendment Bill 1989 (NSW): NSW, *Parliamentary Debates*, Legislative Assembly, 30 November 1989, 14052.

8. Membership of the State Parole Authority and Serious Offenders Review Council

In brief

The provisions governing the constitution of panels and the formation of quorums for the State Parole Authority (SPA) and the Serious Offenders Review Council (SORC) should be redrafted and simplified. The membership composition of SPA and SORC should not be changed. Community members should, however, reflect the diversity of the community. Merit based selection processes should be used when appointing members, and members should undertake professional development and be subject to peer performance evaluation.

8.1 In this chapter, we examine the membership of the State Parole Authority (SPA) and the Serious Offenders Review Council (SORC). We look at the processes for appointing members, the criteria against which they are selected, and how their professional development and performance could be improved.

Composition of SPA and SORC

8.2 SPA is required to have at least 16 members, including:

- at least four judicial members
- at least one police officer
- at least one Community Corrections officer, and

- at least 10 community members.[1]

8.3 Community members are required to "reflect as closely as possible the composition of the community at large".[2] One community member must have an appreciation or understanding of the interests of victims of crime.[3]

8.4 The police and Community Corrections members of SPA are collectively referred to in the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) as "official members".[4] Deputies may be appointed to act for official members when they are unavailable.[5] On 31 December 2014, SPA had a total of five judicial members, five official members (three police and two Community Corrections representatives) and 14 community members.[6] In practice, SPA conducts its meetings as a panel of five members drawn from a roster: one judicial member, one police member, one Community Corrections member and two community members.

8.5 SORC is required to have at least eight but no more than 14 members, including:

- three judicial members
- two Corrective Services NSW officers, and
- a remainder made up of community members.[7]

8.6 As with SPA, SORC's community members must reflect as closely as possible the composition of the community at large and its Corrective Services NSW members are referred to in the CAS Act as "official members".[8] On 31 December 2014, SORC had three judicial members, two official members and six community members.[9] In practice, SORC meetings are generally conducted with two judicial members, two official members and two community members.

8.7 SPA and SORC members may be appointed for up to three years and are eligible for re-appointment when their terms of office expire.[10]

Official members

SPA's official members

8.8 While some stakeholders submitted that SPA's current composition is appropriate,[11] others did not support SPA having police and Community Corrections members.

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2).
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2)(e).
3. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2A).
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(3)(b).
5. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 3.
6. Information provided by NSW, State Parole Authority (4 February 2015).
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195(2).
8. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195(2)(b).
9. Information provided by NSW, Serious Offenders Review Council (4 February 2015).
10. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 4, sch 2 cl 4.
11. NSW, State Parole Authority, *Submission PA14*, 4; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.

The NSW Bar Association suggested that police and Community Corrections representatives should participate in an advisory role but should not be permitted to vote at SPA meetings because of the potential conflict of interest between their different roles.[12] The former Chairperson of SORC did not support appointing serving police officers to SPA as he was concerned that the valuable expertise of such officers can be "accompanied by the baggage of personal acquaintance, animus, or institutional prejudices". However, he had an "open mind" about SPA's Community Corrections members, as those members will likely focus on "an offender's *future* prospects, conduct and supervision".[13] Similarly, Legal Aid NSW supported the role of Community Corrections members, saying that they can provide up to date information by accessing the offender's case notes and raise any systemic issues in the performance of Community Corrections or Corrective Services NSW within the agency.[14]

8.9 The Callinan review of the Victorian parole system considered whether the Victorian Adult Parole Board should include a police officer in order to improve information sharing between Victoria Police and the Board. It expressed concern about the perception of a conflict of interest and concluded that a formal police member was unnecessary. However, it recommended that a member of the Victoria Police Fugitive Taskforce be co-located with the Board and that the Board seek police input into all parole decisions about serious offenders.[15]

8.10 It is possible that police or Community Corrections officers appointed to SPA may be influenced by their organisational culture or could be asked to consider an offender for parole that they had dealt with previously in their professional capacity. However, the same could be said about people from other professional backgrounds who are appointed as community members.

8.11 Police members provide law enforcement experience and knowledge about offenders' activities and associations in the community. Community Corrections representatives bring practical experience and knowledge of Community Corrections operations and resources, and can contribute informed assessments of proposed post-release plans.

8.12 It is not unusual for police and correctional staff to be represented on parole boards. In WA, membership of the Prisoners Review Board can include as many corrections and police officers as are necessary to deal with the Board's workload.[16] Membership of the NT Parole Board includes the Commissioner of Correctional Services and two police officers.[17] Queensland's Parole Board must include an officer of the Department of Corrective Services.[18] The Parole Board of SA must

12. NSW Bar Association, *Submission PA11*, 4.
13. D Levine, *Submission PA9*, 2-3.
14. Legal Aid NSW, *Submission PA4*, 9.
15. I Callinan, *Review of the Parole System in Victoria* (2013) 43, 70, 94.
16. *Sentence Administration Act 2003* (WA) s 103(1)(d)-(e).
17. *Parole Act* (NT) s 3B(1)(b)-(c).
18. *Corrective Services Act 2006* (Qld) s 218(1)(c).

include a retired police officer, but corrections employees are ineligible for appointment.[19]

8.13 Police and Community Corrections representatives constitute a minority of SPA's membership and there is no evidence to suggest that their presence on SPA is problematic. We are not persuaded that it is necessary to remove or change the number of SPA's police and Community Corrections members.

SORC's official members

8.14 Stakeholders expressed fewer concerns about SORC's official members. The Police portfolio submitted that a police officer should be added to SORC as "serious offenders are of significant concern to police".[20] When SORC was established in 1990, its official members included a police member.[21] Parliament removed the police member in 1993 as part of a restructure to address SORC's evolution into a case management body that exclusively focused on offenders in custody.[22] At that time, SORC's role in monitoring offenders in the community was transferred to SPA.[23] As case management of prisoners is a corrections function, not a policing function, in our view it is not necessary to add a police member to SORC. It makes sense for SORC's membership to include corrections representatives as official members because SORC's case management functions overlap with those of Corrective Services NSW.

Community members with police or corrections backgrounds

8.15 The NSW Bar Association and Legal Aid NSW submitted that people with police or corrections backgrounds should be ineligible for SPA's community member positions because official positions are reserved for people with this expertise.[24] Similarly, the former Chairperson of SORC argued that former Corrective Services NSW staff should be ineligible for SORC's community member positions as Corrective Services NSW is already represented on SORC, although he did not oppose the appointment of former police officers.[25]

8.16 Concerns about SPA's community members are understandable. As at 31 December 2014, four of SPA's 14 community members were former NSW Police Force or Corrective Services NSW officers (including a former Commissioner of Police and a former Commissioner of Corrective Services NSW).[26] However, we are not convinced that there should be a bar preventing people with police or corrections backgrounds from being appointed as community members. Such

19. *Correctional Services Act 1982* (SA) s 55(3)(e), s 55(4).
20. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.
21. *Prisons Act 1952* (NSW) s 60, inserted by *Prisons (Serious Offenders Review Board) Amendment Act 1989* (NSW) sch 1(2).
22. *Prisons (Amendment) Act 1993* (NSW) sch 1(2); NSW *Parliamentary Debates*, Legislative Council, 28 October 1993, 4620.
23. *Sentencing Act 1989* (NSW) sch 2 as amended by *Sentencing (Amendment) Act 1993* (NSW) sch 1[10].
24. NSW Bar Association, *Submission PA11*, 4; Legal Aid NSW, *Submission PA4*, 9.
25. D Levine, *Submission PA9*, 4-5.
26. Information provided by NSW, State Parole Authority (4 February 2015).

people are likely to have significant relevant experience working in the criminal justice system.

8.17 Our preference is for community member selection and appointment processes to be strengthened and made more transparent to ensure that community members reflect the composition of the community and contribute effectively to SPA and SORC's decision making. We discuss these selection processes later in this chapter.

Number of SPA's community members at meetings

8.18 The legislation governing SPA's composition was changed in 2009 to reduce the number of community members permitted to attend meetings from four to two. This change was made to bring SPA "into line with other tribunals" by decreasing the overall number of attendees from seven to five.[27] In most other Australian jurisdictions, community members outnumber or potentially outnumber the other members of their parole boards in decision making.[28] The NSW Bar Association and NSW Young Lawyers were of the view that returning to four community members at SPA meetings would allow SPA's decision panels to reflect the community's diversity better.[29] SPA's submission stated that a majority of SPA members supported the existing arrangements for meetings, although a minority of members considered that four community members would be preferable.[30]

8.19 There is no evidence that reducing the number of community members at SPA meetings has affected the quality of SPA's decision making. We understand that most decisions are currently unanimous.[31] We are not persuaded that any change needs to be made to the number of community members that attend SPA meetings.

Complexity of legislation on composition and governance

8.20 SPA's practice of sitting as a five member panel made up of one judicial, two official and two community members is not clearly reflected in the legislation providing for SPA's composition and procedures. The relevant provisions are unnecessarily complex and difficult to understand. They describe SPA's panels in terms of open statements (for example, "a Division is to consist of…at least one community member"[32]) together with separate rules in a different part of the CAS Act imposing limits on how many of the different types of members can be present to constitute

27. *Crimes (Administration of Sentences) Amendment Act 2008* (NSW) sch 1 [37], in force from 13 February 2009; NSW, *Parliamentary Debates*, Legislative Assembly, 4 December 2008, 12650, 12654.
28. *Corrections Act 1986* (Vic) s 64(2); *Corrective Services Act 2006* (Qld) s 224; *Correctional Services Act 1982* (SA) s 60; *Corrections Act 1997* (Tas) s 62(2); *Parole Act* (NT) s 3F(4); *Sentence Administration Act 2003* (WA) sch 1 cl 5(4).
29. NSW Bar Association, *Submission PA11*, 4; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 7.
30. NSW, State Parole Authority, *Submission PA14*, 4.
31. NSW, State Parole Authority (Chairperson), *Preliminary Consultation PPAC1*, 2.
32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 184(2)(b).

SPA at any one time (for example, "not more than 2 community members may attend"[33]).

8.21 Additional rules in Schedule 1 of the CAS Act require a quorum for SPA meetings of one judicial member and two non-judicial members.[34] This sits uncomfortably with s 184, which states that a "division" must consist of one judicial member and at least one community member and one official member. During consultations, SPA members stated that they were in favour of a quorum consisting of one of each kind of member. Given the importance of community members participating in SPA's parole decisions, the legislation should require a community member to be present for a decision to be reached as well as a judicial member and an official member. The minimum requirements for a decision to be reached will help in dealing with ad hoc situations where one or two members may not be present for all or part of a meeting.

8.22 The legislation also requires SPA to have a Chairperson, an Alternate Chairperson and a Deputy Chairperson, with complicated arrangements for them to act in each other's place.[35] It would be simpler to have a Chairperson and a Deputy Chairperson to act in the Chairperson's absence.

8.23 The provisions about SORC's composition and operation are similarly labyrinthine. SORC meetings require a quorum of one judicial member, one community member and one official member.[36] No more than three community members may attend SORC meetings.[37] There are no limitations on the numbers of other members who may attend, although only one judicial member may vote.[38] As we noted earlier, SORC meetings in practice attended by two judicial members, two official members and two community members.

8.24 In the interests of simplicity and transparency, it would be beneficial for the relevant parts of the CAS Act to be reviewed and redrafted so it is clear from the legislation how SPA and SORC are required to operate.

Recommendation 8.1: Composition and governance of the State Parole Authority

The parts of the *Crimes (Administration of Sentences) Act 1999* (NSW) relating to the composition and governance of the State Parole Authority should be redrafted according to the following requirements:

(a) The Authority must have at least 16 members, including at least four judicial members, at least one police member, at least one Community Corrections member, and at least 10 community members.

33. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 14(1).
34. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 13(1).
35. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 1 cl 1-2.
36. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 2 cl 12.
37. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 2 cl 13.
38. *Crimes (Administration of Sentences) Act 1999* (NSW) sch 2 cl 15.

(b) One judicial member should be appointed as Chairperson of the Authority. Another judicial member should be appointed as Deputy Chairperson of the Authority.

(c) The Chairperson of the Authority should schedule panels to make the decisions of the Authority. Each scheduled panel should consist of five members: one judicial member, one police member, one Community Corrections member and two community members. The judicial member should preside.

(d) If fewer than the 5 members that make up a panel are present at a meeting, the panel may make a decision provided at least one judicial member, one community member and one official member (either a police officer or Community Corrections officer) are present.

(e) Each appointing agency for official members may appoint deputies to act in the place of absent official members.

(f) The Chairperson of the Authority should have the power to determine how meetings are to be conducted, and also to convene meetings of all Authority members for the purposes of training, communication and professional development.

Recommendation 8.2: Composition and governance of the Serious Offenders Review Council

The parts of the *Crimes (Administration of Sentences) Act 1999* (NSW) relating to the composition and governance of the Serious Offenders Review Council should be redrafted according to the following requirements:

(a) The Serious Offenders Review Council must have at least eight and no more than 14 members, including at least three judicial members, at least two official members and at least three and no more than nine community members.

(b) One judicial member should be appointed as Chairperson of the Council. Another judicial member should be appointed as Deputy Chairperson of the Council.

(c) The Chairperson of the Council should schedule panels to make the decisions of the Council. Each scheduled panel should consist of six members: two judicial members, two official members (officers of Corrective Services NSW appointed by the Commissioner) and two community members. The Chairperson (or, if the Chairperson is not present, the Deputy Chairperson) should preside.

(d) If fewer than the five members that make up a panel are present at a meeting, the panel may make a decision provided at least one judicial member, one community member and one official member are present.

(e) The appointing authority for official members should be able to appoint deputies to act in the place of absent official members.

(f) The Chairperson of the Council should have the power to determine how meetings are to be conducted, and also to convene meetings of all Council members for the purposes of training, communication and professional development.

Merit selection of SPA and SORC members

Community members

8.25 The Minister for Corrections nominates SPA and SORC's community members (subject to Cabinet consideration) and the Governor appoints them.[39] While in some instances a selection process involving interviews has been used, at present there is no formal selection process or standardised selection criteria for SPA and SORC community members.[40]

8.26 A number of stakeholders supported a more transparent process for selecting community members.[41] Many stakeholders called for a formal process, including standardised selection criteria, to ensure that community members have the appropriate skills and expertise.[42] SPA proposed developing a merit selection process that includes a written application and interview by a panel convened by a judicial member, preferably the Chairperson.[43] Similarly, the former Chairperson of SORC suggested that guidelines should be established for the selection of SORC's community members.[44]

8.27 Justice Action proposed that the NSW Council of Social Services (NCOSS) should appoint half of SPA and SORC's community members. It observed that NCOSS is "the peak non-governmental organisation with a focus on policy review, advocacy and consultation" and that having "both a governmental and a non-governmental entity equally contribute to the members on SPA [and SORC] would be beneficial".[45]

8.28 The Public Service Commission's Appointment Standards require appointments to NSW Government boards and committees to be made on demonstrated merit through a transparent and open selection process.[46] Positions must be advertised and candidates considered against assessment criteria based on the skills, experience, and knowledge required for the role.

8.29 We recommend that SPA and SORC community members be appointed through a transparent and competitive merit selection process. When community members are required, the Minister for Corrections should appoint a recruitment panel to advertise for, assess and interview candidates. SPA or SORC, as the case may be, should be represented on the panel. The Department of Justice should devise

39. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195(2)(c); NSW Department of Attorney General and Justice, *Submission PA32*, 7; NSW Department of Premier and Cabinet, *NSW Government Boards and Committees Guidelines* (July 2013) 14-16.
40. N Beddoe, *Preliminary Submission PPA1*, 1.
41. N Beddoe, *Preliminary Submission PPA1*, 1-2; D Levine, *Submission PA9*, 3-5; NSW, State Parole Authority, *Submission PA14*, 4-5; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.
42. Aboriginal Legal Service, *Submission PA2*, 4; Police Association of NSW, *Submission PA6*, 11; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 7-8; NSW, State Parole Authority, *Submission PA14*, 4
43. NSW, State Parole Authority, *Submission PA14*, 4.
44. D Levine, *Submission PA9*, 5.
45. Justice Action, *Submission PA10*, 7.
46. NSW Public Service Commission, *Appointment Standards: Boards and Committees in the NSW Public Sector* (2013) 5-6.

standard selection criteria for community members in consultation with SPA and SORC, to be approved by the Minister. Once a panel has selected the best candidates, it should forward a recommendation to the Minister that these candidates be appointed. If the Minister accepts the recommendation, the candidates should, subject to Cabinet consideration, be recommended for appointment to the Governor.

Recommendation 8.3: Merit selection of community members

(1) Community members of the State Parole Authority and the Serious Offenders Review Council should be appointed following an openly advertised formal merit selection process.

(2) In consultation with the Authority and the Council, the NSW Department of Justice should develop standard selection criteria for assessing potential candidates. The Minister for Corrections should approve these criteria.

(3) The Minister for Corrections should appoint a panel (on which the Authority or the Council should be represented) to select community members. The selection panel should recommend candidates for appointment to the Minister. If the Minister accepts the recommendation, the candidate should, subject to Cabinet consideration, be recommended to the Governor for appointment.

Judicial members

8.30 The Governor appoints judicial members of both SPA and SORC. In practice, these members are chosen by the Minister for Corrections (for SORC) or the Attorney General (for SPA), subject to Cabinet's consideration.[47] Judges, retired judges, magistrates, retired magistrates, and Australian lawyers of at least seven years standing are eligible for appointment as judicial members.[48]

8.31 Judicial members of SPA and SORC are also not subject to a formal merit selection process. Those that have (or have held) a judicial appointment will meet a certain standard of suitability for the role, but lawyers who have not held a judicial appointment may not.

8.32 In our 1996 sentencing report, we opposed expanding the eligibility criteria for SPA's judicial members beyond judges and retired judges on the ground that it might dilute the value of judicial oversight of SPA's deliberations and the public confidence in its decisions which was said to come from a judge presiding.[49] We recommended that all judicial members be serving or former Supreme Court or District Court judges.

47. NSW Department of Attorney General and Justice, *Submission PA32*, 7; NSW Department of Premier and Cabinet, *NSW Government Boards and Committees Guidelines* (2013) 14-16. The Minister for Corrections is responsible for the *Crimes (Administration of Sentences) Act 1999* (NSW) except for s 183(2)(a), which relates to appointment of judicial members of SPA and is the responsibility of the Attorney General.

48. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1) (definition of 'judicially qualified person'), s 183(2)(a), s 195(2)(a); *District Court Act 1973* (NSW) s 13(2); *Supreme Court Act 1970* (NSW) s 26(2).

49. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [11.21].

8.33 Since 1996, all judicial members appointed to SPA have been serving or retired judges or magistrates.[50] SORC's chairperson has been a judge or retired judge, but its judicial membership has included barristers, solicitors and a law professor.[51] Expanding the eligibility criteria for judicial members has enlarged the pool of legal expertise available to be appointed to SPA and SORC. We have not identified any issues or concerns with the eligibility of such people for appointment as judicial members and no stakeholders have raised concerns.

8.34 It seems desirable for clear criteria to be developed to guide the appointment of judicial members and to ensure the right experience and expertise. As with community members, the NSW Department of Justice could develop appointment criteria in consultation with SPA and SORC, to be approved by the Minister and the Attorney General. Vacancies of judicial members would not necessarily need to be advertised but the appointment criteria could be used as part of an expression of interest process.

Recommendation 8.4: Merit selection of judicial members

The judicial members of the State Parole Authority and the Serious Offenders Review Council should be appointed on the basis of standard appointment criteria. The NSW Department of Justice should develop standard appointment criteria in consultation with the Authority and the Council. The Minister for Corrections and the Attorney General should approve the criteria.

Official members

8.35 The Commissioner of Corrective Services appoints SPA's Community Corrections members after an internal competitive merit selection process which includes internal advertisement, a written application and panel interviews.[52] The Commissioner of Police appoints SPA's police members also through a merit selection process, although this can sometimes be by expression of interest and suitability assessment rather than internal advertisement and competitive selection.[53]

8.36 The Commissioner of Corrective Services NSW appoints SORC's Corrective Services NSW members.[54] They are not subject to a merit selection process. Instead, two senior staff members from Corrective Services NSW's classification and case management area are appointed because of their expertise in areas relevant to SORC's responsibilities.[55] As of 31 December 2014, the two Corrective Services NSW members on SORC were the Executive Director, Inmate

50. Information provided by NSW, State Parole Authority (17 January 2014).
51. NSW, Serious Offenders Review Council, *Annual Report2012*(2013) 6.
52. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2)(c); Information provided by Corrective Services NSW (19 May 2014).
53. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2)(b).
54. *Crimes (Administration of Sentences) Act 1999* (NSW) s 195(2)(b).
55. Information provided by Corrective Services NSW (19 May 2014).

Classification, Case Management and External Leave Programs and the Assistant Director, Inmate Classification and Placement.[56]

8.37 As official members of SPA are already subject to a merit selection process, we see no need for change in this area. SORC's official members are not subject to merit selection, but this seems to be a special case due to the expertise in classification and case management that is desirable in these members. We see no reason to change the way that SORC's official members are selected.

Criteria for selecting community members

8.38 Currently, the CAS Act requires SPA and SORC's community members to "reflect as closely as possible the composition of the community at large".[57] At least one of SPA's community members must also be a person who, in the opinion of the Minister, "has an appreciation or understanding of the interests of victims of crime".[58]

Representing the community

8.39 As at 31 December 2014, 25% of SPA members were female, 4% identified as Aboriginal, 17% were from culturally and linguistically diverse backgrounds and 17% lived in regional areas.[59] A large number of submissions were in favour of reserving community member positions on SPA and SORC for people with specific personal backgrounds or characteristics. Some Australian jurisdictions, such as Queensland, SA and the NT, require women and Aboriginal people to be represented on their parole boards.[60]

8.40 The Public Interest Advocacy Centre submitted that SPA's membership should include minimum representation for:

- women
- people who identify as Aboriginal or Torres Strait Islander
- people from a culturally or linguistically diverse background
- people who identify as gay, lesbian, bisexual, transgender or intersex
- people who work with people with mental illness
- people who work with people with disabilities, and
- people who work with homeless people.[61]

56. Information provided by NSW, Serious Offenders Review Council (4 February 2015).
57. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2)(e), s 195(2)(c).
58. *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2A).
59. Information provided by NSW, State Parole Authority (4 February 2015).
60. *Corrective Services Act 2006* (Qld) s 218(1)(b)(i); *Correctional Services Act 1982* (SA) s 55(3)(f); *Parole Act* (NT) s 3B(1)(f).
61. Public Interest Advocacy Centre, *Submission PA1*, 6.

8.41 The former Chairperson of SORC agreed that SORC's community members should be appointed to reflect the ethnic diversity of the community, men and women, and the metropolitan and regional populations.[62]

8.42 SPA indicated in its submission that the majority of its members were of the view that the current balance of membership appears appropriate and should remain representative of the community at large.[63] A minority of SPA members favoured establishing specialist positions for Aboriginal people and people of culturally and linguistically diverse backgrounds. The Police portfolio was of the view that the current balance of SPA's membership is appropriate.[64]

8.43 Other stakeholders submitted that positions should be reserved for people of specific personal backgrounds or characteristics to ensure that the needs and experiences of certain groups within the prisoner population are represented. A number of stakeholders submitted that, having regard to the overrepresentation of Aboriginal people in custody, SPA and SORC should have a specific role for an Aboriginal or Torres Strait Islander person.[65] NSW Young Lawyers suggested that when selecting SPA and SORC members, the overrepresentation of Aboriginal people in the criminal justice system should be considered, but increasing Aboriginal representation should not necessarily be a mandatory measure.[66] Justice Action advocated including in SPA's membership at least one former prisoner with personal experience with the parole system.[67]

8.44 There appears to be some uncertainty about the role of community members and what "representing the community" means in the context of SPA and SORC. Some stakeholders thought that community members should represent the interests of the community as a whole. Others submitted that community members should reflect particular groups that are significantly represented (or overrepresented) in the criminal justice system. Some seemed to be of the view that community members should represent particular minority groups, given that judicial and official members are less likely to reflect these groups.

8.45 In our view, SPA and SORC are bodies that ultimately represent the interests of the community, not the interests of prisoners. We agree that knowledge and understanding of the issues facing prisoners should inform SPA and SORC's decisions. However, we consider that SPA and SORC community members should represent the community as a whole.

8.46 As part of representing the community, we consider it desirable for community members to be drawn from a range of different backgrounds. We recommend that the stipulation in the CAS Act that community members must "reflect the composition of the community at large" be rephrased as a requirement that

62. D Levine, *Submission PA9*, 3-5.
63. NSW, State Parole Authority, *Submission PA14*, 4.
64. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.
65. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 4-5; D Levine, *Submission PA9*, 4-5; Legal Aid NSW, *Submission PA4*, 10-11.
66. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 7.
67. Justice Action, *Submission PA10*, 7.

community members must, as far as is practicable, "reflect diversity in the community".

8.47 We appreciate stakeholders' arguments that positions should be reserved for people of different backgrounds, particularly Aboriginal people, women and other people from culturally and linguistically diverse origins. However, as SPA usually has about 12 community members at any one time and SORC has about five, it is impossible for such small groups of people to "reflect the composition of the community at large", especially because the two organisations make decisions as panels which usually include only two community members. Instead of reserving specific positions, we recommend that a competitive merit selection process should consider a candidate's background and whether the candidate contributes to the community members of SPA and SORC "reflecting the diversity of the community". Such a formulation emphasises diversity and the importance of drawing community members from a range of different backgrounds.

Recommendation 8.5: Community members should reflect the diversity in the community

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to provide that State Parole Authority and Serious Offenders Review Council community members must, as far as is practicable, reflect diversity in the community.

(2) A competitive selection process for community members should include consideration of a candidate's background and the extent to which the appointment of the candidate would contribute to community members reflecting diversity in the community.

Specialist members

8.48 Some Australian jurisdictions require people with expertise in specific areas to be appointed to their parole boards. The Queensland Parole Board must include at least one doctor or psychologist.[68] The SA Parole Board must include one legally qualified medical psychiatric practitioner and one expert in criminology or sociology.[69] In Tasmania, two of the three members of the Parole Board must be experts in sociology or criminology, or otherwise possess appropriate knowledge and experience.[70]

8.49 Many stakeholders supported including a psychologist or psychiatrist in SPA's membership because people with cognitive and mental health impairments frequently appear before SPA.[71] Justice Action also recommended including criminologists and sociologists in SPA's membership.[72] The Police Association of NSW emphasised that such experts may be capable of "looking at reports,

68. *Corrective Services Act 2006* (Qld) s 218(1)(b)(ii).
69. *Correctional Services Act 1982* (SA) s 55(3).
70. *Corrections Act 1997* (Tas) s 62(2)(b).
71. Legal Aid NSW, *Submission PA4*, 10; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 4; Justice Action, *Submission PA10*, 7.
72. Justice Action, *Submission PA10*, 7.

questioning these reports, [and] going through them in considerable detail".[73] Legal Aid NSW also submitted that SORC should have a designated role for a forensic psychologist because of the significant influence that field has on parole outcomes for serious offenders.[74]

8.50 Other stakeholders expressed concerns that people with specialist expertise would not necessarily reflect or represent the community.[75] NSW Young Lawyers was of the view that a proportion of community members should be selected purely as representatives of the community to reassure the community as a whole that its interests are represented.[76] Stakeholders such as the NSW Bar Association and the former Chairperson of SORC suggested that, with careful consideration, separate positions could be created for specialist members akin to those reserved for police and Community Corrections representatives.[77]

8.51 The majority of SPA members did not think that positions needed to be set aside for people with specialist expertise as such expertise is more appropriately and more cost effectively canvassed in specialist reports than by appointing a specialist member.[78] However, a minority of members saw value in having specialist members in the areas of psychology, psychiatry, victim representation, Aboriginal people and culturally and linguistically diverse people.

8.52 People with professional expertise in areas such as psychology, psychiatry and criminology would undoubtedly make a valuable contribution to SPA and SORC's work. However, in our 1996 sentencing report, we took the view that where deliberations could be assisted by expert advice from specialists, it could be sought in individual cases.[79] In particular, SPA or SORC can request a psychologist or psychiatrist report on an offender when they have special concerns.

8.53 We consider that community member positions should not be reserved for people with particular expertise. There needs to be flexibility when appointing members as the number of suitable candidates for positions who can devote enough time to take on the significant workload of a SPA or SORC member may be limited. In addition, reserving community member positions for specialist professionals could affect SPA and SORC's capacity to reflect the diversity of the community. Additional positions could be added instead for specialist members but this may dilute their experience and expertise and is less cost effective than SPA or SORC commissioning expert reports where necessary in individual cases.

8.54 At the same time, community members should actively contribute to the quality of decision making through their knowledge, experience or expertise. To ensure that community members can make a useful contribution, the standard selection criteria for community members could include the basic requirement that the person should

73. Police Association of NSW, *Submission PA6*, 11.
74. Legal Aid NSW, *Submission PA4*, 11.
75. D Levine, *Submission PA9*, 5; NSW Bar Association, *Submission PA11*, 5; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 3.
76. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 7-8.
77. D Levine, *Submission PA9*, 5; NSW Bar Association, *Submission PA11*, 5.
78. NSW, State Parole Authority, *Submission PA14*, 4.
79. NSW Law Reform Commission, *Sentencing*, Report 79 [11.24].

have knowledge of, or experience working in, the criminal justice system, or relevant fields such as social work, mental health or other human services.

8.55 This would not require a high level of knowledge or expertise; all community members would not have to be lawyers, criminologists, social workers or mental health professionals. Instead, the criterion would be intended to ensure that community members have the ability and interest to perform the role through some level of interest in, and awareness of, the relevant issues. People from many different professional backgrounds – psychologists, psychiatrists, criminologists, sociologists, alcohol and other drug workers, social workers and mental health workers – would meet this threshold, as would people who work with community and other non-government organisations, and who work with victims and offenders.

Recommendation 8.6: Criteria for appointing community members

The standard selection criteria used for selecting community members should require the person to have knowledge of, or experience working in, the criminal justice system or relevant fields such as social work, mental health or other human services.

Professional development and performance evaluation

8.56 When they commence their appointment, SPA community members are given SPA's *Operating Guidelines* and members' handbook, and then receive on the job training by sitting as observers with a mentor for a few meetings.[80] SPA also generally holds two "policy days" per year where all members are able to meet to share views and experience and receive professional development,[81] although no policy days could be held in 2013.[82]

8.57 SPA submitted that a thorough, structured orientation process should be developed that explains relevant legislation, the role of Community Corrections, and the role, duty and obligations of SPA members. SPA suggested that this should be supplemented by a three to six month mentoring process for all new community, official and judicial members. SPA noted that an orientation process and mentoring program would require significant funding but should produce knowledgeable and well informed decision makers.[83]

8.58 SPA also submitted that its members, particularly community members, may benefit from more opportunities and resources for professional development. It proposed that the Chairperson or other judicial members should give members regular feedback. It submitted that this should be used as "an opportunity to provide two way feedback on issues of concern for either party and as a forum for raising areas

80. NSW, State Parole Authority, *Preliminary Consultation PPAC2*.
81. NSW, State Parole Authority, *Annual Report 2012* (2013) 12; NSW, State Parole Authority, *Member's Handbook* (2012) 5.
82. Information provided by NSW, State Parole Authority (19 August 2014).
83. NSW, State Parole Authority, *Submission PA14*, 5.

required for further development and training, either individually or as an Authority".[84]

8.59 The former Chairperson of SORC supported a number of proposals for SORC community member professional development including making information available to all candidates for membership about the level of work involved, and orientation and mentoring for new members.[85]

8.60 The Public Interest Advocacy Centre submitted that there should be a comprehensive program of professional development for all community members, and this should involve training in the relevant legislation, operating policies and recent developments in sentencing.[86] Similarly, Legal Aid NSW proposed there be ongoing training for community members, particularly regarding the sentencing process, the role of parole, cognitive impairments, and cross cultural awareness. Legal Aid NSW also submitted that members need more than the current two "policy days" per year for professional development.[87] NSW Young Lawyers submitted that all SPA and SORC members should be subject to performance reviews.[88]

8.61 In our view, given the importance of the work carried out by SPA and SORC, there should be a commitment to members' professional development and to evaluating their performance. A structured orientation and mentoring process should be developed for new community members of both SPA and SORC. The Chairpersons of SPA and SORC should consider whether a similar or adjusted process would be useful for new judicial and official members.

8.62 SPA should receive adequate funding to hold at least two "policy days" per year for all members' professional development. As well as covering detailed matters of operational policy, policy days should cover issues such as cross cultural awareness, the experience of offenders with cognitive or mental health impairments, and the use of actuarial risk assessment tools in correctional contexts.

8.63 Introducing performance appraisals could enhance professional development. The system of appraisal for the Parole Board for England and Wales includes peer observation, with all members being appraised by their colleagues "at regular intervals".[89] Performance appraisals of SPA and SORC members might assist in standardising approaches to decision making and in rectifying any problems that may arise with particular members, as well as bringing the quality of representation in line with community expectations.[90] We recommend that SPA and SORC develop a system of regular (for example, annual) peer performance appraisals to give

84. NSW, State Parole Authority, *Submission PA14*, 5.
85. D Levine, *Submission PA9*, 3-5.
86. Public Interest Advocacy Centre, *Submission PA1*, 6-7.
87. Legal Aid NSW, *Submission PA4*, 10.
88. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 7.
89. Parole Board for England and Wales, *Member Handbook* (2006)s A ch 5 quoted in S Shute, "Parole and Risk Assessment" in N Padfield (ed) *Who to Release? Parole, Fairness and Criminal Justice* (Willan Publishing, 2007) 30-1.
90. N Beddoe, *Preliminary Submission PPA1*, 3-4.

members feedback on their performance. Such performance appraisals should be considered during any re-appointment process.

Recommendation 8.7: Professional development and performance evaluation for State Parole Authority and Serious Offenders Review Council members

(1) A structured orientation and mentoring process should be developed and implemented for new community members of the State Parole Authority and the Serious Offenders Review Council. The Chairpersons of the Authority and the Council should consider whether a similar or adjusted process would be useful for new judicial and official members.

(2) The Authority should receive adequate funding to hold at a minimum two "policy days" per year for all members' professional development. As well as covering detailed matters of operating policy, policy days should cover issues such as cross cultural awareness, the experience of offenders with cognitive impairments, and the use of actuarial risk assessment tools in correctional contexts.

(3) The Authority and the Council should develop a system of regular (for example, annual) peer performance appraisals to give members feedback on their performance. Such performance appraisals should be considered during any re-appointment process.

9. Parole conditions

In brief

All parolees should be required not to commit any offence and accept supervision. The list of obligations under a supervision condition should make it clear that a parolee must follow the reasonable directions of the supervising officer. The list should include examples of the main types of matters about which a supervising officer could give reasonable directions. The State Parole Authority should be able to add any other condition it considers reasonably necessary: to manage the risk to community safety of releasing the offender on parole; to take account of the effect on a victim of releasing the offender on parole; and to respond to a breach of parole.

9.1 In this chapter, we discuss the standard conditions that apply to all parole orders. We also look at the additional conditions that can be added by the State Parole Authority (SPA). We discuss breach of conditions and revocation of parole orders in Chapter 10.

Standard conditions of parole

9.2 Parolees in NSW must comply with the three standard conditions of parole which are:

(a) to be of good behaviour

(b) not to commit any offence, and

(c) to adapt to normal lawful community life.[1]

9.3 These standard conditions are imposed on all parolees by regulation and cannot be revoked or altered.[2] They apply for the duration of all parole orders. SPA and the Police portfolio submitted that all the current standard conditions are adequate.[3]

Retaining the "not commit any offence" condition

9.4 Legal Aid NSW submitted that the condition requiring offenders on parole not to commit offences should be amended to "not be convicted of an offence that attracts a term of imprisonment", so that low level crimes such as fare evasion or minor traffic matters will not jeopardise an otherwise compliant parolee's liberty.[4] Shopfront Youth Legal Centre made a similar submission.[5]

9.5 Parole conditions requiring offenders not to commit offences are imposed in most other Australian jurisdictions.[6] The ACT requires offenders on parole not to commit offences punishable by imprisonment, while other jurisdictions require offenders not to commit any offences.

9.6 In our 2013 sentencing report we considered it appropriate, in the case of a good behaviour bond imposed under a suspended sentence, to confine the condition to "not to commit a further offence punishable by imprisonment", because the consequence of breaching a suspended sentence is likely to be imprisonment.[7] For other good behaviour bonds, where there is less likelihood of an offender being incarcerated for a breach, we recommended that the condition be the broader "not commit a further offence".

9.7 There are differences between parole and suspended sentences which lead us to the view that the broader condition ("not commit any offence") is appropriate for parole. In the case of a suspended sentence, a breach will usually lead to

1. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 214.
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(4).
3. NSW, State Parole Authority, *Submission PA19*, 4; NSW Police Force and NSW Ministry of Police and Emergency Services, *Submission PA30*, 4.
4. Legal Aid NSW, *Submission PA33*, 14.
5. Shopfront Youth Legal Centre, *Submission PA40*, 7.
6. *Corrections Regulations 2009* (Vic) sch 4 form 1; *Corrective Services Act 2006* (Qld) s 200(1)(f); *Correctional Services Act 1982* (SA) s 68(1)(a)(i), s 68(1aa)(a)(i); *Crimes (Sentence Administration) Act 2005* (ACT) s 137(1)(a); *Crimes Act 1914* (Cth) s 19AN(1)(a); Parole Board of Tasmania, *Annual Report 2011-2012* (2012) 24; Parole Board of the Northern Territory, *Annual Report 2013* (2014) 20.
7. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [10.58]-[10.59].

revocation and incarceration unless the breach was trivial or there were good reasons for it.[8] In the case of a breach of parole, SPA has full discretion to revoke or not revoke parole in response to a breach. SPA deals with reoffending breaches on a case by case basis, looking at the seriousness of the parolee's conduct. This is discussed in Chapter 10 where we also propose that SPA should have a wider range of responses available to deal with breaches that do not merit revocation. This would give SPA added flexibility to deal with situations where a parolee has committed a minor offence not punishable by imprisonment. Consequently, our view is that the condition requiring offenders not to commit any offence while on parole should not be changed.

Making supervision a standard condition of parole

9.8 NSW is the only Australian jurisdiction where supervision is not an automatic component of parole for all offenders.[9] Instead, a supervision condition can be added as an additional condition on the parole order either by the sentencing court (for court based parole) or SPA. Once a supervision condition is added to a parole order cl 219(2) of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation) sets out the obligations that apply under that condition.

9.9 In practice, supervision is a standard feature of parole in NSW. SPA adds a supervision condition to all the parole orders it makes. Court based parole orders automatically include a supervision condition unless the sentencing court expressly states otherwise.[10] Corrective Services NSW estimates that about 98% of parolees are subject to a supervision condition.[11]

9.10 The period after release from custody has been identified as a crucial period for offenders.[12] They have to reacquire skills that were unnecessary in custody, such as arranging housing and connecting to utilities, paying bills, preparing meals, looking for work, booking medical appointments, and managing their time. Some offenders have complex needs, such as drug and alcohol issues or cognitive or mental health impairments and require significant ongoing support to manage the risk of reoffending. Some offenders need monitoring to deter reoffending and manage risk.

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8. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 98(3); *DPP v Cooke* [2007] NSWCA 2.
9. *Corrective Services Act 2006* (Qld) s 200(1)(a); *Corrections Regulations 2009* (Vic) sch 4 form 1; *Correctional Services Act 1982* (SA) s 68(1aa)(a)(iii)(A); *Sentence Administration Act 2003* (WA) s 31(1); *Corrections Act 1997* (Tas) s 77(2); *Parole Act* (NT) s 5(5)(a); *Crimes (Sentence Administration) Regulation 2006* (ACT) cl 4(b). Supervision is a mandatory condition of parole in NSW where the Supreme Court has determined a non-parole period (but not a specified term) for an offender under *Crimes (Sentencing Procedure) Act 1999* (NSW) sch 1 and where SPA grants parole because of exceptional extenuating circumstances under *Crimes (Administration of Sentences) Act 1999* (NSW) s 160: *Crimes (Administration of Sentences) Act 1999* (NSW) s 128B and s 128C.
10. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 51(1AA).
11. Information provided by Corrective Services NSW (23 October 2013).
12. M Borzycki, *Interventions for Prisoners Returning to the Community* (Australian Institute of Criminology, 2005) 33-36; E Baldry, "Recidivism and the Role of Social Factors Post Release" (2007) 81 *Precedent* 4, 5.

9.11 In our view, supervision by Community Corrections should be a standard condition of parole. A recent meta-analysis found that supervision of medium and high risk offenders according to the best practice risk-needs-responsivity principles[13] significantly reduces reoffending rates (by about 20%).[14] The purpose of releasing offenders on parole is to reduce risk to community safety by managing and supervising offenders' re-entry into the community. Parole cannot serve this purpose unless supervision is a general condition of parole. The public understanding of parole is that it involves supervision by Community Corrections officers.

9.12 Currently, if an offender is subject to a supervision condition, it applies either until the end of the offender's parole period or for three years (if the offender's parole period is more than three years). SPA can extend the supervision condition for up to another three years at a time for serious offenders.[15]

9.13 Within the timeframe that the supervision condition applies, Community Corrections can decide to end active supervision for low risk offenders who do not need further monitoring, treatment, support or services. In these cases, supervision is still a condition of the parole order but the offender's obligations under the condition are suspended.[16] Being able to suspend active supervision is important, as actively supervising lower risk offenders unnecessarily uses resources and may actually increase these offenders' risk of reoffending.[17]

9.14 Community Corrections actively supervises all offenders subject to a supervision condition for at least two months before considering whether supervision could be suspended.[18] When considering whether to suspend, Corrective Services NSW policy requires officers to look at the risks posed by the offender, whether the offender has demonstrated a significant period of stability, the offence type, the offender's history of compliance, whether the offender has continuing criminogenic needs[19] and whether the case plan has been implemented. Extra considerations are relevant to sex offenders and parolees who have committed domestic violence offences. Under Corrective Services NSW policy, offenders who are assessed as posing a high level of risk to community safety cannot have their supervision suspended.[20]

13. See para 14.4.
14. E Drake, *Inventory of Evidence-Based and Research-Based Programs for Adult Corrections* (Washington State Institute for Public Policy, 2013).
15. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 218(2).
16. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 219(3).
17. See, eg, C Lowenkamp and E Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-risk Offenders*, Topics in Community Corrections (National Institute of Corrections, 2004).
18. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section a part 6.
19. See para 4.49.
20. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section a part 1.22.

9.15 Some stakeholders submitted that the three year limit on supervision should be removed.[21] Others did not support changing the current arrangements for the length of parole supervision.[22] The NSW Department of Justice submitted that once an offender has remained in the community for three years without significant incident, the ongoing risk he or she presents will, on average, be relatively low.[23] SPA submitted that all case management strategies should have been met during the three year period and that further supervision could be considered a punitive and an inappropriate use of resources.[24] NSW Young Lawyers submitted that Community Corrections is best placed to assess, based on risk to community safety, whether an offender needs to be actively supervised at any particular point in time during the parole period.[25]

9.16 We agree that Community Corrections is best placed to decide on an offender's supervision needs. We think that supervision should be a standard condition of parole for the duration of all parole orders. Community Corrections should be able to suspend supervision for low risk offenders who do not need it. Higher risk offenders should be actively supervised beyond three years and for as long as Community Corrections considers that supervision is necessary.

9.17 We do not recommend imposing a limit on the duration of a standard supervision condition, such as the three year limit which currently exists for supervision conditions. The provisions that currently deal with the three year limit and its exceptions in cl 218 of the CAS Regulation should be repealed as unnecessary to our proposed scheme.

Removing the "good behaviour" condition

9.18 Some stakeholders submitted that the good behaviour condition is vague and unhelpful.[26] The NSW Department of Family and Community Services (Ageing, Disability and Home Care) submitted that for people with a cognitive impairment, parole conditions have to be presented in plain language and easy to understand.[27] The NSW Bar Association was of the view that the good behaviour condition could be simplified to "not commit any offence".[28]

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21. NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 10; NSW Bar Association, *Submission PA31*, 6; Law Society of NSW, *Submission PA45*, 4.
22. NSW, State Parole Authority, *Submission PA19*, 4; Legal Aid NSW, *Submission PA33*, 15; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 6; Shopfront Youth Legal Centre, *Submission PA40*, 8; Police Association of NSW, *Submission PA25*, 19; NSW Police Force and NSW Ministry of Police and Emergency Services, *Submission PA30*, 4; NSW Department of Justice, *Submission PA54*, 14.
23. NSW Department of Justice, *Submission PA54*, 14.
24. NSW, State Parole Authority, *Submission PA19*, 4.
25. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 11.
26. NSW Bar Association, *Submission PA31*, 5; Law Society of NSW, *Submission PA45*, 4; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 10; NSW Department of Justice, *Submission PA54*, 12.
27. NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 9.
28. NSW Bar Association, *Submission PA31*, 5.

9.19 NSW and the Commonwealth are the only Australian jurisdictions where statute requires offenders on parole to be of good behaviour.[29] The Tasmanian and NT Parole Boards include good behaviour conditions in the conditions they impose as a matter of practice.[30] Other jurisdictions do not require offenders to be of good behaviour as part of parole.

9.20 In our 2013 report on sentencing we commented:

> Although the courts and legal practitioners generally accept that an undertaking to be of "good behaviour" means that a person must not commit any further offence, this is not necessarily evident to those who have had little experience with the criminal justice system. Nor is it necessarily clear what the somewhat vague expression "to be of good behaviour" encompasses.[31]

9.21 We recommended replacing the good behaviour condition found in good behaviour bonds with "not commit a further offence" and, in the case of a bond attached to a suspended sentence, with "not commit a further offence punishable by imprisonment".[32]

9.22 We have the same view with regard to parole conditions. The phrase "good behaviour" is unhelpfully vague. A clear and structured approach to managing the behaviour of parolees requires conditions that can be clearly defined. If the good behaviour condition is generally understood and applied by courts and legal practitioners to mean that an offender should not commit any offence, then this is what the condition should say. As there is already a standard parole condition requiring offenders not to commit any offence, the good behaviour parole condition could simply be removed. Any other problematic behaviours that fall outside "not commit any offence" but might possibly have been captured under "be of good behaviour" can be covered by a parolee's Community Corrections supervising officer giving the parolee a specific direction not to engage in that behaviour, if it is reasonable to do so.[33]

Removing the "adapt to normal lawful community life" condition

9.23 NSW is the only Australian jurisdiction that has a mandatory parole condition requiring offenders to adapt to normal lawful community life. Of the three standard conditions, this one elicited the most comment from stakeholders.

Stakeholder submissions

9.24 Like the condition to be of good behaviour, stakeholders criticised the "normal lawful community life" condition as too vague.[34] Others submitted that it is unrealistic to

29. *Crimes Act 1914* (Cth) s 19AN(1)(a).
30. Parole Board of Tasmania, *Annual Report 2011-2012*, (2012) 24; Parole Board of the Northern Territory, *Annual Report 2013* (2014) 20.
31. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [12.37].
32. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) Recommendations 10.3 and 12.1.
33. On reasonable directions, see para [9.41]-[9.43], [9.63]-[9.66].
34. NSW Bar Association, *Submission PA31*, 5; Law Society of NSW, *Submission PA45*, 4; Shopfront Youth Legal Centre, *Submission PA40*, 7; Aboriginal Legal Service (NSW/ACT),

expect some offenders to comply with the condition. The Mental Health Coordinating Council described it as "a 'big ask' for people who have spent most of their lives in chaotic and dysfunctional environments prior to incarceration".[35] The Aboriginal Legal Service observed that:

> factors such as social disadvantage, mental illness and substance dependency often restrict the ability of our clients to lead what could be described as a normal community life. There are additional, obvious difficulties in the definition of 'normal'.[36]

9.25 The NSW Department of Justice suggested amending the condition to "undertake reasonable efforts to adapt to normal lawful community life". It submitted that, although still broad, this formulation would place an onus on offenders to do their best to adapt, rather than requiring them to achieve the standard.[37]

9.26 Some stakeholders suggested in consultations that the "adapt to normal lawful community life" condition currently serves an important function. It allows SPA to find a breach and revoke parole in circumstances where the offender has not committed an offence and is not in breach of any other condition, but SPA and Community Corrections still consider that the offender poses too great a risk to be permitted to stay in the community.[38] In effect, because the condition is so vague, any behaviour that is concerning for Community Corrections and SPA can be considered a breach of the condition and so allow revocation of parole.

9.27 One example we were given of such a situation was where the supervising Community Corrections officer becomes aware of domestic violence allegations but the parolee has not been arrested or charged, perhaps because the victim is unwilling to cooperate with police. Currently, a Community Corrections officer might report this to SPA as a breach of the "adapt to normal lawful community life" condition, and the parole order might be revoked on that basis. Another example might be where the parolee has acted in an inappropriate and intimidating way to the supervising officer but is not in breach of any specific condition.

Our view

9.28 We recommend that the condition requiring offenders to adapt to normal lawful community life be removed from the standard conditions of parole. We agree with stakeholders that it is not clear what "normal lawful community life" encompasses, given the community is made up of people of diverse backgrounds and lifestyles. It is impractical and unfair to hold parolees to a standard that is imprecise and not easily described.

9.29 Even if the concept of "normal lawful community life" could be defined, it would probably include activities such as being employed, participating in education, not

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Submission PA22, 5; Public Interest Advocacy Centre, *Submission PA23*, 13; Shopfront Youth Legal Centre, *Consultation* PAC22; NSW, State Parole Authority, *Consultation PAC27.*

35. Mental Health Coordinating Council, *Submission PA37*, 3.
36. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 5.
37. NSW Department of Justice, *Submission PA54*, 12.
38. Corrective Services NSW, *Consultation PAC24*; NSW, State Parole Authority, *Consultation PAC27*.

using illegal drugs, forming healthy social relationships and managing money. These are all goals that parolees could and should work towards in custody and on parole. However, we do not think that this is a realistic standard to require of parolees as a standard parole condition. As the Aboriginal Legal Service and the Mental Health Coordinating Council point out in their submissions, this could effectively be setting many parolees up to fail.

9.30 We have seriously considered the point made by stakeholders that the "normal lawful community life" condition is necessary to allow SPA to respond adequately to risk, when the parolee has breached no other more precise condition. This is a complex issue.

9.31 Arguably, in the domestic violence example given earlier at paragraph 9.27, the offender could be taken to have breached the "not commit any offence" condition. SPA and Community Corrections currently seem to interpret the "not commit any offence" condition very narrowly. Breach of this condition is not considered unless (at minimum) the parolee has been charged with an offence by the police. Sometimes, it seems that the condition is interpreted as relying on the court process, so a parolee who is diverted from conviction under mental health legislation or acquitted is taken not to have breached the condition. Our view is that this is an overly restrictive approach to the "not commit any offence" condition. Unlike the courts, SPA is not required to be satisfied beyond reasonable doubt that an offence has occurred. SPA might find a breach of the "not commit any offence" condition on the balance of probabilities when the parolee has not been charged by the police and even if tried and acquitted.

9.32 We accept that there may be circumstances where the supervising Community Corrections officer reasonably fears for the safety of the community or of a particular person but the parolee has not breached any other more precise condition. Some such situations could be prevented through increased care to add any necessary additional conditions when the parole order is made. In some cases, the supervising officer could also give the parolee reasonable directions designed to prevent problematic behaviour. If an additional condition is imposed or a reasonable direction given about particular behaviour, any breach of such a condition would leave the parolee liable to revocation.

9.33 At the same time, we appreciate that it is unreasonable to expect SPA and Community Corrections to foresee all possible behaviours that might suggest an increased risk to the community, or to expect that all such behaviours could be addressed through additional conditions or directions.

9.34 In these circumstances, instead of retaining a broad and imprecise condition that requires offenders to adapt to normal lawful community life, we consider that the issue is best resolved by an adjustment to SPA's power to revoke parole. In Chapter 10, we recommend that SPA should be able to revoke parole – even when there has been no breach of a condition – if it considers that the offender poses a serious and immediate risk to community safety or to any particular person.[39] This direct approach to the issue would achieve what Community Corrections and SPA

39. Para [10.98]-[10.103] and Recommendation 10.4.

are trying to achieve, in a roundabout way, in these cases. We prefer this approach to relying on breach of a broad and vague condition requiring offenders to adapt to normal lawful community life, especially when the condition's requirements cannot be easily specified in advance.

Recommendation 9.1: Standard conditions of parole

(1) The standard condition of parole requiring offenders not to commit any offence should be retained.

(2) Supervision by Community Corrections should be a standard condition of parole. The provisions that deal with the three year limit on the duration of supervision conditions should be removed from cl 218 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW).

(3) The standard condition of parole requiring offenders to "be of good behaviour" should be removed.

(4) The standard condition of parole that offenders must adapt to normal lawful community life should be removed.

Obligations under the supervision condition

9.35 The following section deals with the obligations that we recommend should arise under the standard supervision condition that we propose. We first look at the existing provision, then set out the form and content of the new provision that we propose, followed by recommendations that relate to imposing, communicating and enforcing the obligations.

The existing provision

9.36 If an offender is subject to a supervision condition, cl 219(2) of the CAS Regulation sets out the obligations that apply under the condition. The offender is required to:

(a) obey all reasonable directions of the [supervising Community Corrections] officer

(b) report to the officer (or to another person nominated by the officer) at such times and places as the officer may from time to time direct

(c) be available for interview at such times and places as the officer (or the officer's nominee) may from time to time direct

(d) reside at an address approved by the officer

(e) permit the officer to visit the offender at the offender's residential address at any time and, for that purpose, to enter the premises at that address

(f) not to leave New South Wales without the permission of the officer's community corrections manager

(g) not to leave Australia without the permission of the Parole Authority

(h) if unemployed, to enter into employment arranged or agreed on by the officer, or make himself or herself available for employment, training or

participation in a personal development program as instructed by the officer

(i) notify the officer of any intention to change his or her employment:

(i) if practicable, before the change occurs, or

(ii) otherwise, at his or her next interview with the officer

(j) not to associate with any person or persons specified by the officer

(k) not to frequent or visit any place or district designated by the officer

(l) not to use prohibited drugs, obtain drugs unlawfully or abuse drugs lawfully obtained.

Stakeholders supported retaining most of these obligations.

9.37 The obligations can be divided into two broad categories:

- those that impose a requirement or a prohibition on the offender without the need for a supervising community corrections officer to make a direction, and
- those that impose a requirement to obey a particular direction or type of direction made by a supervising community corrections officer.

Our general approach to the supervision condition

9.38 We generally support retaining the existing provisions that do not require further direction from a parole officer. We recommend retaining items (e), (f), (g) and (i) in cl 219(2). However, we recommend a different approach to item (l) that prohibits using illegal drugs, obtaining drugs unlawfully and the abuse of lawfully obtained drugs.[40]

9.39 We further recommend a somewhat different approach to the remaining obligations, which require further directions to be made by a parole officer in order to be enforceable. The current provision lists each of these obligations as standalone obligations, some of them quite narrowly interpreted in practice. Any limitations in these provisions may be overcome by the broader obligation, in item (a), that requires the offender to obey all reasonable directions of the supervising officer. We propose a provision that makes the obligation to follow the reasonable directions of the supervising officer the main source of the offender's obligation to obey a supervising officer's directions. This obligation is then accompanied by a non-exhaustive list of the matters about which a supervising officer could give directions. The list of matters draws on the obligations in the current provision, but with some changes in emphasis.

9.40 Recommendation 9.2 sets out our proposals for the supervision condition. The paragraphs that follow discuss some parts of the recommendation and make incidental recommendations where required.

40. Para [9.52]-[9.59].

Recommendation 9.2: Obligations under the supervision condition

Under the *Crimes (Administration of Sentences) Regulation 2014* (NSW), the obligations under the supervision condition should be:

(a) to obey all reasonable directions of the supervising Community Corrections officer, including, but not limited to, reasonable directions about:

  (i) reporting to the officer (or the officer's nominee) and being available for interview

  (ii) place of residence

  (iii) participating in programs, interventions and treatment

  (iv) employment, education and training

  (v) consenting to third parties disclosing information relevant to monitoring compliance with the parole order

  (vi) not associating with any specified person or persons

  (vii) not frequenting or visiting any specified place or district

  (viii) observing curfew requirements

  (ix) alcohol and drug testing, and

  (x) ceasing or reducing alcohol or drug use

(b) to permit the officer to visit the offender at the offender's residential address at any time and, for that purpose, to enter the premises at that address

(c) to notify the officer of any change or intention to change his or her employment:

  (i) if practicable, before the change occurs, or

  (ii) otherwise, at his or her next interview with the officer

(d) not to leave NSW without the permission of the officer's Community Corrections manager

(e) not to leave Australia without the permission of the State Parole Authority.

The obligation to follow reasonable directions

9.41 In our view the key obligation for supervised offenders should be to obey the reasonable directions of the supervising Community Corrections officer.

9.42 In consultations, some stakeholders suggested that most of the supervision obligations could be dropped and offenders instead be simply required to obey reasonable directions.[41] This would make the list of obligations shorter and more straightforward. On the other hand, we see some value in supervision obligations listing the main matters about which a supervising officer might give directions. In our view, this approach makes it clear that a supervising officer's directions must always be reasonable, gives officers guidance about the matters that are suitable

41. Roundtable: legal practitioners, *Consultation PAC28.*

subjects of directions, and allows officers greater flexibility in dealing with individual circumstances.

9.43 Clause 219 should require a parolee to obey all reasonable directions of the supervising Community Corrections officer, including (but not limited to) directions about the matters listed in Recommendation 9.2.

Place of residence

9.44 Clause 219(2)(d) currently requires parolees to live at an address approved by Community Corrections while supervised. In submissions and consultations, stakeholders expressed concerns about this requirement and how Community Corrections assesses the suitability of housing. Offenders can have great difficulty identifying suitable accommodation for approval. Many offenders are homeless or living in unstable housing before they enter custody, and the shortage of affordable and suitable accommodation for offenders leaving custody has emerged as a key issue in this reference.[42].

9.45 We discuss some changes to the way suitability of accommodation is assessed in Chapter 3. We also discuss some ways to relax the current requirement for all offenders to have suitable accommodation before they can be released on parole in Chapters 3 and 4. In those chapters, we recommend that both Community Corrections and SPA take a risk based approach to whether accommodation is "suitable" for a parolee and whether suitable accommodation is in fact necessary to supervise and manage the risks posed by the parolee. Even if these recommendations were implemented, if cl 219(2)(d) were to continue to apply, any supervised parolee not residing at approved accommodation will be in breach of parole conditions.

9.46 Controlling where a parolee lives is important to ensure, for example, that offenders do not reside near victims, child sex offenders keep away from schools, and offenders are not in close contact with known criminal associates or co-offenders.

9.47 We recommend instead that the new provision identify place of residence as one of the matters about which a supervising officer could give reasonable directions. This would not be a large shift from the current obligation. Any offender who was paroled without pre-arranged accommodation could, under our recommended risk based framework, be given directions about not living in certain places or with certain known associates but could otherwise choose a residence. Other parolees might be specifically directed to reside at a particular address when this is necessary to manage risk. Depending on the nature of the direction, parolees without stable accommodation would not necessarily be in breach.

42. Para [3.34]-[3.59], [4.107]-[4.117].

Employment, education and training, and participation in programs, interventions and treatment

9.48 Clause 219(2)(h) currently requires unemployed offenders to undertake employment arranged by the supervising officer, or to participate in training and personal development programs as directed by the supervising officer.

9.49 No specific obligation in cl 219 requires all supervised offenders to participate in programs, interventions and treatment directed at their reoffending risk factors (although supervising officers can give offenders "reasonable directions" to participate in such activities under the general power in cl 219(2)(a)). Community based rehabilitation programs are an essential part of parole and a key way that parole can reduce risk to the community. Community based custodial sentences such as home detention and intensive correction orders require offenders to follow directions to participate in such programs and other activities.[43]

9.50 The obligations in cl 219(2)(h) about employment, education and training only require unemployed offenders to make themselves available for employment, education or training. Corrective Services NSW has told us that it is important that parolees are also required to follow other reasonable directions about employment, including disclosing to the employer the parolee's criminal record and parole supervision.[44] Such disclosure may assist in managing the risks posed by the parolee.

9.51 We recommend instead that participation in programs, interventions and treatment be identified, in addition to employment, education and training, as some of the matters about which a supervising officer could give reasonable directions.

Drug and alcohol use

9.52 Under cl 219(2)(l), supervised parolees must not use prohibited drugs, obtain drugs unlawfully, or abuse prescription medication or other lawfully obtained drugs. Drug use is prohibited not simply because it is illegal, but because it is a significant factor connected with offending and reincarceration.[45] Despite the link between alcohol and criminal behaviour, especially violent crime,[46] alcohol consumption is not addressed by the standard obligations under the supervision condition.

9.53 Like NSW, the ACT expressly prohibits drug use and abuse of lawfully obtained medication by parolees,[47] but not alcohol consumption. WA prohibits drug and alcohol use by offenders at community corrections centres, or while engaged in community work, community corrections activities or performing a program

43. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 186(p), cl 190(r).
44. Information provided by Corrective Services NSW (17 September 2014).
45. E Baldry and others, "Ex-prisoners, Homelessness and the State" (2006) 39 *Australian and New Zealand Journal of Criminology* 20, 29-31; D Weatherburn, *What Causes Crime?* Crime and Justice Bulletin No 54 (NSW Bureau of Crime, Statistics and Research, 2001) 5.
46. D Weatherburn, *What Causes Crime?* Crime and Justice Bulletin No 54 (NSW Bureau of Crime, Statistics and Research, 2001) 5.
47. *Crimes (Sentence Administration) Regulation 2006* (ACT) cl 4(c).

requirement.[48] Other jurisdictions do not expressly prohibit drug and alcohol consumption, but parole boards may use their general powers to impose such conditions.

9.54 Some stakeholders submitted that parole conditions should focus more on measures to encourage offenders to address drug and alcohol use.[49] Blanket bans may achieve compliance on parole, but do little to effect lasting change without support and rehabilitation.

9.55 The NSW Department of Justice submitted that instead of a condition requiring offenders not to use drugs, conditions could be imposed requiring offenders to advise their supervising officer of all drug and alcohol use, submit to drug and alcohol testing as directed, and seek assistance in controlling their drug and alcohol use.[50] It submitted that such conditions would be more relevant, realistic and aligned with case management and long term mitigation objectives. SPA could impose abstinence conditions as additional conditions where necessary, as it currently does in some cases with respect to alcohol use.[51] As an alternative, Corrective Services NSW proposed that supervised parolees could be required to follow reasonable directions from supervising officers about drug and alcohol use, which could include directions to cease or reduce use.[52]

9.56 We acknowledge stakeholder concerns about the effectiveness of blanket bans on drugs and alcohol, and acknowledge that it may be unrealistic to expect total abstinence from parolees with drug and alcohol issues. Abstinence should be the goal that parolees work towards but Community Corrections should focus on step by step management and reduction rather than trying to enforce abstinence through breach action and the possibility of revocation and return to custody.

9.57 We, therefore, recommend that ceasing or reducing alcohol or drug use and alcohol and drug testing should be among the matters about which a supervising officer could give directions. Directions about participating in programs, interventions and treatment[53] would also address questions of ceasing or reducing alcohol or drug use.

9.58 Use of illegal drugs and illegally obtaining prescription drugs would still constitute a breach of parole under the condition requiring offenders to not commit any offence.[54] The purpose of the approach we recommend would be to focus attention on the importance of addressing and managing parolees' drug and alcohol issues, rather than trying to enforce total abstinence. Where SPA wanted to draw particular attention to the need for abstinence from drug use, it could add an explicit

48. *Sentence Administration Act 2003* (WA) s 29(c), s 76(4)(a).
49. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 10; Legal Aid NSW, *Submission PA33*, 14; Mental Health Coordinating Council, *Submission PA37*, 4; Shopfront Youth Legal Centre, *Submission PA40*, 7; Law Society of NSW, *Submission PA45*, 4.
50. NSW Department of Justice, *Submission PA54*, 12-13.
51. NSW Department of Justice, *Submission PA54*, 13, 21.
52. Information provided by Corrective Services NSW (17 September 2014).
53. Para [9.48]-[9.51].
54. Use of a prohibited drug or unlawfully obtaining a prescription drug are offences under the *Drug Misuse and Trafficking Act 1985* (NSW) s 12, s 16-18.

abstinence requirement as an additional condition. Similarly, SPA could impose an alcohol abstinence condition in appropriate cases.

9.59 These changes would be supported by our recommendations in Chapter 10 for Community Corrections officers to have more discretion to manage parolees' behaviour and impose sanctions for breaches such as drug use before reporting the matter to SPA.

Curfews

9.60 A Community Corrections officer can currently impose a curfew on a parolee under the general power to give a reasonable direction in cl 219(2)(a). However, there is no explicit clause in the supervision obligations that draws attention to a curfew as an option for managing parolees. Corrective Services NSW suggested that curfews can be effective day to day risk management tools and so compliance with any curfew should be specifically included in the obligations under the supervision condition.[55]

9.61 We recommend in Chapter 10 that curfews should be available to Community Corrections officers to be used as sanctions for breaches of conditions that are not serious enough to warrant reporting to SPA. In this context, a curfew could be both a punishment for non-compliance and also a risk management tool to try to minimise the risk to the community posed by the parolee. We consider it appropriate that a Community Corrections officer should also be able to use a curfew pre-emptively to manage risk where the parolee has not breached any conditions.

9.62 In order to distinguish clearly curfews imposed by Community Corrections officers from home detention (which we recommend that SPA can impose in Chapter 10), a provision should specify that supervising officers may, in making a direction that imposes a curfew, only require a parolee to remain at home for a maximum of 12 hours in any 24 hour period. Both Victoria and WA use a similar formulation to limit the curfews that may be imposed as part of their community based sentences.[56] We also consider that Corrective Services NSW should develop a policy that requires a supervising officer to obtain permission from a manager before imposing a curfew as an obligation of supervision and that requires a manager to review the curfew requirements after each month of operation.

Recommendation 9.3: Curfews under the supervision condition

(1) The *Crimes (Administration of Sentences) Regulation 2014* (NSW) should provide that, if a supervising Community Corrections officer imposes a curfew as an obligation under the supervision condition, the officer may not require a parolee to remain at home for more than 12 hours in any 24 hour period.

(2) Corrective Services NSW should develop a policy about Community Corrections officers imposing a curfew as an obligation under the supervision condition that requires:

55. Information provided by Corrective Services NSW (17 September 2014).

56. *Sentencing Act 1991* (Vic) s 48I; *Sentencing Act 1995* (WA) s 75.

(a) a supervising officer to obtain permission from a manager before imposing the curfew, and

(b) a manager to review the curfew after each month of operation.

No express limits on reasonable directions

9.63 In consultations, we discussed with stakeholders the possibility of a limit being placed on directions linked to the purpose of parole in addition to the requirement that any direction should be reasonable.[57] Such a limit might be a clause requiring any directions given to a parolee to be for the purpose of reducing risk to community safety.

9.64 We think it likely that almost all directions that supervising Community Corrections officers currently give are, in one way or another, for the purpose of managing the risk that the parolee poses to community safety. For some directions – such as a direction to attend a rehabilitation program – the connection to managing the risk to community safety is direct and obvious. However, other directions may not be so directly connected. For example, if a parolee behaves in an intimidating and offensive way during home visits, the supervising officer might give the parolee a direction about this behaviour to ensure that the officer feels safe conducting future visits. The purpose of the direction is to facilitate supervision and monitoring of the offender and the purpose of supervision and monitoring is to manage community safety risk. However, we would be concerned that the officer in our example might find him or herself in a time consuming argument with the parolee and the parolee's lawyer about whether, for example, a direction to the parolee to remain clothed, leave the lights on and not use offensive language during home visits was a direction for the purpose of reducing risk to community safety.

9.65 In some situations, officers might also use directions partly to manage risk to community safety and partly as a sanction in response to low level breaches. For example, if a parolee has been seen in restricted areas several times, an officer might direct the parolee to report more frequently to the Community Corrections office. Alternatively, the officer might direct the parolee to obey a curfew at relevant times. The purpose of the direction would be to manage risk to the community by monitoring the parolee more closely, but it could also be characterised as a punishment for breach. We discuss the use of reasonable directions as responses to low level breaches in Chapter 10.

9.66 For these reasons, we do not recommend any restriction on officers' directions beyond that they be "reasonable". Instead, we recommend that Corrective Services NSW's *Community Corrections Policy and Procedures Manual* should state that directions should be given for the purpose of managing risk to community safety and that directions given for other purposes might not be "reasonable".

57. Corrective Services NSW, *Consultation PAC24*; NSW, State Parole Authority, *Consultation PAC27*; Roundtable: legal practitioners, *Consultation PAC28*.

Recommendation 9.4: Purpose of reasonable directions

Corrective Services NSW's *Community Corrections Policy and Procedures Manual* should state that, to assist in complying with the requirement that they be reasonable, directions should be given to parolees for the purpose of managing risks to community safety and that directions given for other purposes might not be reasonable.

Disclosure of information by third parties

9.67 Corrective Services NSW suggested that the supervision condition should explicitly allow Community Corrections officers to direct parolees to consent to third parties providing Community Corrections with information about attendance at programs or services related to the parole. For example, the officer might direct the parolee to consent to a treating therapist or a program provider giving information to the officer confirming the parolee's attendance. This would allow an officer to monitor compliance without carrying out an intrusive and resource intensive site visit at the time the parolee is supposed to be there.

9.68 Corrective Services NSW seeks limited information related to attending a program or service as required by the parole order:

> Community Corrections is not particularly concerned with the details of what passes between an offender and a service provider during the course of an appointment. Offenders often engage with programs when assured that what they say in sessions with programs staff will not be reported back to their supervising officer. Community Corrections' concern is to ensure that the offender is attending the program in compliance with the parole order and accessing programs and services that promote his or her rehabilitation and reintegration into the community.[58]

9.69 The standard conditions of both home detention and intensive correction orders (ICOs) contain a similar requirement to consent to any medical practitioner, therapist or counsellor providing certain information to Community Corrections. [59]

9.70 There are a variety of barriers to Corrective Services NSW obtaining the information it requires including privacy legislation at NSW and Commonwealth level. This legislation can limit Corrective Services NSW's ability to collect information from third parties, and third parties' ability to disclose information to Corrective Services NSW.[60] Privacy legislation contains exceptions for information collected for law enforcement purposes, but it is not always clear that the exceptions cover Corrective Services NSW as a law enforcement agency, or that the administration of parole or community based sentence obligations is a law enforcement activity.[61]

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58. Information provided by Corrective Services NSW (5 November 2014).
59. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 186(g), cl 190(n).
60. *Privacy and Protection of Personal Information Protection Act 1998* (NSW) s 8, s 17; *Health Records and Information Privacy Act 2002* (NSW) sch 1 cl 3, cl 11; *Privacy Act 1988* (Cth) sch 1 cl 3.3, cl 3.6, cl 6.1.
61. *Privacy and Protection of Personal Information Protection Act 1998* (NSW) s 23, s 3; *Health Records and Information Privacy Act 2002* (NSW) s 4, sch 1 cl 4(4)(e), cl 11(1)(j); *Privacy Act 1988* (Cth) s 6.

9.71 In our view, Corrective Services NSW's collection of information about attendance at programs and compliance with parole conditions or supervision requirements is legitimate, and service providers' disclosure of information of this nature to Corrective Services NSW is appropriate and necessary for the proper administration of parole.

9.72 Corrective Services NSW says that it seeks to obtain the offenders' consent in order to make transparent to the offender what information will be collected and on what terms. On this basis, we have no difficulty with the proposal to require offenders to consent as a parole supervision requirement. It is, however, hard to see how consent obtained in such circumstances – where the penalty is breach of parole and potentially return to prison – meets the requirement of voluntariness for the purposes of privacy legislation sufficient to allow collection and disclosure.[62]

9.73 For this reason, we consider it could be useful for the CAS Regulation to clarify that Corrective Services NSW is authorised to collect information concerning parolees' compliance with requirements to attend programs or services, and that third party service providers are authorised to disclose information of this nature. NSW and Commonwealth privacy legislation contemplates such authorisations as exceptions to the privacy principles.[63] This should be considered in the course of drafting amendments, in consultation with the Information and Privacy Commission.

Recommendation 9.5: Information about compliance with parole requirements

Consideration should be given to including in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) a provision authorising Corrective Services NSW to collect information from third parties about compliance with parole requirements, and authorising third parties to disclose such information to Corrective Services NSW.

Plain language summary of obligations

9.74 We recognise that this list is still likely to be difficult for many offenders to understand. We recommend that summaries of the obligations in English and other relevant languages be developed and given to all supervised parolees. Such summaries should be in simple and direct language. For example:

> As part of your parole supervision, you must do what your supervisor tells you to do.
>
> This includes reasonable directions about:
>
> - reporting when your supervisor tells you to
> - living where your supervisor says you can and not living where your supervisor says you can't

62. See discussion of voluntariness in Australian Law Reform Commission, *For your Information: Australian Privacy Law and Practice,* Report 108 (2008) [19.8]-[19.12].
63. *Privacy and Protection of Personal Information Protection Act 1998* (NSW) s 25; *Health Records and Information Privacy Act 2002* (NSW) sch 1 cl 11(2)(b); *Privacy Act 1988* (Cth) sch 1 cl 3.4(a), cl 3.6(a)(ii), cl 6.2(b).

- letting your supervisor visit you at home
- staying at home if your supervisor tells you to
- doing programs, interventions, treatment, education, training and employment that your supervisor tells you to do
- letting other people give your supervisor information about you
- telling your supervisor if you get a job, change jobs or lose your job
- not going to any place that your supervisor has told you not to go to
- not talking to or being with any person when your supervisor has said you can't
- being tested for drugs and alcohol if your supervisor tells you to, and
- not using drugs or drinking alcohol, or using or drinking less, if your supervisor tells you to.

You must let your supervisor visit you at home at any time.

You must notify your supervisor if you change, or plan to change, your address.

You must not leave NSW without your supervisor's permission. You must not leave Australia without permission from the State Parole Authority.

9.75 Supervising officers should also use such simple and direct language to explain the conditions and supervision obligations to parolees at the start of the parole period.

Recommendation 9.6: Plain language summary of obligations

Corrective Services NSW should provide plain language summaries of supervision obligations in English and other relevant languages to all supervised parolees. Supervising officers should also use plain language to explain obligations to parolees at the start of the parole period.

Additional conditions

9.76 Apart from the standard conditions of parole and the supervision obligations already discussed in this chapter, SPA can also impose additional conditions on parole orders.[64] SPA can do this at the time of an offender's release or while the offender is on parole in the community. For court based parolees, the sentencing court can also attach additional conditions to the parole order at the time of sentencing, although we propose in Chapter 3 that courts no longer have this power.

9.77 The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) requires that SPA must impose additional conditions to give effect to the post-release plan prepared for the offender by Community Corrections.[65] Any such additional

64. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(1)(c).
65. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2A).

conditions must not be inconsistent with the standard conditions of parole.[66] Beyond these requirements, SPA is not restricted in the additional conditions it can impose.

9.78 SPA generally imposes additional conditions at the request of Community Corrections to address issues that cannot be adequately managed under the standard supervision obligations. Sometimes SPA will impose additional conditions at the request of a victim, such as prohibiting the offender from having contact with the victim or from residing in or visiting the area where the victim lives. SPA may also impose additional conditions on its own initiative if it considers it appropriate.

A statutory framework for additional conditions

9.79 SPA's discretion to impose additional conditions gives it flexibility to tailor parole orders to the individual circumstances of each offender it deals with. Additional conditions may be enough to persuade SPA to release an offender when it would otherwise refuse parole. They can also help SPA to ensure that a parole order meets the needs of victims. On the other hand, SPA's wide discretion may create potential for unnecessary and inappropriate conditions.

Concerns specific to electronic monitoring conditions

9.80 Of all additional conditions imposed by SPA, stakeholders only raised particular concerns about electronic monitoring conditions. Electronic monitoring is used to track an offender's location. In NSW, legislation expressly provides for electronic monitoring to be a condition of extended supervision orders, home detention orders, ICOs, and the Compulsory Drug Treatment Correctional Centre program.[67] According to the NSW Department of Justice, 12 offenders on parole were subject to electronic monitoring as of 17 December 2013. The daily average number of offenders on parole in 2012-13 was 4530.[68]

9.81 Legal Aid NSW submitted that electronic monitoring:

> is an appropriate tool for the surveillance of some serious, high risk offenders on parole when used in conjunction with other risk and case management strategies. Electronic monitoring is a serious invasion of civil liberty and should only be made a condition of an offender's parole when there is a nexus between the offending, the risk of reoffending and the need for place restrictions and surveillance. A cautious approach should be taken to the use of electronic monitoring as it is not a panacea. It is simply a tool to monitor a parolee's whereabouts.[69]

9.82 Stakeholders also highlighted technical issues with equipment reliability,[70] the costs of electronic monitoring[71] and the onerous and stigmatising effect on an offender of wearing electronic monitoring equipment.[72]

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66. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(4)(b).
67. *Crimes (High Risk Offenders) Act 2006* (NSW) s 11(e); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 186(l), cl 190(h), cl 200(1)(c).
68. NSW Department of Justice, *Submission PA54*, 15.
69. Legal Aid NSW, *Submission PA33*, 16.
70. Legal Aid Commission of NSW, *Submission PA33*, 16; NSW Department of Justice, *Submission PA54*, 15-16; NSW Department of Family and Community Services (Ageing Disability and Home

9.83 Other stakeholder submissions on electronic monitoring generally acknowledged that it may be necessary in some cases.[73] Shopfront Youth Legal Centre submitted that the availability of electronic monitoring may give SPA confidence to release an offender on parole, who might otherwise remain in custody.[74]

Linking additional conditions to the purpose of parole

9.84 Statutory guidance about the types of additional conditions that SPA can impose might be useful to ensure that any additional conditions, including electronic monitoring, are suitable for an offender's circumstances. A statutory framework could also help parties making submissions to SPA (including victims) to propose additional conditions that are relevant and appropriate.

9.85 A statutory framework would need to be sufficiently flexible so as not to curtail SPA's ability to impose any necessary additional conditions. SPA would need to be able to impose any conditions that were necessary to manage the risks posed by the parolee or to reflect the needs of victims. SPA should also continue to have the option of imposing or varying additional conditions as a response to a breach of parole.[75] By "breach of parole" we mean any breach of the standard parole conditions, the standard obligations under the supervision condition, or any other additional condition imposed by SPA (or the sentencing court in the case of court based parolees).

9.86 We recommend that the legislation be amended so that SPA can impose any additional conditions it considers reasonable to:

(a) manage the risk to community safety of releasing the offender on parole, including (but not limited to) conditions that

(i) support participation in rehabilitation programs and assist in managing reintegration, or

(ii) give effect to the post-release plan prepared by Community Corrections

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Care), *Submission PA35*, 11; NSW Police Force and NSW Ministry of Police and Emergency Services, *Submission PA30*, 5.

71. Law Society of NSW, *Submission PA45*, 5; Shopfront Youth Legal Centre, *Submission PA40*, 8; NSW Department of Justice, *Submission PA54*, 15-16; NSW Police Force and NSW Ministry of Police and Emergency Services, *Submission PA30*, 5; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 13.

72. NSW Bar Association, *Submission PA31*, 7; NSW Police Force and NSW Ministry of Police and Emergency Services, *Submission PA30*, 5; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 11; Justice Action, *Submission PA28*, 7. See also M Martinovic and P Schluter, "A Researcher's Experience of Wearing a GPS-EM Device" (2012) 23 *Current Issues in Criminal Justice* 413, 418.

73. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 12; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 7; Shopfront Youth Legal Centre, *Submission PA40*, 8; NSW Bar Association, *Submission PA31*, 7; Law Society of NSW, *Submission PA45*, 5; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 11.

74. Shopfront Youth Legal Centre, *Submission PA40*, 9.

75. Para [10.59]-[10.62], [10.70].

(b) take account of the effect of the offender being released on parole on any victim of the offender, and on any such victim's family, or

(c) respond to breaches of parole.

9.87 Such a framework would state clearly the permitted purposes of additional conditions while ensuring that SPA could impose any necessary conditions. It would pick up the current provision which requires SPA to add conditions to give effect to the post-release plan but would link this to managing risk to community safety.

9.88 We have considered whether an additional item should be included to allow SPA to impose conditions that it considers reasonable to "respond to the circumstances of the individual case". This would make doubly sure that SPA is able to impose necessary conditions. However, on balance, we consider the framework outlined above is sufficient.

9.89 Corrective Services NSW suggested that the framework for additional conditions should also require SPA to consider the effect any proposed condition would have on Community Corrections resources or operations.[76] We appreciate that additional conditions might have implications for Community Corrections where an officer is required to implement them. However, we consider that the presence of a Community Corrections officer on SPA[77] is sufficient to ensure that practical considerations such as this are taken into account.

Recommendation 9.7: Framework for additional conditions

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to specify that the State Parole Authority can impose any additional conditions it considers reasonable to:

(a) manage the risk to community safety of releasing the offender on parole, including (but not limited to) any conditions that:

(i) support participation in rehabilitation programs and assist in managing reintegration, or

(ii) give effect to the offender's post-release plan prepared by Community Corrections

(b) take account of the effect of the offender being released on parole on any victim of the offender, and on any such victim's family, or

(c) respond to breaches of parole.

Exemptions from complying with place restriction and curfew conditions

9.90 In consultations, some stakeholders raised that a supervising Community Corrections officer may sometimes give an offender permission to go to a certain location that is forbidden under an additional condition of the parole order. This might happen if the offender needs to attend a funeral in the area or travel through the area to get to a required activity in another location. If a place restriction has

76. Information provided by Corrective Services NSW (17 September 2014).

77. See Para [8.8]-[8.13].

been added at the request of a victim, the victim may experience anxiety and question the offender's compliance with parole conditions if the offender is seen in the forbidden area.

9.91 Similarly there may be concerns about curfew conditions imposed by SPA, for example, in cases where an offender may need permission to attend medical treatments or work obligations within a curfew time.

9.92 While s 128A of the CAS Act does set out some circumstances where non-association and place restriction conditions imposed by the sentencing court or SPA do not apply, Community Corrections officers do not currently have authority to excuse offenders from complying with place restriction or curfew conditions. We accept that, in practice, an offender may sometimes need to be in a forbidden area or away from home at a particular time. It would be cumbersome for the officer to have to apply to SPA to have the condition altered in all such circumstances. We therefore recommend that the CAS Act be amended so that an offender does not contravene a place restriction or curfew condition if the supervising officer has permitted the offender to do so for a limited time and for a specified purpose.

9.93 The Homicide Victims Support Group suggested that Corrective Services NSW should advise victims if an offender is permitted to go to an area that he or she is otherwise prohibited from visiting, to avoid unnecessary distress to victims.[78] We support this proposal.

Recommendation 9.8: Exemptions from complying with place restriction or curfew conditions

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that an offender does not contravene a place restriction or curfew condition that has been imposed by the State Parole Authority if the supervising officer permits the offender to do so. Supervising officers should only grant such permission for a limited time and for a specified purpose.

(2) If a supervising officer grants such permission, Corrective Services NSW should inform any relevant registered victim.

78. Homicide Victims Support Group, *Consultation PAC12*.

10. Breach and revocation

In brief

The goals of a system for dealing with breach of parole orders are to manage risk and ensure the parolee's compliance. We propose a system of graduated sanctions to achieve these goals. Community Corrections officers should have a range of responses available to deal with breaches and should only report breaches to the State Parole Authority (SPA) if the responses cannot adequately achieve the system's goals. SPA should have a range of sanctions, in addition to revoking parole, to achieve the system's goals.

10.1 In this chapter we look at the breach and revocation process. We explore the goals of the system. We outline the powers of the State Parole Authority (SPA) for responding to breaches of parole, and explore response options short of revocation. We consider how and when SPA should decide to revoke parole and remove offenders from the community. We also examine the ambit of Community Corrections' responsibility to respond to and report detected breaches to SPA.

10.2 By "breach of parole", we mean any failure to comply with the standard conditions of parole, the obligations of supervision set out in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation), or any other condition that SPA or the sentencing court has attached to the parole order. We discuss parole conditions in Chapter 9.

10.3 SPA makes determinations about breaches of court based parole orders and SPA parole orders. SPA also has the power to revoke a parole order before an offender is released for reasons other than breach. We discuss this power in Chapter 3.[1]

Goals of a breach and revocation system

10.4 The goals of managing risk and ensuring compliance are closely linked in a breach and revocation system. The system is strongest if responses to breaches serve both purposes simultaneously.

10.5 A breach and revocation system should allow Community Corrections and SPA to be responsive and flexible in dealing with breaches. Breaches should attract clear and proportionate consequences so that the practice of attaching conditions to parole remains meaningful. It should be clear to stakeholders in the system what is expected for a parolee to complete parole successfully.

10.6 The best way to manage the risk and behaviour of offenders on parole is to impose a proportionate sanction as soon as possible after a breach. A recent review of 20 studies of case management programs for substance abusing offenders in the US concluded that case management has a greater effect when coupled with sanctions that are swift and certain, and that swiftness and certainty of punishment has a larger deterrent effect than severity.[2] Commentators in the US who have analysed policies on deterring crime have noted that there is substantial evidence that increasing the certainty of punishment produces significant deterrent effects.[3] They have also noted there is little evidence that increases in the severity of punishment yield strong deterrent effects.[4] Psychological and criminological research in the

1. Para [3.18]-[3.59].
2. E Drake, *Chemical Dependency Treatment for Offenders: A Review of the Evidence and Benefit-Cost Findings,* Document No 12-12-0201 (Washington State Institute for Public Policy, 2012) 1, 5.
3. See, eg, T B Marvell and C E Moody, "Specification Problems, Police Levels, and Crime" (1996) 34 *Criminology* 609; E Helland and A Tabarrok, "Does Three Strikes Deter? A Nonparametic Estimation" (2007) 42 *Journal of Human Resources* 309.
4. S N Durlauf and D S Nagin, "Imprisonment and Crime: Can Both be Reduced?" (2011) 10 *Criminology and Public Policy* 13, 16-18; S N Durlauf and D S Nagin, "The Deterrent Effect of Imprisonment" in P J Cook and others (ed) *Controlling Crime: Strategies and Tradeoffs* (UCP, 2011) 43.

context of sentencing suggests that the deterrent effect of certainty is stronger than that of severity because offenders tend to give less weight to possible future consequences than to the present likelihood of discovery and arrest.[5]

10.7 The powers that SPA and Community Corrections have should relate to the different core functions of each:

- SPA's main role is to make decisions about release on parole and the return of offenders to custody in the event of breach. SPA provides a transparent and independent decision making process for these important decisions.
- Community Corrections supervises and case manages parolees in the community and provides advice to SPA.

Each body needs to be equipped to fulfil its role and to ensure that risk is properly managed. In a system aimed at providing proportionate, swift and certain sanctions, Community Corrections should perform a function over and above reporting breaches to SPA and SPA does not need to receive notification of all breaches. In our view, in order for Community Corrections to carry out professional and effective case management it must have the discretion to respond to minor, non-reoffending breaches of parole.

The current breach and revocation system

10.8 Parole orders currently require parolees to be of good behaviour, not commit an offence, and adapt to normal lawful community life.[6] We have recommended that these standard conditions be condensed to two: not commit any offence and submit to supervision.[7]

10.9 SPA or the sentencing court may also attach additional conditions to the parole order. Further, parolees must abide by any obligations under a supervision condition which is included in about 98% of parole orders.[8] These obligations include residing at an approved address, reporting as directed, receiving home visits, not using prohibited drugs and following all reasonable directions of the supervising officer.[9] We have recommended some changes to the obligations of supervision.[10]

10.10 Community Corrections supervises nearly all parolees during their parole period, the remaining small number of parolees are unsupervised.[11]

5. S N Durlauf and D S Nagin, "Imprisonment and Crime: Can Both be Reduced?" (2011) 10 *Criminology and Public Policy* 13, 17-18.
6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(1)(a); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 214.
7. Recommendation 9.1(1) and (2).
8. Information provided by Corrective Services NSW (23 October 2013).
9. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 219.
10. Recommendation 9.2.
11. Information provided by Corrective Services NSW (23 October 2013).

Community Corrections responses

10.11 There is nothing in the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) or Corrective Services NSW policy outlining the actions Community Corrections officers can take in relation to offenders they are supervising on parole other than reporting the breach to SPA.

10.12 Corrective Services NSW policy states:

> Officers must prepare a breach report for the Parole Board within **five working days** if any of the following occurs:
>
> a. A court imposes a full-time custodial sentence for a further offence.
>
> b. An offender is no longer able to be contacted by the Service.
>
> c. 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.
>
> d. The offender is convicted of a new offence.
>
> e. The offender is arrested and charged with any offence.
>
> f. The offender changes their address without the prior approval of their supervising officer.
>
> g. The offender fails to comply with directions in regard to employment.
>
> h. The offender breaches any conditions of their Parole Order. [12]

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.[13]

10.13 Breaches that may be reported to SPA under item (h) include:

- 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.

10.14 As part of the breach report, the policy requires the Community Corrections officer to recommend how SPA should respond to the breach, and allows the officer to recommend a less severe response than revocation.[14] A Community Corrections Unit Leader countersigns the breach report. The recommendation may be to:

- revoke the parole order

12. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B, part 3 [3.1.1].
13. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B, part 3 [3.1.2].
14. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B part 3 [3.1.4].

- vary the conditions
- issue a formal warning to the offender, or
- simply note the breach with no further action.

A Community Corrections Unit Leader vets the breach report and must comment on the recommendation.[15]

10.15 The Corrective Services NSW policy says that all breaches must be reported to SPA within five working days. However, the policy also says that officers may allow offenders some latitude in terms of failures to report (although high risk offenders must receive "minimal latitude").[16] In practice, Community Corrections officers exercise a level of discretion in managing some types of breaches and determining whether a particular breach should be reported to SPA, particularly with breaches that are very minor or have a reasonable explanation.[17]

10.16 If a Community Corrections officer has decided that reporting a breach is not warranted, the officer may instead implement risk management or case management strategies. These strategies may include issuing informal verbal warnings, increasing reporting requirements, or issuing reasonable directions to offenders. For example, if an offender fails to attend a course with a good excuse, an informal warning may be the only response necessary. Or if an offender is behaving in a way that makes him or her difficult to manage, it may be possible to remedy the situation by issuing reasonable directions targeted at changing this behaviour. As obeying all reasonable directions made by the Community Corrections officer is an obligation of a supervision condition[18], failure to comply with such a direction would constitute a breach that can be reported to SPA for action if a response of escalated severity is required.

SPA responses

10.17 After it receives a breach report, SPA decides its response in a private meeting, without input from the offender.[19]

10.18 If SPA revokes an offender's parole order, a warrant is issued for the offender's arrest and he or she is returned to custody. SPA must then review the revocation decision between two and four weeks from the date the revocation order is served on the offender, in order to allow the offender to make submissions. After the review, SPA will either confirm or rescind the revocation. If SPA confirms the revocation, the offender remains in custody for the balance of the sentence, subject

15. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section B, part 3 [3.1.4].
16. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section A, part 2 [2.17.11].
17. Information provided by NSW, State Parole Authority (9 October 2013); Probation and Parole Officers' Association of NSW, *Submission PA50*, 2.
18. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 219(2)(a).
19. For more about SPA's decision making process, see para [6.4]-[6.27].

to any further grant of parole. If SPA rescinds the revocation, the offender will be re-released on parole.[20]

10.19 Table 10.1 sets out the outcomes of SPA's decision making in response to parole breaches in 2008-2013.

Table 10.1: SPA decisions to warn, revoke or vary a parole order

	2008	2009	2010	2011	2012	2013
Warnings issued	936	1117	1277	1829	2118	1799
Parole orders revoked	2007	2242	2246	2059	2261	2334
Revocations rescinded	288	345	446	336	361	346
Parole orders varied	213	266	264	255	269	198

Sources: NSW, State Parole Authority, Annual Report 2013 (2014) 12; NSW, State Parole Authority, Annual Report 2010 (2011) 11.

Problems with breach responses in practice

10.20 In practice, the extent of discretion that Community Corrections officers exercise in managing some types of breaches and determining whether they should report a particular breach to SPA means the reporting policy is not applied consistently.

Rigid policy is impractical

10.21 The policy's rigidity means that officers must follow it inconsistently in order to ensure a proportionate and fair response to some breaches. It would be impossible and impractical for Community Corrections officers to report every single breach to SPA. For example, if an offender misses one day of a scheduled course due to a public transport breakdown, neither Community Corrections nor SPA will want to take any action, so it would be a waste of resources to require Community Corrections to report this and SPA to consider it.

Alternative responses to reporting are used inconsistently

10.22 Because of the blanket nature of the existing policy, Community Corrections offices and officers inconsistently use risk management or case management strategies, such as issuing informal verbal warnings, increasing reporting requirements, or issuing reasonable directions to offenders.

High reporting of minor breaches creates a heavy workload for SPA

10.23 Even though Community Corrections officers sometimes implement strategies to manage a situation rather than reporting the breach to SPA, much of SPA's large workload is made up of minor breach matters where the Community Corrections report recommends a response short of revoking parole. As illustrated in

20. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173-175.

Table 10.1, in 2013, SPA issued 1799 warnings, varied 198 orders and revoked 2334 parole orders.

10.24 SPA submitted that there is a perception that the rise in reported non-reoffending breaches is due to a focus on compliance rather than case management by Community Corrections, because supervisors think that they may be held responsible for an offender's behaviour. This can lead to early reporting to SPA rather than first attempting case management intervention and solutions. SPA stated there was a particular need to reconsider notifying SPA of drug use before the offender has been presented with intervention strategies and given the opportunity to engage with them, and the success of the intervention has been determined. SPA was of the view that it should only be advised of a non-reoffending breach after every other case management option has been exhausted.[21]

Stakeholder views

10.25 Many stakeholders supported Community Corrections being able to use a greater level of discretion than is currently the case when handling breaches, rather than reporting all breaches to SPA.[22] Stakeholders believed this would have many advantages:

- SPA's unsustainable workload would be eased, with less reporting of matters that are not sufficiently serious to warrant revocation.[23]
- The resources of both SPA and Community Corrections would be used more effectively, directed towards offender management rather than administrative work on breach matters that do not warrant revocation.[24]
- Relationships between supervising Community Corrections officers and parolees would be stronger.[25]
- Some discretion is necessary for effective and professional case management, especially for Community Corrections to consider a breach in the context of the offender's progress on parole and rehabilitation more generally.[26]
- Some discretion would help Community Corrections officers respond promptly to breaches and better link behaviour with consequences.[27]

21. NSW, State Parole Authority, *Submission PA19*, 8.
22. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 17; Aboriginal Legal Service (NSW/ACT), *Submission PA22,* 10; Public Interest Advocacy Centre*, Submission PA23*, 21; NSW Bar Association, *Submission PA31*, 9; Legal Aid NSW, *Submission PA33*, 24.
23. NSW, State Parole Authority, *Submission PA19*, 7; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 17.
24. NSW Department of Justice, *Submission PA54*, 20.
25. Aboriginal Legal Service (NSW/ACT), *Submission PA22,* 10.
26. Public Interest Advocacy Centre*, Submission PA23*, 21-22; Legal Aid NSW, *Submission PA33*, 24; Aboriginal Legal Service (NSW/ACT), *Submission PA22,* 10.
27. NSW Department of Justice, *Submission PA54*, 20; NSW, State Parole Authority, *Submission PA19*, 7; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35,* 14.

10.26 Some discretion would also help to promote information sharing between the Community Corrections officer and the government and non-government workers providing services to the parolee.

10.27 We note that Community Corrections already uses alternative responses to breaches, rather than reporting every single breach to SPA.

10.28 Stakeholders did not raise any issues about Community Corrections failing to report significant breaches of parole conditions or underreporting breaches in general, a criticism that has been made of parole officers in Victoria.[28]

The framework in Queensland

10.29 Unlike NSW, Queensland has a breach and revocation system that provides a variety of sanctions and allows parole officers to exercise their professional judgement to determine the most suitable response to a breach. This better aligns with the goals of a breach and revocation system discussed at paragraphs 10.4-10.7.

10.30 Queensland Corrective Services policy requires Probation and Parole officers to report the process of responding to all breaches or possible breaches of parole conditions in the Integrated Offender Management System. After recording notification of a breach, the officer must conduct a risk assessment and make a response that is commensurate with the level of risk and approved by the Chief Executive or delegate.[29] The response should represent a graduated escalation from any previous actions taken.[30]

10.31 Case management actions available to Probation and Parole officers in Queensland include:

- verbal warnings
- written censure
- referral to the Parole Board with a recommendation for action
- temporary amendment to the conditions of the parole order for up to 28 days (permanent amendments must be approved by the Parole Board), or
- suspension (mandatory if the breach involves positive urinalysis for amphetamines, methamphetamines, opiates or cocaine) for up to 28 days, in which case the Parole Board must be notified and requested to take action in response to the suspension.[31]

28. I Callinan, *Review of the Parole System in Victoria* (2013) 68; see also J Ogloff, *Review of Parolee Reoffending By Way of Murder* (2011) 31-2, Recommendation 7.
29. Queensland Corrective Services, *Probation and Parole Operational Practice Guidelines* (2012) "Managing Contraventions" 2-3, 5.
30. Queensland Corrective Services, *Probation and Parole Operational Practice Guidelines* (2012) "Managing Contraventions" 5.
31. *Corrective Services Act 2006* (Qld) s 201; Queensland Corrective Services; *Probation and Parole Operational Practice Guidelines* (2012) "Managing Contraventions" 5-7.

10.32 Verbal and written warnings are suitable for minor breaches causing minor increases in risk. An amendment to conditions can only be made if Probation and Parole believes the parolee has failed to comply with the parole order or poses a serious and immediate risk of harm to himself or herself. Examples of amendments include imposing a curfew or directing the offender to abstain from illicit drugs or alcohol. A parole order can be suspended if Probation and Parole believes the parolee has failed to comply with the parole order, poses a serious immediate risk of harm to someone else, poses a serious immediate risk of committing an offence, or is preparing to leave Queensland without permission.[32]

Our overall conclusion: a system of graduated sanctions for breach of parole

10.33 Following on from the goals discussed above, a good breach and revocation system should feature:

- the dual goals of managing risk and ensuring compliance
- a system of graduated sanctions enabling proportionate, swift and certain responses by Community Corrections and SPA, and
- powers for SPA and Community Corrections that reflect the core functions each body performs in the system.

Revocation, as the ultimate sanction, should be used to respond to risks that cannot be managed in the community.

10.34 The term "graduated sanctions" first emerged in the US to describe the imposition of community based penalties such as day reporting or home detention for non-compliance with the conditions of parole. These penalties operated as intermediate alternative responses to revocation. However, "graduated sanctions" is now often used more narrowly to refer to structured sanctions imposed in accordance with set criteria such as the severity of the breach.[33] For example, in some parole systems in US states, parole officers or parole authorities are guided by sanction grids for minor breaches.[34] The grids identify a range of common breaches and match these with responses of proportionate severity, taking into account the number of previous sanctions imposed and the level of risk that the offender poses to the community. Our use of the term "graduated sanctions" falls somewhere in the middle of these

32. *Corrective Services Act 2006* (Qld) s 201; Queensland Corrective Services; *Probation and Parole Operational Practice Guidelines* (2012) "Managing Contraventions" 6-7.
33. E J Wodahl and others, "Offender Perceptions of Graduated Sanctions" (2013) 59 *Crime and Delinquency* 1185, 1186-7.
34. Examples include Wyoming, Ohio and Pennsylvania. See D M Fetsco, "Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends" (2011) 11 *Wyoming Law Review* 99; D M Fetsco, "Parole Revocation in Wyoming" (2012) 1(10) *Association of Paroling Authorities International* 2; B Martin and S Van Dine, *Examining the Impact of Ohio's Progressive Sanction Grid: Final Report* (National Criminal Justice Reference Service, 2008) 18; J Karmer and others, *Evaluation of the Pennsylvania Board of Probation and Parole's Violation Sanction Grid,* Final Report (2008); M C Potteiger, *Pennsylvania's Reentry System: Toward Safer Communities* (Pennsylvania Board of Probation and Parole, 2013).

two ideas: we propose that a menu of options should be available to SPA and to Community Corrections, with enough variety and gradations of severity to allow these bodies to respond proportionately to a variety of cases. The sanctions could be escalated to respond to repeated or increasingly serious breaches or used as management tools as part of a step down approach when transitioning offenders back onto parole after revocation.

10.35 The system of graduated sanctions that we recommend for breaches of parole involves, at the level of minor breaches, a series of responses from a Community Corrections officer that increase in severity until the officer must refer the breach to SPA. We recommend that SPA should have a full set of options to employ in response to breach, from noting the breach and taking no further action, through issuing a warning, varying conditions and adding new conditions, electronic monitoring, home detention and revocation.[35]

10.36 Both before and after a breach is reported, our aim is to ensure that the decision makers are equipped to perform their roles in achieving the dual goals of managing risk and ensuring compliance, by means of a system of graduated sanctions aimed at proportionate, swift and certain responses.[36]

Recommendation 10.1: A graduated system of sanctions

The legislative and policy framework for responding to breaches of parole should incorporate a system of graduated sanctions, as detailed in Recommendations 10.2-10.3. Community Corrections and the State Parole Authority should apply these sanctions in a way that ensures a proportionate, swift and certain response.

Community Corrections' responses to breaches

10.37 The first, and in many ways the most important, component of a graduated system of sanctions is the Community Corrections response.

10.38 In our view Community Corrections officers should be given greater scope to exercise their professional judgement in response to breaches. This should be adapted from the Queensland approach.

10.39 In our view, the CAS Act should state that, in response to a breach, a Community Corrections officer must take one of the following actions:

- report the breach to SPA with a recommendation that SPA do one or more of the following:
  - revoke parole
  - impose home detention on the offender
  - impose electronic monitoring on the offender, or

35. Recommendation 10.3.
36. See the discussion of system goals at para [10.4]-[10.7].

  - vary or add to the offender's parole conditions.
- impose a curfew on the offender
- give a reasonable direction to the offender about their behaviour
- request that a senior officer issue a warning to the offender
- issue a warning to the offender, or
- note the breach and take no further action.

10.40 Our proposal would provide a broad range of flexible sanctions for Community Corrections to use in response to breaches that are not subject to mandatory reporting. Community Corrections officers would be able to choose the most proportionate response to a particular breach, which should facilitate a greater focus on case management than the current rigid policy. With this approach, a sanction imposed would relate to the seriousness of the breach in its context, with the potential to escalate the severity of the sanction to respond to a series of breaches, or reduce severity if warranted by the circumstances surrounding the breach.

Reports to SPA

10.41 A breach report to SPA is potentially the most severe response available to Community Corrections officers, because it can result in revocation of parole.

10.42 We envisage that under our proposal, a breach report would be made when a breach is assessed as meeting one of the grounds for reporting.[37] Community Corrections would be required to make a recommendation to SPA in the breach report, but only from among the four options listed above. Parolees should expect that if they are reported to SPA, something serious will happen as a result.

10.43 It is our view that a breach should only be reported to SPA if it requires an elevated response from SPA – that is, a response that Community Corrections cannot make itself, which will usually be of a higher level of severity – and careful consideration by SPA as the body ultimately responsible for deciding whether the offender should be removed from the community. This is why we consider home detention and electronic monitoring to be a response more fitting for SPA and curfews to be a response more fitting for Community Corrections.

10.44 We think that ideally, when a breach report contains a recommendation for SPA to revoke parole or impose home detention, the report should include a home detention suitability assessment. This would ensure that SPA can make an informed decision about the home detention option at the revocation meeting, and make an order immediately. However, given SPA usually makes over 2000 revocation orders each year (see Table 10.1), the resource implications for Community Corrections may outweigh the benefit of convenience for SPA. There are also likely to be situations where a requirement to prepare a suitability assessment would delay the delivery of the breach report, and thereby delay revocation for an offender who

37. See para [10.45]-[10.54].

should be removed from the community. Therefore, in our view, a suitability assessment should only be included where timing and resources permit. This is therefore a matter for administrative policy rather than amendment of the law.

New Corrective Services NSW policy on reporting

10.45 Several stakeholders emphasised that their support for a higher level of discretion for Community Corrections to deal with breaches was conditional on guidelines being developed.[38]

10.46 One way of achieving this would be to develop a formal framework that enables Community Corrections to filter breaches before they are reported to SPA, the objective being to ensure that suitable kinds of breaches are managed as part of the ongoing supervision of the parolee but serious breaches are still always reported. Many stakeholders supported this idea.[39]

10.47 Several stakeholders favoured a framework with two components, where serious breaches would be reported to SPA and responses to other breaches would be at the discretion of Community Corrections officers exercising professional judgement.[40] This would involve carefully specifying either a set of minor breaches suitable to be dealt with by Community Corrections or a set of serious breaches which should always be reported to SPA, depending on which component is the preferred starting point.

10.48 We recommend that Corrective Services NSW should develop a new policy to guide Community Corrections officers in exercising discretion when they respond to breaches. The policy would need to set out when breaches should be reported to SPA. It is for Corrective Services NSW to determine this policy, but by way of example, it could include criteria for reporting a breach to SPA such as whether, in the officer's and the Unit Leader's opinion, the breach (in the context of the offender's overall conduct) demonstrates:

- consistent failure to report
- the offender has failed to engage with parole supervision and/or the officer cannot continue to work with the offender
- reason to fear for the safety of an individual or group in the community
- failure to reduce drug or alcohol use
- that the offender is engaging in behaviour related to his or her past offending that elevates the risk of reoffending (other than drug or alcohol use), or

38. NSW, State Parole Authority, *Submission PA19*, 7; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35,* 14.
39. NSW, State Parole Authority, *Submission PA19*, 7; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 17; NSW Bar Association, *Submission PA31*, 9; Shopfront Youth Legal Centre, *Submission PA41*, 1; Public Interest Advocacy Centre, *Submission PA23,* 22; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 7; Justice Action, *Submission PA29*, 1; Legal Aid NSW, *Submission PA33*, 24.
40. NSW Bar Association, *Submission PA31*, 9; Shopfront Youth Legal Centre, *Submission PA41*, 1; Legal Aid NSW, *Submission PA33*, 24-5; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 17.

- that there are circumstances SPA should be informed of, including new charges before a court.

10.49 The new policy should state that breaches not meeting the reporting threshold should be dealt with by the supervising officer through case management strategies and actions to be taken within the officers' powers. The policy must delineate these strategies, to ensure certain and consistent breach responses across the system.

10.50 This approach would work well to reduce reporting of the kinds of breaches that are currently often reported "for information only" with a recommendation that SPA either take no action or issue a warning.

10.51 It would facilitate a more useful way of dealing with drug and alcohol use. As one stakeholder stated, the system needs to respond to drug use in a way that rewards reducing use (not just zero use), otherwise the system is based on unrealistic expectations and gives parolees no encouragement.[41] A reporting threshold of "failure to reduce" would ensure that SPA is not notified unnecessarily of every failed drug test.

10.52 In our view, this framework would allow Community Corrections to exercise professional discretion while providing enough guidance to ensure that the policy is straightforward to implement to ensure consistency across different Community Corrections offices. We envisage that the list of breach scenarios would capture all situations that present an increased risk, while avoiding requiring officers to make decisions according to a broad risk based test (such as whether the breach indicates an increased risk of reoffending or risk to the community). Individual officers will decide whether a breach meets one of the situations, which may involve considering past breaches (whether reported or not reported).

10.53 We acknowledge the concern that giving greater discretion to Community Corrections in how it responds to breaches (particularly whether they must be reported) would place a greater responsibility on officers to handle risk.[42] However, discretion is already being exercised in practice when determining whether or not to report breaches to SPA. We would expect that Community Corrections would record all responses to breaches (as is the case in Queensland) in order to inform the choice of appropriate sanctions that its officers can impose on an offender on each occasion and to inform breach reports when they are made to SPA.

10.54 When breaches are reported, the officers' recommendations reflect their judgment and SPA uses them to guide its decisions. Moreover, we expect that by reducing the number of reports to SPA, SPA will be better able to focus on those cases that require its attention, instead of being overwhelmed by large numbers of cases that in fact represent low risk.

41. Roundtable: Wagga Wagga legal practitioners, *Consultation PAC16.*
42. Probation and Parole Officers' Association, *Submission PA50*, 2-4.

Curfews

10.55 A curfew is a new option for Community Corrections to use in response to breach (though currently Community Corrections can impose a curfew through a reasonable direction). It is less restrictive than home detention (which we propose that SPA may impose). It is a level of response that Community Corrections should have available, given that Community Corrections' role involves case management and SPA's does not. This could be restricted, as in WA and Victoria, where, in the sentencing context, curfews may be imposed for a maximum of 6 months and a maximum of 12 hours per day.[43]

10.56 We have also recommended that curfews be explicitly included in the obligations of supervision about which Community Corrections officers can issue reasonable directions.[44] In line with Recommendation 9.3, we recommend that the curfew option be restricted so that a supervising officer may only require a parolee to remain at home for up to 12 hours in any 24 hour period. Given the seriousness of the restrictions that a curfew can involve, we also consider that Corrective Services NSW should develop a policy that requires a supervising officer to obtain permission from a manager before imposing a curfew as a response to breach and that requires a manager to review the curfew conditions after each month of operation.

Giving reasonable directions

10.57 The power to give a reasonable direction is already a power available to Community Corrections officers. It should be included in a new list of graduated responses. Officers can give a reasonable direction to the offender about behaviour, including varying the offender's reporting requirements.

Warnings

10.58 We have provided two layers of warnings: from the Community Corrections officer, and from a more senior officer. There is likely to be some advantage in the latter as the offender is likely to perceive a warning differently from a person of authority with whom the offender has no established relationship. The offender is likely to view this type of warning as more serious and formal. Also, it would provide another step in the graduated sanctions scheme, and it would be useful for Community Corrections to have an additional low level response. Alternatively, a general power to warn could encompass both warnings from the supervising officer and any other Community Corrections officer. We envisage that a warning from Community Corrections could be a serious event in the graduated sanctions system because it can be seen as a clear precursor to a report to SPA asking for a much more significant response.

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43. In Victoria, a curfew condition may be attached to a community correction order: *Sentencing Act 1991* (Vic) s 48I(1). In WA, a curfew requirement may be attached to an intensive supervision order or suspended sentence: *Sentencing Act 1995* (WA) s 33H, s 75, s 84C.

44. Recommendation 9.2(a)(viii).

Recommendation 10.2: Community Corrections responses to breach

(1) The *Crimes (Administration of Sentences) Act 1999* (NSW) should outline the breach response options available to Community Corrections officers to the following effect:

In response to a breach, a Community Corrections officer must do one of the following:

(a) report the breach to the State Parole Authority with a recommendation that the Authority do one or more of the following:

(i) revoke parole

(ii) impose home detention

(iii) impose electronic monitoring

(iv) make any other variation or addition to the conditions

(b) impose a curfew on the offender, for no more than a maximum of 12 hours in any 24 hour period

(c) give a reasonable direction to the offender about the offender's behaviour

(d) request that a more senior Community Corrections officer warn the offender

(e) warn the offender

(f) note the breach and take no further action.

(2) Corrective Services NSW should develop a policy about Community Corrections officers imposing a curfew in response to a breach that requires:

(a) a supervising officer to obtain permission from a manager before imposing the curfew, and

(b) a manager to review the curfew after each month of operation.

(3) Corrective Services NSW should develop a policy that sets out the circumstances in which a breach must trigger a Community Corrections report to the Authority, and provide a clear framework to guide Community Corrections officers in exercising their discretion when they respond to breaches.

SPA responses to breaches

10.59 The CAS Act states that, in response to a confirmed breach of parole, SPA may:

- revoke the parole order
- impose further conditions on the parole order, or

- vary existing conditions on the parole order.[45]

10.60 SPA also has a general power to impose additional conditions or vary conditions "from time to time", as long as this is not inconsistent with any standard conditions imposed by the CAS Act or CAS Regulation.[46] This means SPA can respond to and manage a serious situation in the absence of a breach of parole,[47] although this is not SPA's usual practice.

10.61 If SPA is to employ additional responses, it is desirable to set these out transparently and explicitly in legislation as part of a graduated sanctions regime.

10.62 Consistently with our approach of graduated sanctions, we propose that the following options should be available to SPA:

- noting the breach
- issuing a warning
- varying existing conditions
- imposing additional conditions
- electronic monitoring
- home detention, and
- revocation.

Noting the breach and warning the offender

10.63 The CAS Act does not provide SPA with the breach response options of warning the offender or noting the breach and taking no further action. In practice, Community Corrections officers frequently recommend one of these low level responses in breach reports, and SPA often makes these responses.

10.64 As set out in Table 10.1, SPA's use of warnings had been increasing in recent years before decreasing by 15% in 2013. SPA has advised us that increases are likely a result of an increase in the proportion of Community Corrections breach reports that recommend issuing a warning rather than recommending that the breach be noted with no further action.[48] The decrease in 2013 could be due to fewer requests for warnings from Community Corrections or an increase in cases where SPA decided to note the breach instead (for which figures are unavailable), or it could be a temporary anomaly. In any case, the figures indicate 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 additional conditions, variation of conditions or revocation of parole.

45. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170.
46. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(2), s 128(4).
47. See para [10.98]-[10.103].
48. Information provided by NSW, State Parole Authority (9 October 2013).

10.65 Stakeholders agreed that warnings can be useful. One stakeholder said that a warning from SPA might carry more weight and spur an offender into getting back on track more successfully than a warning from a Community Corrections officer.[49] Many stakeholders supported amending the CAS Act to grant SPA the power to give a formal warning in response to a breach of parole.[50] Stakeholders submitted that this would legitimise SPA's use of warnings and reflect the fact that a warning is often the most suitable response.[51] SPA has indicated that it would like the option to warn as well as the option to note a breach with no further action.[52]

10.66 One stakeholder suggested that SPA should always combine issuing a warning with orders such as a temporary increase in reporting requirements or monitoring.[53]

10.67 We recommend that the CAS Act give SPA the option to warn and the option to note a breach and take no further action in response to a Community Corrections report seeking some other action. We note our earlier recommendation that Community Corrections should not be able, when reporting a breach to SPA, to recommend that SPA warn the offender.[54]

10.68 The problem with the current situation is that SPA's workload increases to an unmanageable level when it receives reports of a large number of matters that warrant a warning only. Earlier in this chapter we made a recommendation aimed at enabling Community Corrections to filter the breaches of parole that are reported to SPA.[55] If Community Corrections only refers a matter to SPA when it is necessary for SPA to take an action that Community Corrections cannot take, there would be a reduction in the number of minor matters referred to SPA. The options to warn or note the breach would only need to be used sparingly and in borderline cases, for example where SPA does not accept a Community Corrections recommendation to take stronger action.

10.69 We note SPA could consider adding a warning when it decides to change an offender's parole conditions (or take any other action short of revocation). The warning would be secondary to the decision to alter a condition, rather than the main decision.

Varying and adding conditions

10.70 We propose no change to SPA's capacity to add conditions or vary conditions in response to a breach. The existing provision is enough to provide SPA with a flexible option to adjust conditions suitable for some cases of breach.

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49. NSW Bar Association, *Submission PA31*, 9.
50. Shopfront Youth Legal Centre, *Submission PA41*, 1-2; Legal Aid NSW, *Submission PA33*, 26, 27; Law Society of NSW, *Submission PA45*, 7; Police Association of NSW, *Submission PA25,* 23; NSW Young Lawyers Criminal Law Committee, *Submission PA21,* 17; Justice Action, *Submission PA29*, 1; NSW Bar Association, *Submission PA31*, 9.
51. Justice Action, *Submission PA29*, 1; Shopfront Youth Legal Centre, *Submission PA41*, 1.
52. NSW, State Parole Authority, *Consultation PAC20*.
53. NSW Bar Association, *Submission PA31*, 9.
54. Recommendation 10.2(1)(a).
55. See para [10.37]-[10.58] and Recommendation 10.2.

Electronic monitoring

10.71 Electronic monitoring should be included in the list of options available to SPA as a sanction one step down in severity from home detention. SPA submitted that it would like electronic monitoring to be available as a specific sanction.[56] The CAS Act should make clear that electronic monitoring is imposed as an additional parole condition, as would be the case for home detention. The same process of suitability assessment could also apply to both sanctions.[57]

10.72 Some stakeholders expressed concern over SPA imposing electronic monitoring on offenders as an additional parole condition when first releasing an offender on parole, submitting that electronic monitoring should be used for the surveillance of high risk offenders only.[58] These concerns do not seem to be a barrier to allowing the use of electronic monitoring as a response to a breach. We expect this sanction would usually be employed primarily to manage risk, and in response to a risk that has eventuated or escalated. Since additional conditions must be reasonable and attached for relevant purposes only,[59] it seems fair that a breach of parole could attract an electronic monitoring condition.

Home detention

10.73 In our view, SPA should have the option of imposing home detention. We consider that home detention would be imposed on a relatively small number of offenders in situations where revocation is currently the only suitable response. This would mean fewer offenders being returned to custody over a breach.

10.74 By "home detention" we mean an option similar to the sentence of home detention, including the requirement to submit to electronic monitoring, as well as the other usual conditions.[60]

10.75 SPA can currently impose home detention on an offender through its power to add to or vary the conditions of a parole order in response to a breach.[61] However, this power is not routinely used. SPA has indicated that it would like to have home detention available as a specific sanction it can impose.[62]

10.76 There was widespread support from stakeholders for giving SPA the power to impose home detention.[63] The advantage of home detention is that an offender's

56. NSW, State Parole Authority, *Consultation PAC20*.
57. Para [10.78]-[10.80].
58. Legal Aid NSW, *Submission PA33*, 16; NSW Bar Association, *Submission PA31*, 7; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 12; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 7. See para [9.80]-[9.83].
59. Para [9.79]-[9.89].
60. See *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 190.
61. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(4).
62. NSW, State Parole Authority, *Consultation PAC20*.
63. Shopfront Youth Legal Centre, *Submission PA41*, 1-2; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 18; Justice Action, *Submission PA29*, 1-2; Police Association of NSW, *Submission PA25,* 24; Law Society of NSW, *Submission PA45,* 7; NSW, State Parole Authority, *Submission PA19*, 7, 8; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 15.

access to community services, accommodation, income support programs and employment (where applicable) is not disrupted, which is an important issue for parolees. One stakeholder noted that non-custodial sanctions that restrict an offender's movements are more cost effective than revocation and also offer effective community protection by promoting rehabilitation.[64] Using home detention as a sanction in suitable cases would also avoid the extra work for Community Corrections and Corrective Services NSW associated with returning such offenders to custody for short periods of time. Community Corrections has the relevant expertise as it already manages offenders serving the sentence of home detention.

10.77 The CAS Act should make clear that home detention can be imposed as an additional parole condition. This is important because it would allow SPA to deal with an offender's non-compliance with home detention as a breach of parole conditions.

10.78 When deciding whether to sentence an offender to home detention, a sentencing court is required to request a suitability assessment report from Community Corrections.[65] The court can then only make the order if the assessment report finds that the offender is suitable.[66] In our view, SPA should also request a suitability assessment report from Community Corrections when it is considering whether to make a parolee subject to home detention conditions.

10.79 It would be procedurally straightforward for a Community Corrections officer to prepare and attach a suitability assessment to a breach report if the report recommends home detention. We have already suggested that Community Corrections should include a suitability assessment with a breach report whenever it recommends that SPA revoke parole or impose home detention provided timing and resources permit.[67]

10.80 In cases where SPA receives a breach report in which Community Corrections recommends a different response, and SPA wishes to impose home detention, SPA can choose to revoke parole and request Community Corrections to prepare a suitability assessment in time for the review hearing. However, we think SPA should only have the power to do so if no other option is appropriate, that is, if parole would otherwise be revoked in any case.

10.81 Limits should also be placed on how long home detention conditions can apply to an offender on parole. SPA can already impose up to seven days home detention as a condition of an intensive correction order (ICO) in response to a breach of the ICO.[68] A longer maximum should apply to a breach of parole, since a sentence of imprisonment with a parole component is a more serious penalty than a custodial community order such as an ICO. At the same time, the maximum duration should take into account that home detention is very onerous for an offender. We think a maximum of 30 days in response to a particular breach would strike the right

64. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 18.
65. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(2), s 78(2).
66. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 67(4), s 78(4).
67. See para [10.44].
68. *Crimes (Administration of Sentences) Act 1999* (NSW) s 90(1)(b).

balance, after which the offender would again be subject to the conditions of the parole order only.

10.82 Since home detention is the most punitive of the intermediate sanctions we recommend, we have considered whether SPA should be required to give the offender an opportunity to be heard before imposing it. SPA could achieve this by holding a s 169 inquiry to establish whether or not a breach has occurred and to decide what action to take, at which the offender would have the opportunity to respond to the breach allegation. If SPA still wished to impose home detention, it could then do so. However, we do not consider that giving an offender the opportunity to be heard before home detention conditions can be imposed offers much procedural protection to offenders, given that they are likely to spend at least two weeks in custody awaiting an assessment report before home detention can commence (amounting to almost half of the maximum time that the offender can spend on home detention under the current proposal).

Recommendation 10.3: State Parole Authority responses to breach

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that:

(1) In response to a breach of parole, the State Parole Authority may do one or more of the following:

  (a) revoke parole

  (b) add a condition to the parole order that requires the offender:

    (i) to spend time under home detention conditions, or

    (ii) to be subject to electronic monitoring

  (c) otherwise vary, add or remove one or more conditions of the order

  (d) warn the offender, or

  (e) note the breach and take no further action.

(2) The Authority must not require an offender to spend time under home detention conditions unless it has received a suitability assessment from Community Corrections.

(3) The Authority must not require an offender to spend more than 30 days under home detention conditions in response to a particular breach.

(4) The Authority must not revoke parole for the purpose of obtaining a home detention suitability assessment unless no response other than:

  (a) an order that the offender spend time under home detention conditions, or

  (b) revocation

would be proportionate.

Responses we do not recommend

Community service

10.83 We have also considered whether a community service order could be a tool for SPA. In a general sense, stakeholders were in favour of SPA being able to order an offender to undertake community service work as part of a graduated sanctions scheme,[69] but did not outline how this particular sanction should work.

10.84 In SA, 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 work.[70] In the year 2010-11, 38 community service orders were issued.[71] One stakeholder explicitly opposed NSW following the SA model.[72]

10.85 In our view, community service is not at present a suitable or practical option for parolees. There are existing difficulties with finding community placements and work for community based sentences. In our view, these issues should be resolved before the option of community service could be extended to parolees. We also note that community work could be difficult for some parolees to comply with, and that some groups would be assessed as unsuitable (including those with mental health and cognitive impairments or a history of serious violent or sexual offending).

Short term revocation

10.86 Some stakeholders suggested that, as an intermediate sanction, SPA should have the option to revoke parole temporarily so that an offender spends a short period in custody.[73] Short term revocation could be valuable as a swift, sharp sanction.

10.87 Two stakeholders supported short term revocation provided that lower level non-custodial sanctions are considered first (or have already been tried and a further breach has occurred), and parole is restored automatically at the end of the revocation period.[74] One stakeholder was of the view that the re-release of an offender after a short period in custody should not occur automatically but rather depend on a suitability report from a Community Corrections officer.[75] Another stakeholder considered it important to include options in the revocation order to

69. Shopfront Youth Legal Centre, *Submission PA41*, 1-2; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 18; Justice Action, *Submission PA29*, 1-2; Police Association of NSW, *Submission PA25,* 24; Law Society of NSW, *Submission PA45,* 7; NSW, State Parole Authority, *Submission PA19*, 8.
70. *Correctional Services Act 1982* (SA) s 74AA.
71. Parole Board of South Australia, *Annual Report 2010-2011* (2012) 13.
72. Probation and Parole Officers' Association of NSW, *Submission PA50*, 5.
73. NSW, State Parole Authority, *Submission PA19*, 8; Law Society of NSW, *Submission PA45,* 7; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 7; NSW Bar Association, *Submission PA31*, 10.
74. Legal Aid NSW, *Submission PA33*, 27-28; Shopfront Youth Legal Centre, *Submission PA41*, 2.
75. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 7.

maintain the offender's participation in community programs, such as day release, to reduce the disruption to the rehabilitation process.[76]

10.88 One stakeholder favoured the use of short term revocation when the breach is due to a "soluble problem" such as a loss of suitable accommodation or a temporary loss of contact with a supervising officer.[77] In some cases a short period in custody can provide opportunities to carry out assessments, provide referrals to rehabilitation programs, and address and resolve conflicts. In the experience of the Probation and Parole Officers' Association of NSW, such cases are common in SPA revocation reviews and SPA is often persuaded to rescind revocation when obstacles to prior parole performance are removed through this process.[78] In our view, it is preferable for SPA to continue to deal with these cases by revoking parole in the usual way, and for SPA to confirm the revocation and immediately make a new parole order if problems have been solved by the time of the review. SPA would be free to do so if our recommendation to override the 12 month rule is implemented.[79]

10.89 Some stakeholders did not support short term revocation for the following reasons:

- It would impose a significant administrative burden on Corrective Services NSW because of reception and screening requirements, the difficulty of managing bed availability across correctional centres, and extra work for parole officers.
- It would disrupt an offender's progress in the community, particularly in terms of housing, employment and eligibility for any social security benefits. Offenders would face the same problems upon re-release, and those on government housing or supported accommodation would be forced to give up their places in the meantime.
- Little can be done with offenders during a short period of time in custody. [80]

10.90 A new power for SPA to use short term revocation in response to a breach would be analogous to the power of the NSW Drug Court to order a participant to spend up to 14 days in custody.[81] However, participants in the program can accumulate days prior to being placed in custody, and can reduce the number of days through good behaviour. An evaluation of the Drug Court indicated that compared with offenders who were imprisoned, participants who completed the program (44% of total participants) were:

- 17% less likely to be convicted of a new offence
- 30% less likely to be reconvicted of a violent offence, and

76. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 15.
77. NSW Bar Association, *Submission PA31*, 10.
78. Probation and Parole Officers' Association of NSW, *Submission PA50*, 6.
79. Recommendation 12.1.
80. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 18; Public Interest Advocacy Centre, *Submission PA23*, 23; Justice Action, *Submission PA29*, 2; Probation and Parole Officers' Association of NSW, *Submission PA50*, 5; Wagga Wagga Community Corrections Office, *Consultation PAC14*.
81. *Drug Court Act 1998* (NSW) s 16(2)(f).

- 38% less likely to be reconvicted of a drug offence during the follow up period (an average of 35 months).[82]

However, the evaluation did not reveal the extent to which this success was due to the imprisonment option.

10.91 The Hawaii Opportunity Probation with Enforcement (HOPE) program operates in a similar way to the Drug Court. This program for drug dependent probationers involves frequent random drug testing, with positive tests and missed appointments resulting in immediate apprehension and return to custody for a few days. If a probationer commits multiple persistent breaches, probation is revoked. Initial research from 2008 suggests that HOPE has led to a 90% decrease in absconding and positive urine tests.[83] While this is a positive result for the HOPE program, we should exercise caution in considering whether similar results would be attained in our jurisdiction with its different criminal justice system and community setting (including different entitlements to public housing and unemployment benefits upon release).

10.92 In fact, a form of short term revocation already occurs when SPA rescinds the revocation of a parole order. This process generally involves the offender spending six to eight weeks in custody between SPA's decision to revoke parole and SPA's decision to rescind the revocation. Revocation and rescission achieves the same effect as short term revocation. The short term nature of the revocation in each case is not decided when the revocation is imposed but when SPA decides whether or not to rescind the revocation. Circumstances, available information or conclusions made by SPA can change between the initial decision and the review hearing.

10.93 **Our view.** We do not think short term revocation should be an option specifically available for SPA to respond to a breach. We consider any period in custody to be a very significant (and perhaps disproportionate) sanction for an offender who has committed a breach that is insufficiently serious to warrant revocation. This sanction does not appear to be well aligned with the goals of parole. Its impact on the offender's personal circumstances and progress towards rehabilitation is potentially very serious, and the period of time spent in custody is too short for Corrective Services NSW to work with the offender. Aside from punishing the offender, the gains are unclear.

SPA's discretion to revoke parole

10.94 When SPA is notified that an offender has failed to comply with the conditions of his or her parole order, SPA can decide to revoke parole. SPA has complete discretion in making this decision. This is the ultimate sanction for parole breach.

82. D Weatherburn and others, *The NSW Drug Court: A Re-evaluation of its Effectiveness,* Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008) 9.

83. M Kleiman and A Hawken, "Fixing the Parole System: a System Relying on Swiftness and Certainty of Punishment Rather than on Severity Would Result in Less Crime and Fewer People in Prison" (2008) 24(4) *Issues in Science and Technology* 45. See also M Kleiman and A Hawken, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (US Department of Justice, 2009).

10.95 In this section we consider whether there should be:

- a test for revocation or whether the current broad discretion should be retained
- a power to revoke without breach in some cases, and
- presumptions in favour of or against revocation in some cases, particularly where there are new charges.

Retain the current broad discretion for revocation following breach

10.96 Some stakeholders supported including a revocation test in the CAS Act to ensure that SPA makes revocation decisions based on risk.[84] A revocation decision made using this test would respond to an increased risk posed by the offender remaining in the community, rather than to the offender breaching the conditions of parole. Moving away from breach of conditions to a risk based test as the basis of revocation would allow SPA to revoke parole where no breach has occurred but SPA considers that the risk posed by the offender has increased sufficiently to warrant revocation.

10.97 We consider that a test to guide SPA's decision making is unnecessary. No issue has been raised concerning SPA's current decision making. Restricting SPA with a new test may have unintended consequences. Also, revocation is sometimes not directly about risk. It can be about behaviour management and punishment for non-compliance with conditions which support the regime of supervision ultimately aimed at reducing the risk of reoffending. There may therefore be cases where SPA revokes parole for reasons that are incidental to an increase in risk, particularly among the large number of revocations which take place in the absence of fresh offending (which make up half of all parole orders revoked by SPA).[85] Examples include non-harmful contact with a victim and repeatedly running late to appointments. Parolees must know that they will be held accountable when they break the rules. A pattern of minor breaches may warrant revocation.

A power to revoke in the absence of breach

10.98 While we consider it unnecessary to constrain SPA's discretion with a revocation test based on risk, SPA should be able to take action and revoke parole in all cases involving a risk that indicates an offender should not remain in the community. In part this is prompted by our recommendation to remove the difficult and unclear standard conditions to be of good behaviour and adapt to normal lawful community life.[86] Cases may arise where SPA thinks it is necessary to revoke parole but the parolee's behaviour is not a breach of the remaining standard conditions (not to offend and to comply with supervision) or any additional conditions that may be in place. There may be cases where a person has not breached those conditions, but nonetheless there is evidence that he or she poses a significant risk to the

84. Roundtable: legal practitioners, *Consultation PAC21.*
85. NSW, State Parole Authority, *Annual Report 2012* (2013) 15.
86. Recommendation 9.1(3) and (4).

community, and action should be taken. At times, SPA currently uses failure to adapt to normal, lawful community life to respond to such cases.

10.99 We think the best way to resolve this issue is to introduce a provision enabling SPA to revoke parole on the basis of risk in the absence of a breach.

10.100 We recommend that the CAS Act should provide that even though there is no breach of parole, SPA can revoke parole if it considers that the offender poses a serious and immediate risk to the safety of the community or any individual which cannot be mitigated through reasonable directions from the supervising officer or by added or varied parole conditions.

10.101 We recommend that the power be cast similarly to the power held by judicial members of SPA to suspend parole in emergencies at the application of the Commissioner of Corrective Services.[87] This would cover situations where:

- there are reasonable grounds for believing there is a serious and immediate risk to the safety of the community or of any individual, or
- there is a serious and immediate risk that an offender will leave NSW.[88]

10.102 This second ground is important, because at present there is only a power to suspend parole in these circumstances, not an explicit power to revoke parole and return the person to custody. Our proposal fills this gap.

Community Correction's power to seek revocation in the absence of breach

10.103 In order for SPA to consider these cases, Community Corrections would need a matching power to report to SPA. The CAS Act should provide that a Community Corrections officer can report to SPA in circumstances where there is no breach of parole with a recommendation that SPA revoke parole or add or vary parole conditions, if the officer considers that the offender poses a serious and immediate risk to the safety of the community or any individual or that there is a serious and immediate risk that the offender will leave NSW and this risk cannot be mitigated by reasonable directions from the officer.

Recommendation 10.4: New powers to revoke parole in the absence of breach

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that:

(a) where there is no breach of parole, the State Parole Authority can revoke parole if it considers that:

(i) either

(A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

87. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A.

88. On the emergency suspension power, see para [11.62]-[11.77].

(B) there is a serious and immediate risk that the offender will leave NSW, and

(ii) the risk cannot be mitigated by reasonable directions from the supervising officer or by adding or varying parole conditions.

(b) a Community Corrections officer can report to the Authority in circumstances where there is no breach with a recommendation that the Authority revoke parole or add or vary parole conditions if the officer considers that:

(i) either

(A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

(B) there is a serious and immediate risk the offender will leave NSW, and

(ii) the risk cannot be mitigated by reasonable directions from the officer.

There should not be a presumption in favour of revocation in any cases

10.104 Although there is no provision for automatic revocation of parole in NSW, in practice SPA will always revoke parole if a parolee commits a fresh offence that results in a new custodial sentence. If the fresh offence attracts 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.[89]

10.105 In all other Australian jurisdictions, parole is automatically revoked when certain kinds of breaches occur. Queensland, WA, the NT and Tasmania prescribe automatic parole revocation if the parolee reoffends and is sentenced to a new period of full time imprisonment.[90] 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.[91] In the ACT, parole is automatically revoked if a parolee is convicted of any offence punishable by imprisonment.[92] Under Commonwealth law, federal parolees who reoffend and receive a sentence of full time imprisonment (or aggregate sentence) of three months or more have their parole automatically revoked.[93]

10.106 Victoria has recently changed its legislation so that there is a presumption that parole will be revoked if a parolee is convicted of an offence punishable by imprisonment while on parole.[94] It is automatically revoked when a parolee receives another custodial sentence while on parole.[95] Parole will also be automatically

89. Information provided by NSW, State Parole Authority (9 October 2013).
90. *Corrective Services Act 2006* (Qld) s 209; *Sentence Administration Act 2003* (WA) s 67; *Parole Act* (NT) s 5(8); *Corrections Act 1997* (Tas) s 79(3)-(4).
91. *Correctional Services Act 1982* (SA) s 75.
92. *Crimes (Sentence Administration) Act 2005* (ACT) s 149.
93. *Crimes Act 1914* (Cth) s 19AQ.
94. *Corrections Act 1986* (Vic) s 77(4)-(5).
95. *Corrections Act 1986* (Vic) s 77(6A).

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.[96]

10.107 As well as its new rules about parolees convicted of new offences, Victoria has recently legislated to introduce a presumption that parole will be revoked if an offender 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.[97]

Stakeholder submissions

10.108 Some stakeholders thought the CAS Act should mandate SPA's practice of revoking parole if there is a fresh sentence of imprisonment,[98] and SPA itself did not object to the idea.[99]

10.109 The NSW Office of the Director of Public Prosecutions recognised that there is often uncertainty surrounding sentencing a parolee for a fresh offence, as the sentencing court is unsure about what SPA will do about the breach. This is particularly difficult if the sentencing court intends to impose an alternative penalty to full time custody, but is unsure whether parole will be revoked and the offender will end up back in custody. The sentencing court would be assisted by clear guidelines as to the factors SPA takes into account when revoking parole.[100] The Police portfolio submitted that a criminal offence committed on parole should be considered a material breach and not be subject to low level responses.[101] The Police portfolio was in favour of a presumption of revocation where an offender is convicted of an offence punishable by imprisonment, with automatic revocation in place for certain offences (violent offences, sexual offences or offences involving the possession or use of a prohibited firearm or weapon.)[102]

10.110 Most stakeholders did not support SPA's discretion being confined, particularly as no problem has been identified with how it is currently exercised.[103] The Probation and Parole Officers' Association submitted that listing circumstances which should constrain SPA's discretion would lead to highly prescriptive decision making in a context where circumstances vary greatly, and for this reason it is best to leave the decision entirely to SPA.[104]

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96. *Corrections Act 1986* (Vic) s 77(6).
97. *Corrections Act 1986* (Vic) s 77(3).
98. NSW Office of the Director of Public Prosecutions, *Submission PA17*, 1-2; Police Association of NSW, *Submission PA25*, 24; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8.
99. NSW, State Parole Authority, *Submission PA19*, 8-9.
100. NSW Office of the Director of Public Prosecutions, *Submission PA17*, 1-2.
101. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8.
102. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8.
103. Shopfront Youth Legal Centre, *Submission PA41*, 3; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 18; Justice Action, *Submission PA29*, 2; NSW Bar Association, *Submission PA31*, 11; Legal Aid NSW, *Submission PA33*, 29; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 15.
104. Probation and Parole Officers' Association of NSW, *Submission PA50*, 7.

10.111 SPA submitted that in its view it currently handles breaches involving reoffending "robustly and fairly". SPA considers various matters when making a revocation decision involving reoffending, including

- information in police facts
- whether bail has been granted
- the likelihood of a fresh custodial sentence
- criminal history
- current index offence
- compliance with parole conditions
- community safety
- victim issues
- referral to MERIT or Drug Court, and
- whether the court has requested a pre-sentence report, or put a long remand period or Section 11 good behaviour bond[105] in place.[106]

Our view

10.112 We think it unnecessary to constrain SPA's discretion by imposing a requirement to revoke parole in certain cases or a presumption in favour of revocation. Stakeholders did not suggest that SPA's decision making is of concern where fresh charges have been laid or fresh sentences imposed. SPA already revokes parole whenever a new sentence of full time imprisonment is imposed on an offender.

10.113 There would also be difficulties with restricting SPA's discretion on the basis of reoffending. Revocation removes offenders from the community because the risk they pose has escalated to an unmanageable level. The nature and seriousness of a breach and how it affects the risk posed by the offender can vary greatly, regardless of whether it constitutes reoffending or not. For example, contact with a victim may contravene an additional condition without being an offence, but may escalate the risk to the victim enough to warrant the offender's removal from the community. This may be much more serious than comparatively minor reoffending that does not warrant a new sentence of imprisonment. Classifying breaches on the basis of whether reoffending has occurred is not helpful to the exercise of determining whether revocation is warranted.

There should not be a rule against revocation in any cases

10.114 One stakeholder suggested that revocation of parole should not be permitted on the basis of fresh charges before there has been any plea or finding of guilt.[107] A related

105. See *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11.
106. NSW, State Parole Authority, *Submission PA19*, 8.
107. NSW Bar Association, *Preliminary Submission PPA4*, 1.

issue is whether SPA should be barred from revoking parole if bail has been granted by the court dealing with the fresh offending.

10.115 When a parolee commits a fresh offence, 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 charge. During this period, the offender may have been granted police or court bail. SPA has to decide whether the charges warrant revocation of parole before a finding of guilt or innocence has been recorded. 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 against a sentence of imprisonment.

10.116 SPA may regard fresh charges as an important indication that the risk the parolee poses to the community has become too great for parole to be continued. SPA bases its decision on the apparent seriousness of the alleged reoffending. 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.[108]

Our view

10.117 In our view, SPA should retain full discretion over its revocation decisions where fresh charges have been laid. While some may argue that it is unfair to revoke parole solely due to fresh charges, particularly where the charges are later withdrawn or dismissed, we do not agree. When an offender has breached the standard condition not to commit any offence SPA can revoke parole before guilt is admitted or determined through the court process. This is because SPA must not make a parole order unless it is satisfied that the release of the offender is appropriate in the circumstances.[109] This justifies a revocation for committing an offence even if the offender is not convicted.

10.118 SPA should also retain discretion over its revocation decisions where a court has granted bail. While a bail decision and parole decision both involve examining whether an offender should remain in the community or not, different considerations apply. SPA is managing a sanction already imposed by a court, and as such has to resolve different questions to those facing a bail court, which is dealing with an unproved offence. SPA also considers different factors, including the parolee's history of compliance and reporting on parole. A bail court and SPA, applying different legal frameworks, may well reach different conclusions about whether the offender should be in the community or in custody.

Breach of parole should not be an offence

10.119 Breach of parole is not an offence in NSW. If the breach involves reoffending, the offender will often be returned to custody to finish serving the original sentence of

108. Information provided by NSW, State Parole Authority (9 October 2013).

109. For the current law and our proposals on the standard of proof that SPA applies, see para [4.21]-[4.22].

imprisonment and must also serve any new sentence imposed for the fresh offence. The fact that the fresh offence was committed on parole is an aggravating factor and may result in a heavier sentence for the fresh offence.[110] The court dealing with the fresh offence can order the offender to serve any new term of imprisonment cumulatively on the original sentence. However, the breach of parole is not an offence in itself.

10.120 The Victorian Government has recently amended the *Corrections Act 1986* (Vic) to create a new offence of breach of parole.[111] 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.[112] No explicit arguments in support of the new offence were put forward at the time of its introduction, although the Victorian Premier stated that "the primary purpose of parole should be the protection of the community…this [change] is very much in line with that principle".[113] No other Australian jurisdiction treats breach of parole as an offence in itself, although in NZ breach of parole is an offence punishable by imprisonment for up to one year.[114] In NSW, it is also not an offence to breach other community based sentences such as community service orders, good behaviour bonds, home detention or ICOs.

10.121 All stakeholders who made submissions on this issue were opposed, some strongly opposed, to the idea of making breach of parole an offence.[115] Reasons included:

- It is unnecessary since full time imprisonment is already the consequence of a breach and no deterrent value would be added.[116]
- An offence of breach of parole would have an "incremental detrimental impact generally on the [correctional centre] population and specific detrimental effect on [offenders]".[117]
- The seriousness of the bare fact of breach of parole is already addressed by revocation and can be an aggregating factor affecting the sentence imposed for a new offence.[118]

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110. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 [48]; *R v Tran* [1999] NSWCCA 109 [15].
111. By the *Corrections Amendment (Breach of Parole) Act 2013* (Vic), assented 10 September 2013.
112. *Corrections Act 1986* (Vic) s 78A; *Sentencing Act 1991* (Vic) s 16(3BA).
113. D Napthine, "Legislation Introduced to Make Breach of Parole an Offence" (Media Release, 25 June 2013) 1.
114. *Parole Act 2002* (NZ) s 71.
115. Justice Action, *Submission PA29*, 4; NSW Office of the Director of Public Prosecutions, *Submission PA17,* 2; NSW, State Parole Authority, *Submission PA19*, 10; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13; Shopfront Youth Legal Centre, *Submission PA41*, 5; Police Association of NSW, *Submission PA25*, 28; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 10; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; NSW Bar Association, *Submission PA31,* 13; Legal Aid NSW, *Submission PA33,* 34; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 17; Probation and Parole Officers' Association of NSW, *Submission PA50*, 11.
116. NSW, State Parole Authority, *Submission PA19*, 10; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13; Shopfront Youth Legal Centre, *Submission PA41*, 5; Police Association of NSW, *Submission PA25*, 28; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 10.
117. NSW Office of the Director of Public Prosecutions, *Submission PA17,* 2.

- It would be "contrary to the whole scheme of sentencing and sentence administration in NSW" and would shift the focus from the purposes of parole to punishment for breaches.[119]
- For non-reoffending breaches, it would lead to an increase in costly court appearances.[120]
- Behaviours that lead to breach are often not offences in themselves; it is clearer for the offender if the breach is linked with the original offence, and some groups of offenders might find themselves unfairly over-represented in the offence of breach.[121]
- As there are already clear consequences for breach of parole conditions, creating an offence of breach would complicate rather than clarify matters.[122]

Our view

10.122 While we do not necessarily agree with all the points made by stakeholders, we see little advantage and considerable disadvantage in creating an additional offence of breach of parole.

10.123 An offence committed by an offender on parole who is subject to conditional liberty is a circumstance that operates adversely to the offender on sentence at common law[123] and under the *Crimes (Sentencing Procedure) Act 1999* (NSW).[124] We recommended in our Sentencing report that this factor be removed from the list of aggravating factors that courts must take into account in sentencing, and placed in a stand alone provision. Our recommendation was that it should be taken into account when assessing the need for the sentence to contain an additional element of specific deterrence, denunciation and/or community protection, and also when assessing the offender's prospects of rehabilitation.[125]

10.124 Making the fact of breach an additional offence with its own penalty could also be a broader form of penalty stacking. Currently, if a breach does not amount to criminal conduct, a parolee faces 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.

Recommendation 10.5: No offence of breach of parole

Breach of parole should not be an offence.

118. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; Legal Aid NSW, *Submission PA33,* 34.
119. NSW Bar Association, *Submission PA31,* 13.
120. NSW Bar Association, *Submission PA31,* 13.
121. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 17.
122. Probation and Parole Officers' Association of NSW, *Submission PA50*, 11.
123. *R v Ponfield* [1999] NSWCCA 435; 48 NSWLR 327 [48]; *R v Tran* [1999] NSWCCA 109 [15].
124. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(j).
125. NSW Law Reform Commission, *Sentencing,* Report No 139 (2013) Recommendation 4.7.

11. Breach and revocation: procedural issues

In brief

We recommend amending the *Crimes (Administration of Sentences) Act 1999* (NSW) to clarify breach and revocation procedures and align the legislation with current practice. Procedures should be simplified where possible, and the powers of the State Parole Authority (SPA) should be broadened where this would make procedure more consistent. Our recommendations also aim at increasing the transparency of SPA's revocation decision making.

11.1 In this chapter we examine a range of distinct procedural issues connected to breach and revocation of parole.

11.2 We propose retaining the basic framework as it currently exists, changing provisions only where necessary to clarify, simplify or ensure transparency and procedural fairness.

Date of revocation and street time

11.3 If an offender has breached parole, Community Corrections can provide a breach report to the State Parole Authority (SPA). After receiving the breach report, SPA may decide in a private meeting to revoke parole if it is satisfied that the offender has failed to comply with the parole obligations. If SPA revokes the order, the revocation order is effective from the date the order was made unless SPA selects an earlier date.[1] The earliest date that SPA can select is the date of the first occasion that SPA considers the offender failed to comply with the parole obligations.[2] Between this earliest date and the date SPA makes the order, there is a wide range of possible dates that SPA can select.

11.4 The time that elapses between the date the revocation order takes effect and the offender's re-entry into custody is generally known as "street time". Street time does not count as time served. Instead, in accordance with s 171(3) of the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act), the offender's sentence is extended by the number of days the person was "at large" between the day on which the revocation order took effect and the day the offender was "taken into custody". The operation of this provision can sometimes add months, or more, to an offender's sentence.

Selecting the revocation date

11.5 Some stakeholders opposed SPA's current broad power to select the revocation date, and thought SPA's discretion should be constrained.[3] Stakeholders suggested new, narrower ranges of revocation dates, such as:

- Either the date of alleged reoffending or the date that Community Corrections submits the report for non-reoffending breaches, unless there are substantial reasons to select another date.[4]
- The date of breach.[5]
- The date that the revocation order is issued.[6]

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(1).
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(2).
3. Shopfront Youth Legal Centre, *Submission PA41*, 3; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11; Police Association of NSW, *Submission PA25*, 25; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8; Legal Aid NSW, *Submission PA33*, 29; NSW Bar Association, *Submission PA31*, 11.
4. See Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11; Police Association of NSW, *Submission PA25*, 25; NSW Bar Association, *Submission PA31*, 11.
5. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8; Probation and Parole Officers' Association of NSW, *Submission PA50*, 8.
6. Legal Aid NSW, *Submission PA33*, 29; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 19.

11.6 SPA submitted that it should maintain discretion in determining the revocation date.[7] In its view, flexibility is necessary to ensure fairness to the offender.[8] We understand that SPA's practice is generally to date the revocation from when the order is made, unless there is a good reason to date the revocation from the actual breach, for example, the offender has been charged with a fresh offence and has been refused bail.

Our view

11.7 In our view, the CAS Act should continue to provide that a revocation order takes effect on the date on which the order is made, or on an earlier date that is no earlier than the first occasion that SPA considers the offender breached parole. There may be cases where a date earlier than the date of the revocation order is desirable in the circumstances. It is desirable for SPA to have flexibility in selecting an alternative revocation date. Therefore we make no recommendation for change to the existing provisions.

Street time in cases of imprisonment outside of NSW

11.8 The street time provisions raise some difficult issues when the reason the parolee has not been returned to custody by the effective date of revocation is that the parolee has been in custody outside of NSW.

11.9 The Supreme Court considered this issue in *Palizio v NSW Parole Authority*,[9] a case where an offender went to Western Australia in breach of parole. The offender was subsequently arrested in Western Australia on fraud and other charges, was remanded in custody, tried and sentenced. Upon release, he was extradited and returned to custody in NSW where he applied to SPA to review the revocation of his parole. He appealed SPA's refusal to rescind the revocation on a number of grounds, including that SPA had wrongly interpreted the street time provisions. The offender contended that the phrase "taken into custody" in the street time provision[10] should be taken to include custody in Western Australia, so that street time should not have been counted against him once he entered custody in Western Australia.

11.10 The Supreme Court concluded that:

> the better interpretation is that the phrase "taken into custody" should be qualified by the words "with respect to the sentence for which parole was granted" or some similar formula.[11]

11.11 This interpretation means if SPA revokes parole and issues a warrant after an offender absconds, and the offender is later arrested interstate because of the outstanding NSW warrant, the time the offender spends in custody before

7. State Parole Authority, *Submission PA19*, 9; State Parole Authority, *Consultation PAC20.*
8. State Parole Authority, *Consultation PAC20.*
9. *Palizio v NSW Parole Authority* [2013] NSWSC 1829.
10. *Crimes (Administration of Sentences) Act 1999* (NSW) s 171(3).
11. *Palizio v NSW Parole Authority* [2013] NSWSC 1829 [48].

extradition to NSW is not street time and will count as time served.[12] Time spent in custody outside NSW is not added to the sentence in that case. However, if, as in *Palizio*, the offender is taken into custody interstate with respect to an interstate offence, the time spent in custody will be treated as street time and will not count as time served. Time spent in custody outside NSW is added to the sentence in that case.

11.12 The Court rejected an interpretation of the legislation which would simply have treated time spent in custody outside NSW in the same way as time spent in custody in NSW because it would follow that "a person whose parole was revoked and who was placed in custody for any reason, anywhere in the world under any conditions, would have the period for which they were in custody treated as service of their NSW sentence".[13]

11.13 In cases where an offender enters custody outside NSW for a different offence, SPA may revoke parole due to the reoffending but it could be years before the offender is released from custody outside NSW and returned to custody in NSW. In effect, this means that a sentence imposed outside NSW is cumulative upon the sentence of imprisonment the parolee is already serving.[14] By contrast, if the fresh offending had occurred in NSW, the sentencing court in NSW would have to consider whether the new sentence should be cumulative or run concurrently with the existing sentence.[15]

Stakeholders' views

11.14 The Aboriginal Legal Service called for clarity concerning the treatment of street time in the legislation. It was of the view that the CAS Act should specify that time spent in custody outside NSW should not be treated as street time because the offender is not at liberty or on the street.[16] Some other stakeholders agreed.[17] SPA did not.[18]

11.15 The Police portfolio submitted that in cases where an offender has been incarcerated outside NSW in relation to an offence committed prior to the NSW offence, SPA should have the power to determine if the sentence for the offence committed outside NSW would have been concurrent or cumulative if handed down in NSW at the time of sentencing for the NSW offence. SPA should then be able to reduce the amount of street time on its assessment of how much longer the

12. *Palizio v NSW Parole Authority* [2013] NSWSC 1829 [50].
13. *Palizio v NSW Parole Authority* [2013] NSWSC 1829 [47].
14. See *Palizio v NSW Parole Authority* [2013] NSWSC 1829.
15. *Callaghan v R* [2006] NSWCCA 58, 160 A Crim R 145.
16. Aboriginal Legal Service (NSW/ACT), *Submission PPA2*, 1; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11.
17. Roundtable: legal practitioners, *Consultation PAC21*; Probation and Parole Officers' Association of NSW, *Submission PA50*, 8; NSW Bar Association, *Submission PA31*, 11; Legal Aid NSW, *Submission PA33*, 30; Shopfront Youth Legal Centre, *Submission PA41*, 3; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 15; Law Society of NSW, *Submission PA45*, 8.
18. State Parole Authority, *Submission PA19*, 9.

accused person would have spent in custody in NSW if the offence had been committed in NSW.[19]

11.16 The Aboriginal Legal Service was of the view that SPA should be given greater flexibility to deal with outstanding street time (for example, SPA could require an offender to serve street time as part of parole rather than street time simply being added to the sentence, with it being uncertain whether the additional time would be served in prison or on parole).[20] The NSW Bar Association suggested allowing revocation to be considered when the prisoner is in prison outside NSW, with review hearings via audio-visual link.[21] Another stakeholder suggested that extenuating circumstances should be taken into account when considering how street time should apply to an offender, submitting that the lack of supports available to offenders with an intellectual disability and the transient nature of their lives means they are more likely to be on street time than other offenders.[22]

Our view: the street time provision should reflect and clarify current law

11.17 In our view, there are no viable alternatives to how street time currently operates as determined in *Palizio*. SPA is not a court and is not equipped to determine whether one sentence should be served concurrently or cumulatively with another. SPA would have to take into account prosecution and defence submissions. It would have the appearance of reopening the original court's decision.

11.18 We recognise that the current rule means that a sentence imposed outside NSW will effectively always be cumulative upon the sentence of imprisonment the parolee is already serving in NSW. However, a rule that time spent in custody outside NSW does not count as street time would mean the other sentence would always run concurrently with the parolee's NSW sentence. In practice, when a parolee reoffends in NSW and receives a fresh prison sentence, the parolee will generally serve the fresh sentence semi-concurrently with the earlier one. Accordingly, neither scenario is fully aligned with the situation of a parolee who reoffends and receives a fresh prison sentence in NSW.

11.19 We think s 171(3) of the CAS Act should be amended to clarify the law in accordance with the decision in *Palizio.*[23] The subsection should be to the effect that any days from the date the revocation order takes effect to the date that the parolee is taken into custody with respect to the revocation order must be added to the sentence.

11.20 The requirement that the parolee be taken into custody with respect to the revocation order means that the revised provision would not apply if the parolee enters custody outside NSW with respect to another offence. Time served interstate in respect of a new offence would not count as "time served" in relation to the revocation. Time served interstate might be taken as time served in respect of the

19. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 8.
20. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11.
21. NSW Bar Association, *Submission PA31*, 11.
22. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 15.
23. *Palizio v NSW Parole Authority* [2013] NSWSC 1829.

revocation if, for example, the offender is further detained pending extradition to NSW under a warrant issued by SPA.

11.21 The subsection should further provide that the extension must not be longer than the time the parolee had left to serve at the date the revocation order took effect. This is implicit but not clearly stated in s 171(3). The qualification is necessary to cover situations where the parolee has absconded or is in custody outside NSW for a period that is longer than the time the parolee had left to serve when the revocation order took effect.

Recommendation 11.1: Clarifying the street time provision

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to the following effect:

(1) Any days from the date a revocation order takes effect to the date that the parolee is taken into custody in relation to the revocation order must be added to the sentence.

(2) Any extension to the parolee's sentence must not be longer than the time the parolee had left to serve at the date the revocation order took effect.

SPA's power to hold a pre-revocation inquiry into a breach of parole

11.22 After receiving a breach report, SPA decides in a private meeting whether to revoke a parole order or vary or add to its conditions.[24]

11.23 Alternatively, SPA can decide to hold an inquiry, under s 169 of the CAS Act, if it suspects that an offender has failed to comply with the conditions of a parole order (whether because SPA has received a breach report from Community Corrections or for any other reason).

11.24 If SPA holds an inquiry, the offender may make submissions.[25] SPA has advised us that it held 21 s 169 inquiries in 2012 and 17 in 2013.[26] No inquiries were held in 2014 up to 30 August.[27] After such an inquiry, SPA will then decide whether to revoke the parole order or vary or add to its conditions.

11.25 Most stakeholders submitted that SPA should conduct more s 169 inquiries.[28] One stakeholder was of the view that a review after revocation may not be the best

24. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170.
25. *Crimes (Administration of Sentences) Act 1999* (NSW) s 169(2).
26. Information provided by the State Parole Authority (9 October 2013); information provided by the State Parole Authority (3 September 2014).
27. Information provided by the State Parole Authority (3 September 2014).
28. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 21; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13; Law Society of NSW, *Submission PA45*, 9; NSW Bar Association, *Submission PA31*, 13; Legal Aid NSW, *Submission PA33*, 32; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16; Shopfront Youth Legal Centre, *Submission PA41*, 4; Probation and Parole Officers' Association of NSW, *Submission PA50*, 10.

forum for deciding a contested breach.[29] One reason for this is that, at the time of the review, the offender has already been in custody for some weeks. This is disadvantageous for the offender, if the breach is not established.[30]

11.26 Stakeholders suggested that SPA should hold s 169 inquiries for:

- All breaches, even if the breach is admitted, to assist SPA in deciding what response to make.[31]
- All breaches except those which are due to major, repeated drug use or serious fresh offending.[32]
- Breaches where there is no immediate threat to the safety of the community, whether or not the offender admits a breach has occurred.[33]
- Cases where service providers are engaged and rehabilitation is at risk if parole is revoked.[34]

11.27 SPA may be reluctant to expend resources on a s 169 inquiry when a review will need to be held anyway if it decides to revoke parole under s 170. On the other hand, significant resources are unnecessarily expended if SPA revokes parole, the offender is returned to custody and the revocation is subsequently rescinded. Shopfront Youth Legal Centre submitted a case study of an offender on parole for a drug related offence. He was taking steps to deal with his substance abuse problems, including undertaking a cannabis reduction program under the supervision of his parole officer. When the offender's parole officer went on leave, a different parole officer supervised him and submitted a breach report based on his cannabis use, which did not disclose the fact that he was on a medically supervised reduction regime with the knowledge and support of his former parole officer. SPA revoked the offender's parole and he spent several weeks in custody before SPA ultimately rescinded the revocation at a review where the offender's version of events was independently confirmed.[35]

11.28 Some stakeholders submitted that, if SPA used s 169 more frequently, subsequent reviews of revocation decisions could be more limited.[36] Others suggested that if a s 169 inquiry has been held, SPA should be granted discretion to decide whether a further review is warranted.[37] Section 169 inquiries could perform the same function as reviews, which would ensure the effective use of resources.

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29. NSW Bar Association, *Preliminary submission PPA4*, 1.
30. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 21.
31. Law Society of NSW, *Submission PA45*, 9; Shopfront Youth Legal Centre, *Submission PA41*, 4.
32. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13.
33. NSW Bar Association, *Submission PA31*, 13.
34. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16.
35. Shopfront Youth Legal Centre, *Submission PA41*, 4.
36. Probation and Parole Officers' Association of NSW, *Submission PA50*, 10; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 21; NSW Bar Association, *Submission PA31*, 13; Shopfront Youth Legal Centre, *Submission PA41*, 4.
37. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 21; Shopfront Youth Legal Centre, *Submission PA41*, 4; NSW Bar Association, *Submission PA31*, 13.

11.29 Legal Aid NSW submitted that the current systems and processes for s 169 inquiries should be improved. The experience of Legal Aid's Prisoner's Legal Service is that a solicitor tends to become aware that a s 169 inquiry is being held for a client on the morning of the inquiry.[38] Legal Aid NSW stressed the need for a system to be put in place to enable clients to access legal advice and representation before their appearance, as did other stakeholders. Unless this was achieved, the present difficulties could cause adjournments and delay.[39] In addition, s 169 inquiries are currently available only to clients who appear in person at SPA, and could be made more accessible by allowing parolees to attend by audio visual link.[40] We address Legal Aid NSW's concerns at paragraph 11.41.

Our view

11.30 Our view is that s 169 inquiries could be held more regularly. Later in the chapter we make a recommendation that we envisage will encourage increased use of s 169. The recommendation is to make an exception to the automatic reconsideration of revocation decisions where a s 169 inquiry has already been held.[41]

Post-revocation procedures

11.31 Once SPA has decided to revoke a parole order at a private meeting, a revocation notice must be served on the offender along with the material on which SPA based its decision.[42] The revocation notice must set a date between 14 and 28 days later on which SPA will meet to reconsider the revocation and the date on which the revocation order takes effect, if that date is earlier than the date on which SPA made the revocation order.[43] An offender is not entitled to have revocation reconsidered if there are fewer than 30 days left to run on the sentence.[44]

11.32 An offender may give SPA notice that he or she intends to make submissions on the date specified for the meeting in the revocation notice, if he or she does so at least 7 days in advance.[45] If the offender makes such a request, SPA must conduct a hearing on the date set by the revocation notice.[46] After this, and in any case, if the offender does not give such notice, SPA must , after reviewing "all the reports, documents and other information placed before it", decide whether or not to rescind the revocation of the parole order or whether or not to rescind or vary the revocation

38. Legal Aid NSW, *Submission PA33*, 32-33.
39. Roundtable: legal practitioners, *Consultation PAC21*.
40. Legal Aid NSW, *Submission PA33*, 32-33.
41. Recommendation 11.2.
42. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(1), s 173(2)(d).
43. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(2)(b).
44. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175A.
45. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(2)(c).
46. *Crimes (Administration of Sentences) Act 1999* (NSW) s 174(1).

date (where it is a date earlier than the day the revocation order was made).[47] We deal with the effect of rescission at paragraph 11.49 below.

11.33 The review of a revocation decision (with or without a hearing) changes the outcome in a significant proportion of cases: of the 2334 parole orders that SPA revoked in 2013, SPA subsequently rescinded the revocation in 346 cases.[48]

Automatic reconsideration of revocation

11.34 The automatic requirement for SPA to reconsider a revocation decision contrasts with the situation for parole refusals, where a review hearing is held only if SPA considers that a hearing is warranted.[49]

11.35 The 2013 Callinan report on the Victorian parole system 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 reviews 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".[50]

11.36 The majority of submissions to this review supported continuing automatic reviews (either at a meeting or a meeting with a review hearing) after a revocation decision.[51] The following reasons were provided:

- Discontinuing the practice would deny procedural fairness. The offender should have an opportunity to be heard and provide his or her account of events, an opportunity not provided at any other stage of SPA's revocation decision making process.[52]
- Reviews have an educational role, as SPA underlines the importance of strict compliance with parole conditions and emphasises what will be expected of the offender upon any future release on parole.[53]
- Placing an onus on offenders to apply for a review (as might be the case if review were no longer automatic) would create an inherent unfairness and loss

47. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175(1).
48. NSW, State Parole Authority, *Annual Report 2013* (2014) 15-16.
49. *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(1).
50. I Callinan, *Review of the Parole System in Victoria* (2013) 63, 89.
51. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 19; Police Association of NSW, *Submission PA25*, 25; Law Society of NSW, *Submission PA45*, 8; NSW Bar Association, *Submission PA31*, 11; State Parole Authority, *Submission PA19*, 9; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11; Legal Aid NSW, *Submission PA33*, 30; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16; Shopfront Youth Legal Centre, *Submission PA41*, 3; Probation and Parole Officers' Association of NSW, *Submission PA50*, 8.
52. NSW Bar Association, *Submission PA31*, 11; Shopfront Youth Legal Centre, *Submission PA41*, 3; Law Society of NSW, *Submission PA45*, 8; Probation and Parole Officers' Association of NSW, *Submission PA50*, 8; Legal Aid NSW, *Submission PA33*, 30-31; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16.
53. NSW Bar Association, *Submission PA31*, 11.

of confidence in the parole system, particularly if offenders were not assisted with applications.[54]

11.37 Two stakeholders noted that the benefits of reviews far outweigh the resource implications.[55] Stakeholders emphasised the importance of ensuring offenders have an opportunity to be heard and to explain the circumstances surrounding the breach. With legal assistance and representation offenders can present relevant and potentially influential evidence to SPA in support of rescission.

Our view: reviews should be automatic unless a s 169 inquiry has been held

11.38 Subject to one exception, we think reviews should continue to be held automatically after parole is revoked. Reviews are an important safeguard against SPA relying on inaccurate information and ensure that SPA can take into account any extenuating circumstances that favour reinstating parole. If there is no review, an offender would not have an opportunity to make submissions to SPA or provide information about his or her actions and circumstances. Automatic reviews may also help to protect the safety of the community. If SPA suspects that a parolee poses an escalating risk to community safety, it need not hesitate to revoke a parole order, because it must hold a full review of the revocation and give the offender an opportunity to be heard.

11.39 However, we think the CAS Act should be amended to provide that reviews are not automatic if a s 169 inquiry has already been held. SPA should use its discretion to decide whether or not to hold a review in these circumstances. SPA may choose to hold a review if, for example, new facts emerge or issues arise justifying review, or an offender does not attend the s 169 inquiry and parole is revoked. We envisage that this change would increase the use of s 169 inquiries and minimise cases where parolees spend weeks in custody as the result of a breach that a review then finds is not established or does not warrant revocation.

11.40 In effect, SPA would need to hold about the same number of reviews as it currently does, but it would hold some before revocation and some after. We think s 169 inquiries and review hearings are both ways of ensuring offenders can be heard in the revocation decision making process (if they so choose), of investigating whether a breach occurred, and of deciding what should be done if a breach has occurred.

11.41 We note Legal Aid NSW's submission that if a parolee is not automatically entitled to a review when a s 169 inquiry has been held, s 169 inquiries should have most of the same procedural protections as reviews. However, we think the most relevant procedural protection is inviting parolees to make submissions, which already occurs. Because parolees are not in custody before a s 169 inquiry, it would be difficult to provide all parolees with the option of attending by audio visual link. The fact that parolees are in the community also makes it difficult to require SPA to provide the two to three weeks' notice that is given for a review. SPA may wish to move more quickly with a s 169 inquiry, particularly if the inquiry is being held to determine whether a breach has occurred.

54. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11.

55. Legal Aid NSW, *Submission PA33*, 31; Shopfront Youth Legal Centre, *Submission PA41*, 3.

Recommendation 11.2: Reviews automatic unless a s 169 inquiry has been held

Reviews should continue to be held automatically following revocation of parole except that, if a s 169 inquiry has been held and parole has been revoked, the State Parole Authority should have the discretion whether to hold a review or not.

Parole conditions during street time

11.42 Sometimes a significant period of time can elapse between the date the revocation order takes effect and the date of the review hearing, including a lengthy period of street time. It has been argued that, because parole has been revoked, no behaviour during the period of street time can amount to a breach of parole.

11.43 At review hearings, submissions are commonly made that an offender has not reoffended or has made an effort to secure employment or has attended a drug or alcohol program of their own initiative. SPA normally takes these matters into account when deciding whether to rescind.[56] It would make sense for SPA also to take into account, against rescission, that the offender has reoffended or has continued to behave inappropriately.

11.44 In light of the doubt about whether SPA can take behaviour that would amount to breach of parole into account at a review hearing, we consider that the CAS Act should include a provision that clarifies that SPA can take into account an offender's conduct during street time when deciding whether or not to rescind a revocation of parole.

Recommendation 11.3: The State Parole Authority should be able to take into account an offender's behaviour during street time

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the State Parole Authority can, when deciding whether or not to rescind a revocation of parole, take into account an offender's conduct between the date the revocation order took effect and the offender's return to custody.

Outcome of the reconsideration

11.45 There are two results that can arise from SPA's reconsideration of revocation:

- If SPA decides not to rescind the revocation decision, the offender remains in custody and street time is applied to the sentence in accordance with s 171(3).
- If SPA decides to rescind the revocation, the effect is that the revocation never occurred and the original parole order remains on foot. This means that s 171(3) does not apply. Instead, the period of time from the revocation date to the offender's return to custody counts as time served. There is no statutory provision to support this.

56. Information provided by J Wood, Chairperson, State Parole Authority, 25 March 2015.

11.46 On the face of it, the current state of the law might lead to inconsistent treatment between cases where SPA chooses to rescind revocation and cases where SPA chooses not to rescind revocation, depending on the circumstances. For example, two offenders are revoked for good cause but on reconsideration SPA decides to rescind one (because of change of circumstances) and not rescind the other (because nothing has occurred to justify rescission). Both were appropriately revoked, but only one has street time added to the end of the sentence.

11.47 However, in practice, such concerns about unequal treatment would appear to be outweighed by the concern that any change that would result in adding street time to an offender's sentence arising despite rescission would remove an incentive for a revoked offender to go into rehabilitation or secure appropriate accommodation or enter into a drug or alcohol program with a view to securing a rescission. While it is true that, upon revocation, an offender is technically at large without supervision for a period, Recommendation 11.4 will ensure that the offender can be held accountable for behaviour in that period. In any event, the practical consequences of lack of supervision will not be great, except for those who remain at large for lengthy periods and, in such cases, it is unlikely that SPA will decide to rescind.

11.48 Finally, any problem that might arise from street time being added in cases where SPA denies an offender rescission because of a post-revocation breach but the original revocation was unwarranted, can be met by SPA using s 175(1)(b) to rescind or vary the effective revocation date to take into account the more recent breach.

11.49 In our view, there should be an express provision to deal with the effect of a rescission, particularly as it relates to the addition of street time to a sentence under s 171(3) of the CAS Act. The provision should make it clear that the effect of rescinding a revocation order is to give the grant of parole effect as if it had not been revoked. This would ensure that any time added to the sentence as a result of the revocation (according to s 171(3)) would be deducted.

Recommendation 11.4 Effect of rescinding a revocation order

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that the effect of rescinding a revocation order is that the grant of parole has effect as if it had not been revoked.

A flexible approach when a revocation is rescinded

11.50 In Chapter 10, we outlined a graduated sanctions regime aimed at facilitating flexible responses to breaches by Community Corrections and SPA. As well as escalating sanctions to respond to repeated or increasingly serious breaches, SPA could scale down sanctions when it transitions offenders back onto parole after rescinding a revocation.

11.51 For example, when it rescinds a revocation, SPA may wish to impose home detention or electronic monitoring for risk management purposes. However, SPA will not be able to use its power under s 170(4) to vary or add conditions in

response to a breach,[57] because s 170(4) is only available when SPA decides not to revoke at the first meeting. However, SPA can use its power to vary or add conditions at any time under s 128.[58]

11.52 This approach to adding or varying conditions after rescission might result in some offenders being transitioned back into the community earlier than would otherwise be feasible. For example, adding a home detention or electronic monitoring condition might reduce the risk posed by an offender to a point where SPA considers it safe to rescind the revocation. The safe release of more offenders earlier in the parole period would be in line with the purpose of the parole system, which is to release offenders into the community with supervision and support when it is safe to do so.

11.53 We think attention should be drawn to SPA's ability to use its power to vary or add conditions in the context of rescission, by adding a reference in s 175. This would be similar to the way an explicit reference in s 170 draws attention to the way SPA can use its power to vary or add conditions in the context of responding to a breach.

Recommendation 11.5: The State Parole Authority's power to vary or add conditions after rescission

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to include a provision that confirms that, when the State Parole Authority rescinds a revocation order, it has the power to impose further parole conditions, or vary any existing conditions in accordance with s 128.

Aligning the intentions of SPA and the courts when parolees reoffend

11.54 The Aboriginal Legal Service suggested that situations 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 for the fresh offence. 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, unless there are special reasons not to do so.[60]

11.55 SPA was not in favour of any such provision in the CAS Act, as it already takes into account the intentions of the sentencing court and balances this against the safety

57. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(4).
58. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128.
59. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PPA2*, 1.
60. Aboriginal Legal Service (NSW/ACT), *Preliminary Submission PPA2*, 1; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11-12.

of the community.[61] SPA has advised us that it will generally stand over a matter for later consideration rather than revoke parole where there are fresh charges and the court dealing with the charges has referred the offender to a program under s 11.[62]

11.56 Other stakeholders have suggested SPA revokes more readily and that in some cases, a court will indicate that a non-custodial sanction would have been considered if parole had not been revoked.[63] The Probation and Parole Officers' Association of NSW supported SPA's practice of standing a matter over, noting that SPA and the court will have two different sets of information, with the court knowing more about the fresh offending, and SPA knowing more about the offence for which the offender is on parole and the offender's conduct on parole.[64]

11.57 It could be argued that completing pre-sentence intervention programs is compatible with the overall purposes of parole and it makes little sense to stand in the way of the court's assessment. The programs are fundamentally different from programs that may be available to the offender if he or she remained in custody, in terms of program content and the rehabilitative environment offered. On the other hand, SPA may reach a different view from that of the court about the best way to protect the safety of the community, particularly if the information at SPA's disposal provides a broader overview of the offender's behaviour in custody and on parole.

Our view

11.58 Stakeholders have provided different accounts of what generally happens when a court considers directing an offender to a rehabilitation program or the Drug Court when dealing with a fresh offence committed on parole.

11.59 Regardless, it is hard to see what could or should be done to address incompatibility between the intentions of SPA and the intentions of the sentencing court, because two distinct decisions are being made based on different considerations or, at least, with different emphasis on relevant considerations. SPA must make its own decision about whether the offender must remain in custody for the protection of the community. Requiring SPA's decisions to match those of a court dealing with a different matter would unjustifiably constrain SPA's ability to carry out its role.

11.60 Even if there were a special mechanism for SPA to reconsider parole or rescind revocation to enable an offender to complete a rehabilitation program or the Drug Court program, this would be complicated by the fact that a pre-sentence intervention order, or a non-custodial order cannot be imposed if an offender is in custody. SPA would have to re-release an offender upon receiving information that the sentencing court was considering a non-custodial order, to enable the court to impose it. This would involve considerable practical difficulties.

61. State Parole Authority, *Submission PA19*, 9.
62. Information provided by the State Parole Authority (9 October 2013).
63. Legal Aid NSW, *Submission PA33,* 31.
64. Probation and Parole Officers' Association of NSW, *Submission PA50*, 9.

11.61 We conclude that SPA should not be required to accommodate a non-custodial rehabilitation program directed by a court.

Emergency suspensions

11.62 Under s 172A of the CAS Act, the Commissioner of Corrective Services can apply to a judicial member of SPA to have an offender's parole suspended and a warrant issued for the offender's arrest.[65] Under a parole suspension order, the offender may be committed to custody for up to 28 days.[66] Beyond this period, SPA must revoke an offender's parole for the offender to remain in custody. A judicial member of SPA or the Commissioner of Corrective Services can revoke a parole suspension order at any time.[67] If it is revoked, the offender will be re-released on parole.

11.63 A judicial member can suspend an offender's parole only 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.[68]

11.64 When s 172A was introduced,[69] it was intended to provide a process for swift suspension of parole where a meeting of SPA could not be convened at short notice, while acknowledging that a meeting is the ideal forum to determine revocation even in urgent cases. The second reading speech noted that "[w]hile the provisions of this section are likely to be used infrequently, the introduction of a mechanism for urgent situations is necessary in the community interest".[70] SPA has advised us that the power was not used at all in 2012, 2013 or up to 30 August in 2014.[71]

65. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A(1).
66. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A(7).
67. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A(6).
68. *Crimes (Administration of Sentences) Act 1999* (NSW) s 172A(3).
69. *Crimes (Administration of Sentences) Amendment (Parole) Act 2004* (NSW) sch 1 cl 44.
70. NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12103.
71. Information provided by the State Parole Authority (9 October 2013); Information provided by the State Parole Authority (3 September 2014).

11.65 SPA itself does not have the power to make a parole suspension order. Only a judicial member of SPA can make such an order upon application by the Commissioner of Corrective Services NSW.[72] Other Australian jurisdictions have similar powers. In Queensland, the power is cast in very similar terms to NSW, with the same four grounds for suspension.[73] In WA, there are no limits on the reasons for, or length of, a suspension.[74]

11.66 Most stakeholders considered that the current provision was satisfactory, and supported an emergency power to suspend parole even though this power is rarely used.[75] NSW Young Lawyers expressed concern that parole can be suspended for offences or harms that have not yet occurred, allowing the individual to be held in custody for 28 days. The Committee proposed that a reduced maximum period in custody would be more suitable for these "prospective offence matters".[76] Only one stakeholder submitted that s 172A should be repealed.[77]

Our view: revising the grounds for emergency suspensions

11.67 There is value in a judicial member of SPA being able to respond quickly in emergency situations and suspend parole for a short time to allow investigation, after which SPA can decide whether to revoke parole.

11.68 Although this power is rarely used, we suggest the four grounds for exercising it should be revised. We recommend retaining one ground, expanding another and removing two as unnecessary.

Include a serious and immediate risk to the safety of the community or any individual

11.69 Under the current ground (iii), a judicial member can suspend parole if he or she is satisfied that the Commissioner has reasonable grounds for believing that there is a serious and immediate risk that the offender will harm another person.

11.70 In our view, the power should be used when the offender poses a serious and immediate risk to the safety of the community or any individual. This goes further than the current ground to include any number and combination of people in the community, as well any risk the offender may pose to himself or herself.

11.71 The amended ground, set out in Recommendation 11.6(a), would also match a new power for SPA to revoke parole in the absence of a breach in Recommendation 10.4.

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72. State Parole Authority, *Submission PA19*, 9-10.
73. See *Corrective Services Act 2006* (Qld) s 201(2), s 201(4).
74. *Sentence Administration Act 2003* (WA) s 39-40.
75. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13; NSW Bar Association, *Submission PA31*, 12; Legal Aid NSW, *Submission PA33*, 32; Police Association of NSW, *Submission PA25*, 27; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30,* 9; Probation and Parole Officers' Association of NSW, *Submission PA50*, 9-10; State Parole Authority, *Submission PA19*, 9-10.
76. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 20.
77. Justice Action, *Submission PA29*, 3.

11.72 We envisage that when a judicial member suspends parole under the revised ground, SPA will then decide within 28 days (the existing maximum time the offender can be kept in custody) whether to revoke parole. Under Recommendation 10.4, SPA can revoke parole if it considers that the offender poses a serious and immediate risk to the safety of the community or any individual which cannot be mitigated through reasonable directions from the supervising officer or by adding or varying parole conditions. If SPA does not revoke parole, it will revoke the suspension order and the offender will resume parole.

Include a serious and immediate risk that the offender will leave NSW

11.73 In our view, ground (ii) should be retained because it allows parole to be suspended if there are reasonable grounds to believe that there is a serious and immediate risk that the offender will leave NSW. An emergency suspension is justified in such cases, particularly as leaving NSW could put the offender beyond easy reach of SPA. A separate ground is needed because Recommendation 11.6(a) would not apply in such a case.

11.74 In Recommendation 10.4 we have similarly recommended that SPA should have the power to revoke parole if it considers that there is a serious and immediate risk that the offender will leave NSW that cannot be mitigated through reasonable directions of the supervising officer or varied parole conditions.

Do not include a failure to comply with parole conditions

11.75 Ground (i) allows parole to be suspended on the basis that a judicial member is satisfied that the Commissioner has reasonable grounds for believing the offender has failed to comply with parole conditions.

11.76 We think this ground should be removed. It is hard to imagine a case where an emergency response to a breach of parole would be thought necessary unless there is also a risk to the safety of the community or an individual. Police can arrest for any breach of parole that involves serious offending. The usual revocation process will be sufficient to deal with the breach of parole in these circumstances.

Do not include a serious and immediate risk that the offender will commit an offence

11.77 Ground (iv) allows parole to be suspended if a judicial member is satisfied that the Commissioner has reasonable grounds for believing that there is a serious and immediate risk that the offender will commit an offence. We think this ground should be removed. An emergency suspension of parole because of possible future conduct is not justified unless there is also a risk to the safety of the community or an individual under which would be covered by Recommendation 11.6(a).

Recommendation 11.6: Grounds for emergency suspensions

The *Crimes (Administration of Sentences) Act 1999* (NSW) should provide that, on application by the Commissioner of Corrective Services, a judicial member of the State Parole Authority can suspend an offender's parole only if he or she has reasonable grounds for believing that:

(a) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

(b) there is a serious and immediate risk that the offender will leave NSW in contravention of the conditions of the parole order.

Reasons for revocation decisions

11.78 When SPA decides to revoke a parole order, it identifies the parole conditions the offender has breached. SPA must record reasons for certain decisions it makes at private meetings and review hearings in its minutes, including:

- 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.[78]

11.79 The Attorney General, the Commissioner of Corrective Services and Community Corrections can all access SPA's minutes but they are not available to victims, offenders or the public.[79]

Providing reasons to offenders

11.80 SPA is required to include the reason for the revocation as part of the revocation order that is then supplied to the offender.[80] SPA sends the offender a bundle of documents containing:

- an explanatory letter with notification of the automatic review
- a copy of the revocation order, and
- relevant reports to be relied upon at the review.

11.81 In practice, sometimes the reason for the revocation will not be identified in the revocation order itself. Instead, the revocation order will note the relevant Community Corrections breach report which contains details of the breach of parole. This means that offenders are not always informed of the reasons for SPA's decision to revoke parole.

11.82 Several stakeholders favoured the CAS Act requiring SPA to provide the offender with all the detail of the reasons for the revocation, in a way similar to or the same as the way reasons are recorded in SPA's minutes.[81] SPA supported this

78. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175(5), s 193C.
79. *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C(3).
80. *Crimes (Administration of Sentences) Act 1999* (NSW) s 170(3), s 173(2)(d).
81. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 20; NSW Bar Association, *Submission PA31*, 12; Justice Action, *Submission PA29*, 3.

suggestion.[82] We think this should be required as an addition to the explanatory letter. We have also recommended that the CAS Act should require SPA to provide written reasons to offenders when making initial parole decisions.[83]

11.83 The explanatory letter sent to offenders after the initial revocation decision may be difficult for offenders to understand. These letters are text heavy and use a lot of bold text, underlining and capital letters. The letters also use complex language and legal jargon, including an excerpt from the CAS Act. We consider that the style of the standard letter could be improved with a plain English approach and its contents reorganised to increase readability. In particular, it would be helpful to organise the letter in the following way:

- decision made (revocation)
- reason for decision made (the breach or breaches of parole), and
- action that may be taken by the offender (including information about making submissions at the hearing and advising SPA of any intention to brief a legal representative to appear at the hearing).

We have also raised this concern in Chapter 7, where we recommended that SPA review all forms and notices that are routinely sent to offenders.[84]

Recommendation 11.7: Reasons for decisions in revocation matters

The State Parole Authority should review the explanatory letter and revocation notification it sends to offenders to make these as straightforward and easy to understand as possible. The explanatory letter should be organised to include the following information:

(a) decision made

(b) reasons for the decision, and

(c) action that the offender may take.

Publishing reasons

11.84 SPA does not publish reasons for decisions about revocation, although it publishes online reasons for a limited number of decisions to grant or deny parole.

11.85 The WA Prisoners Review Board publishes online reasons for revocation cases where the Board has decided that parole should be revoked.[85] 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.

82. Information provided by the State Parole Authority (14 March 2014).
83. Recommendation 7.5.
84. See Recommendation 7.4(2).
85. Prisoners Review Board of WA, "Prisoners Review Board Decisions" (23 August 2013) < www.prisonersreviewboard.wa.gov.au/D/decisions.aspx?uid=4250-2542-6323-4438>.

11.86 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 provide 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.

11.87 Several stakeholders did not consider that any change is necessary.[86] Others were of the opinion that reasons for decisions to confirm or rescind revocation should be made available or published. It was submitted that this would be in the interests of "procedural fairness, accountability and an improved understanding of the parole process".[87] Options presented by these stakeholders include:

- reasons for all decisions, including minutes, should be available to any interested party and should be in the public domain,[88] or
- reasons for decisions to confirm or rescind a revocation after the review, including reasons for making decisions contrary to the recommendation of a Community Corrections officer, should be published.[89]

In the experience of Legal Aid NSW, current practice is to provide detailed reasons when revocation is rescinded, but not when it is confirmed.[90]

11.88 While it is desirable for SPA to publish reasons in revocation matters, we acknowledge that the volume of revocation decisions is significant, particularly as in each case there will be an initial revocation decision and a compulsory review at which the revocation is either confirmed or rescinded. On the other hand, SPA is already required to record reasons for three types of revocation decision in its minutes.[91] These three categories are likely to be those that the public are most interested in, because they involve SPA going against the view of another interested party, or changing its mind, with the result that offenders remain in the community. The public is also interested in the reasons for initial parole revocations, as these offenders have been out in the community and have contravened the conditions of their release in some way.

11.89 We consider that it is desirable for SPA to publish all decisions relating to revocation in cases where SPA is already required to record reasons in its minutes. This would include cases where SPA decides to:

- revoke a parole order (decisions made at private meetings of SPA)
- refuse 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 (decisions made at private meetings of SPA), and

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86. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16; State Parole Authority, *Submission PA19*, 9; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 9.
87. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 20.
88. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 12; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 20.
89. Legal Aid NSW, *Submission PA33*, 32.
90. Legal Aid NSW, *Submission PA33*, 32.
91. See para [11.78].

- rescind a revocation order (decisions made after a review).[92]

11.90 Publishing reasons in these cases is likely to present little difficulty to SPA's processes as SPA is already required to record reasons. This would minimise the resource implications of this recommendation.

11.91 The same arguments that apply to publishing reasons for initial grants and refusals of parole are applicable here. Several stakeholders were of the view that publishing reasons would increase transparency and public confidence in the administration of justice, as well as educating the community about SPA decision making and the justice system.[93] This is important in the context of revocation decisions, particularly when SPA makes decisions that leave the offender in the community, such as rescinding a revocation. We recommended in Chapter 7 that most decisions to grant or deny parole should be published online.[94] As we commented in Chapter 7, we envisage that this would be done in a similar style to the brief reasons published online by the WA Prisoners Review Board.

Recommendation 11.8: Publishing reasons for decisions in revocation matters

The State Parole Authority should work towards publishing reasons online for revocation decisions that it must already record in its minutes, including decisions to:

(a) revoke a parole order

(b) refuse to revoke a parole order in cases where Community Corrections has recommended that the order be revoked or there has been a submission from the Commissioner or the State, and

(c) rescind a revocation order.

Information sharing

11.92 One of the key criticisms of the Ogloff review into parolee reoffending in Victoria was the poor sharing of information between Victoria Police, Corrections Victoria and the Victorian Adult Parole Board.[95] 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.[96]

92. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175(5), s 193C.

93. State Parole Authority, *Submission PA14*, 15; Legal Aid NSW, *Submission PA4*, 22; Public Interest Advocacy Centre, *Submission PA1*, 14; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 19; Police Association of NSW, *Submission PA6*, 20-21; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 7; NSW Department of Attorney General and Justice, *Submission PA32*, 25.

94. Recommendation 7.6.

95. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (Victoria, Department of Justice, 2011) 19-21, See recommendation 1.

96. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (Victoria, Department of Justice, 2011) 21.

11.93 The report also criticised the fragmented flow of information between the custodial and community branches of Corrections Victoria. In several cases, Victorian parole officers did not have access to key details about a parolee's prison performance which may have affected the response taken to the breach. 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.[97]

11.94 In NSW, the Serious Offenders Review Council (SORC) has responsibility for the case management of serious offenders while they are in custody 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.[98] 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. SPA has submitted that it has begun implementing a system to advise SORC when serious offenders breach parole and are returned to custody, including providing Community Corrections breach reports.[99]

11.95 The presence of a police member and Community Corrections member on SPA means that the difficulties reported about the Victorian system are unlikely to appear in NSW practice.[100] However, stakeholders reported several other information sharing issues.

SPA, the NSW Police Force and Community Corrections

11.96 One stakeholder submitted that the current system allows Community Corrections officers to contact the local intelligence officer at a Local Area Command or access police information on new charges on JusticeLink, but an occasional problem is that JusticeLink does not show incidents under investigation or charges that have not been entered immediately.[101] Another stakeholder suggested that NSW Police should automatically notify either SPA or Community Corrections in the event of alleged reoffending.[102] SPA submitted that it does not have information sharing issues with the NSW Police Force in practice.[103]

SPA and the courts

11.97 Legal Aid NSW emphasised the need for significant improvement in communication between the courts and SPA. It noted situations where clients of the Prisoner's Legal Service have had parole revoked, have been returned to custody, and were then unable to attend future court dates for the fresh offending (for which they were on bail). In some of these cases, the offender is charged with failing to appear at

97. J Ogloff, *Review of Parolee Reoffending By Way of Murder* (Victoria, Department of Justice, 2011) 19-21.
98. Serious Offenders Review Council, *Preliminary consultation PPAC4*.
99. NSW, State Parole Authority, *Submission PA19*, 10.
100. NSW Bar Association, *Submission PA31*, 13; State Parole Authority, *Submission PA19*, 10.
101. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 9.
102. NSW Young Lawyers, *Submission PA21*, 21.
103. Information provided by the State Parole Authority (14 March 2014).

court and convicted *ex parte* with a bench warrant issued. It can be a complicated process to reverse these steps.[104]

11.98 Legal Aid NSW was of the view that there should be a system to ensure SPA notifies the relevant court if a parolee has had their parole revoked and is in custody with a future court date. In addition, the court should implement a process to check whether a person is in custody before charging a client for failing to appear and dealing with the matter *ex parte*.[105]

11.99 SPA submitted that information sharing between SPA and the courts is limited, but SPA has put a procedure in place to notify a correctional centre if an offender has outstanding court matters that SPA is aware of which have not been entered in the Offender Integrated Management System, during the process of the offender being returned to custody. SPA expects that when Joined Up Justice is fully implemented, SPA and Corrective Services NSW will share a system that will allow the courts to see which offenders are in custody.[106]

Our view

11.100 Based on the submissions from stakeholders, we are aware that there are concerns about information sharing, but we have not received enough information to identify clearly the extent to which problems exist and the resources required to address them. We suggest the NSW Department of Justice convene a working group to investigate concerns about information sharing between SPA, the courts, the NSW Police Force and Corrective Services NSW.

Role of the Serious Offenders Review Council

11.101 As well as managing serious offenders in custody, SORC performs a gatekeeper role when SPA considers these offenders for parole. However, SORC is not involved in any breach, revocation or rescission decision making by SPA in relation to a serious offender's parole.

11.102 The former Chairperson of SORC noted that SORC's advisory position in relation to serious offenders does not end until the end of the whole sentence, and was of the opinion that SPA should seek SORC's advice about proposed revocations and rescissions of revocations.[107] This would provide more continuity in SORC's management of serious offenders. Some stakeholders also noted that SORC has access to highly relevant information about these offenders through its in-custody management role.[108]

104. Legal Aid NSW, *Submission PA33*, 33.
105. Legal Aid NSW, *Submission PA33*, 33.
106. Information provided by the NSW State Parole Authority (14 March 2014).
107. D Levine, *Submission PA34,* 2.
108. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 9; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 16; Police Association of NSW, *Submission PA25*, 28.

11.103 One way to involve SORC in breach and revocation decision making would be to allow SORC to make submissions when a revocation decision is being reviewed, after receiving and reviewing breach reports. Two stakeholders favoured this approach.[109] Alternatively, when a serious offender's parole has been revoked and SPA is considering rescinding the revocation, the CAS Act could require SPA to seek SORC's advice on the desirability of rescission. One stakeholder submitted that it was strongly opposed to SORC being involved to the same extent as it is in original proceedings.[110]

11.104 In our view SORC's role in breach and revocation decision making should not be expanded. SORC has no role in managing serious offenders in the community, which in our view is a significant impediment to its involvement in revocation matters. We consider Community Corrections to be best placed to advise SPA in all revocation and rescission decisions.

11.105 A relevant consideration is the delay that may arise if SORC is to make submissions. This is significant because the time between initial revocation and review is time usually spent by an offender in custody without being heard.[111] The process already takes four weeks or so, and SORC's involvement may lengthen this timeframe. We believe this outcome should be avoided.

11.106 For these reasons, we do not recommend that SORC be involved in SPA's processes concerning breach, revocation and rescission decisions.

109. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; NSW Bar Association, *Submission PA31*, 13.

110. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13.

111. Legal Aid NSW, *Submission PA33*, 33.

12. Further applications for parole

In brief

The 12 month rule prevents offenders from applying to the State Parole Authority (SPA) to reconsider a decision to refuse or revoke parole. Flexibility should be introduced so that SPA can set either an earlier or a later reconsideration date at the time of the earlier decision. This will allow some offenders serving short sentences a further opportunity to apply for parole and will prevent distress to victims arising from recurrent applications by offenders serving lengthy sentences.

12.1 In this chapter, we look at provisions that deal with when and under what conditions offenders can apply for parole after the State Parole Authority (SPA) has refused parole or revoked a parole order.

12.2 A short time before the end of an offender's non-parole period (the "parole eligibility date"), SPA must, without application, consider whether the offender should be released on parole. If SPA refuses to release the offender on this first occasion, a "12 month rule" operates to limit the occasions when an offender can subsequently apply for release on parole. If SPA revokes parole, a 12 month rule likewise operates to limit the occasions when an offender can subsequently apply for release on parole. There is an exception to the 12 months rule in the case of manifest injustice. SPA may also extend the 12 month period to up to three years.

12.3 The following paragraphs consider the operation of the 12 month rule, the requirement that offenders must apply to SPA for release on subsequent occasions, and the manifest injustice exception to the 12 month rule as it applies both to refusals of parole and revocations.

The 12 month rule

Application for release on parole after refusal

12.4 An offender must wait 12 months from being first refused parole before applying to be released on parole, and may only reapply thereafter at 12 month intervals.[1] SPA can extend the 12 month waiting period to up to three years if it chooses.[2]

12.5 This 12 month rule means that offenders serving shorter sentences may have a single chance of being released on parole. If SPA refuses parole at the end of the non-parole period, any offender with less than 12 months head sentence remaining will be released when the head sentence expires without any period of parole supervision. Offenders with more time remaining may be released on parole but with such a short parole period they cannot receive the support and supervision they may need.[3] In both situations, the operation of the 12 month rule greatly reduces any incentive that the offender has to use the remaining time in custody constructively and also limits the availability of the advantages of parole supervision on release.

Application for release on parole after revocation

12.6 The 12 month rule also applies to offenders who have been returned to custody after their parole is revoked so that the date 12 months after their return to custody counts as their subsequent parole eligibility date.[4]

12.7 The 12 month rule raises some different issues in the context of revocation. For offenders serving longer 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 that results in a short sentence of imprisonment – for example, one month – he or she must still spend 12 months in custody before he or she can apply for release on parole. In such a case, the 12 months in custody would be considerably more than the court that imposed the sentence for the minor offence would have considered appropriate.

12.8 The 12 month rule can also frustrate the purpose of parole by severely disrupting a parolee's efforts to reintegrate into the community. Because of the period of time involved, parolees living in public housing will lose their accommodation and employed parolees are likely to lose their employment. Other private housing arrangements will likely be disrupted and those parolees participating in transitional or treatment programs will lose their places. The extent of family support available to parolees may also be affected.

1. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137A, s 143A.
2. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137A(3)(c), s 143A(3)(c).
3. NSW Bar Association, *Preliminary submission PPA4*, 1.
4. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3 ("parole eligibility date"), s 137A, s 143A.

The need for the 12 month rule

Stakeholders' views

12.9 The Police portfolio supported the retention of the 12 month rule as it currently applies after parole has been refused, arguing that the rule is necessary to avoid further anguish for victims.[5] A majority of SPA members also supported retaining the 12 month rule, suggesting that the manifest injustice exception[6] provides a sufficient avenue for early applications in deserving cases.[7]

12.10 All other stakeholders who offered a view on this issue – including a minority of SPA members – were in favour of some alteration to the 12 month rule.[8] Justice Action and the Law Society of NSW proposed that it be replaced with a similar six month rule.[9] NSW Young Lawyers proposed that the 12 month rule should remain for offenders serving non-parole periods of three years or more but be replaced with a six month rule for those serving a non-parole period of less than three years.[10] The NSW Bar Association suggested that the 12 month rule should change to a six month rule when an offender has less than two years remaining of the head sentence.[11]

12.11 Legal Aid NSW submitted that a shorter set period like a six month rule would simply perpetuate the current inflexible system. Both Legal Aid and the Aboriginal Legal Service supported a return to the pre-2005 system where SPA could reconsider parole for an offender at any point within 12 months.[12] Other stakeholders supported a system where SPA would set the reconsideration date when parole is refused.[13] A minority of SPA members preferred the existing system to stay in place but with an additional power allowing SPA to set an earlier reconsideration date if it chose to do so.[14]

12.12 Stakeholders expressed widespread dissatisfaction with the 12 month rule as it operates in situations where parole has been revoked, emphasising that it is

5. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 7.
6. Parra [12.25]-[12.32].
7. NSW, State Parole Authority, *Submission PA14*, 15.
8. NSW, State Parole Authority, *Submission PA14*, 15; Justice Action, *Submission PA13*, 8; Law Society of NSW, *Submission PA5*, 7; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 20; NSW Bar Association, *Submission PA11*, 10; NSW Bar Association, *Preliminary submission PPA4*, 1; Police Association of NSW, *Submission PA6*, 21; Public Interest Advocacy Centre, *Submission PA1*, 15-16; Legal Aid NSW, *Submission PA4*, 23-24; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 11. See also Legal Aid NSW, *Preliminary submission PSE18*, 8, which was made to our now concluded sentencing reference.
9. Law Society of NSW, *Submission PA5*, 7; Justice Action, *Submission PA13*, 8.
10. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 20.
11. NSW Bar Association, *Submission PA11*, 10.
12. Legal Aid NSW, *Submission PA4*, 23-24; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 11.
13. Public Interest Advocacy Centre, *Submission PA1*, 15-16; Police Association of NSW, *Submission PA6*, 21.
14. NSW, State Parole Authority, *Submission PA14*, 15.

unnecessarily punitive and inflexible, and can work against rehabilitation.[15] In particular, its inflexibility can work against the strong community interest in offenders having a period of supervision in the community and beginning the rehabilitation process before the sentence expires.[16] SPA has informed us that the 12 month rule is not necessary from its perspective to conserve resources.[17]

Our view

12.13 In our view, there should not be an unlimited right for offenders to apply for parole. An unlimited right could lead to a substantial waste of public resources. Unreasonably frequent applications may also cause distress for registered victims. On the other hand, the ability to apply for parole should not be restricted to a point where an offender is kept in custody longer than is necessary, itself at considerable public expense and contrary to the safety of the community in the long term. There is also widespread dissatisfaction with the way the 12 month rule operates. We are, therefore, strongly of the view that it needs to be amended.

12.14 We agree with Legal Aid that a shorter set period – such as a six month rule – is unlikely to resolve many of the problems created by the inflexibility of the 12 month rule. We also agree that, while early or more frequent consideration of parole is resource intensive, it is likely to cost less than keeping an offender in custody who could be appropriately released on parole.[18] We note that the 12 month rule itself can be resource intensive because it leads SPA to adjourn and relist matters repeatedly while outstanding issues are resolved so that it can avoid refusing parole or confirming revocation and so avoid the 12 month rule applying in an unjust or undesirable way.

12.15 We also note the comments of victims in consultations that SPA rarely uses its power to defer applications for release for up to three years.[19] This power is particularly valuable where an offender is serving a long sentence, there is a registered victim who is annually distressed by parole reconsideration, and the offender has very little prospect of being suitable for parole in the short to medium term.

12.16 Overall, we prefer the proposal for change put forward by a minority of SPA members that SPA should be able to override the 12 month rule.

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15. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 10; Legal Aid NSW, *Submission PA33*, 34; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; Victims of Crime Assistance League Inc NSW, *Submission PA18*, 4; Probation and Parole Officers' Association of NSW, *Submission PA50*, 11; NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA35*, 17; Shopfront Youth Legal Centre, *Submission PA41*, 5; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 13-14; NSW Bar Association, *Submission PA31*, 14; Law Society of NSW, *Submission PA45,* 9.
16. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; Victims of Crime Assistance League Inc NSW, *Submission PA18*, 4; NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA35*, 17.
17. NSW, State Parole Authority, *Preliminary consultation PPAC1*.
18. Legal Aid NSW, *Submission PA4*, 21.
19. Roundtable: victims' representatives, *Consultation PAC13*; Homicide Victims Support Group, *Consultation PAC12.*

12.17 Our view is that the 12 month rule should be retained as the default period of time which must elapse before an offender can apply to SPA for release after it has refused parole or revoked parole. However, we consider that SPA should have the discretion to override the 12 month rule in either direction so that, in addition to its existing power to extend the period for up to three years,[20] SPA should have the flexibility to set an earlier date for the offender to apply for release on parole if the circumstances warrant it.

12.18 The *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) should include a list of matters that SPA must consider, in addition to any other relevant consideration, when deciding whether to override the 12 month rule in either direction. This list of criteria should draw SPA's attention to:

- the period of time that the offender has left to serve
- the interests of any registered victim
- the risk that the offender will be released at the expiry of the head sentence without any period of parole supervision or with a reduced period of parole supervision, and
- whether the offender is likely to be ready for parole during the next 12 months.

12.19 We intend that this list of criteria would allow SPA to override the 12 month rule and set:

- an earlier application date when an offender had only a short time left to serve and/or was in the process of making changes that could realistically result in the offender being ready for a parole a few months later; or
- a later application date if an offender had many years still to serve and the offender was very unlikely to be ready for parole in 12 months; for example, because the offender had only just joined a waiting list to participate in a rehabilitation program that SPA considered necessary and the program itself would take 12 months to complete.

In any situation, SPA could take the interests of registered victims into account when deciding whether to override the 12 month rule and set a different date.

12.20 Retaining the 12 month rule as the default waiting period has a number of advantages. It establishes a transparent expectation that offenders must wait before they can apply for release. Giving SPA the ability to set earlier or later application dates would introduce enough flexibility to suit the varied cases that come before it. We envisage that the power to extend the waiting period might become more widely used as SPA begins to tailor dates as a matter of course. SPA would also retain its power to re-release an offender in circumstances of manifest injustice at any time after revocation, outside the proposed constraints.[21]

20. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137A(3)(c), s 143A(3)(c).
21. Para [12.25]-[12.32].

Recommendation 12.1: Power to override the 12 month rule

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that, when the State Parole Authority refuses parole or revokes parole:

(a) the 12 month rule (which limits subsequent applications for parole) remains in place as the general rule but the Authority should have the power to set an earlier date or a later date (up to three years later) at which the offender may apply for release on parole, and

(b) the Authority, when deciding whether to set such another date, must consider:

(i) the length of time the offender has left to serve

(ii) the interests of any registered victim

(iii) the risk that the offender will be released at the expiry of the head sentence without any period of parole supervision, or with a reduced period of parole supervision, and

(iv) whether the offender is likely to be ready for parole during the next 12 months.

The need for offenders to apply for release on parole

12.21 Although all offenders are automatically considered for parole when they first become eligible, if SPA makes a final decision to refuse parole at the end of the non-parole period, or revokes parole, the offender must apply if he or she wants SPA to consider release on parole in future.

12.22 Before 2005, SPA was required to consider parole automatically for an offender within 12 months of the last time parole was refused. The current 12 month rule was introduced in 2005 because early and repeated reconsideration of parole could consume the resources of SPA, Corrective Services NSW and the Serious Offenders Review Council (SORC) (if the offender is a serious offender), and cause anguish for some victims.[22] More frequent parole consideration is also resource intensive for Community Corrections because it must prepare updated reports.[23] The change was intended to reduce the number of cases that SPA considered "where all parties to the proceedings know that, given the circumstances, the offender will not be granted parole".[24] It was also intended to reflect the principle that "parole is a privilege, not a right".[25]

12.23 Several stakeholders preferred the pre-2005 system where offenders were considered for parole without having to apply, noting the difficulty some offenders might have in making applications due to cognitive impairments or low literacy

22. NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12100. Also: Roundtable: victims' representatives, *Consultation PAC13*; Homicide Victims Support Group, *Consultation PAC12*.
23. NSW Department of Justice, *Submission PA32*, 26.
24. NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12101.
25. NSW, *Parliamentary Debates,* Legislative Assembly, 27 October 2004, 12099.

levels.[26] Legal Aid and the Aboriginal Legal Service in particular advocated for a return to automatic consideration.[27] Other stakeholders either supported consideration by application[28] or did not comment on this issue. Both SPA and the NSW Department of Justice noted SPA's practice of following up offenders who are eligible but have not applied.[29] This acts as a safeguard to ensure that all offenders have an opportunity to be considered.

12.24 The application form is relatively straightforward. We have also recommended in Chapter 7 that SPA review its forms and notices to ensure that they are as easy as possible for offenders to understand.[30] As SPA also follows up offenders to check whether they wish to make an application, we do not consider it necessary to revert to automatic consideration.

The manifest injustice exception to the 12 month rule

12.25 Provisions in the CAS Act enable SPA to consider an offender for release or re-release on parole "at any time" after an offender becomes eligible for parole, but only if such consideration is necessary to avoid "manifest injustice".[31] Circumstances that constitute manifest injustice are defined in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) 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 the charge was subsequently withdrawn or dismissed.[32]

12.26 Many of the grounds of "manifest injustice" are not as easily applied to a parole revocation as to a parole refusal, as they are relevant only when an offender is in

26. NSW Young Lawyers, *Submission PA8*, 20; Law Society of NSW, *Submission PA5*, 7.
27. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 12; Legal Aid NSW, *Submission PA4*, 23.
28. NSW, State Parole Authority, *Submission PA14*, 16; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 7; NSW Bar Association, *Submission PA11*, 10.
29. NSW, State Parole Authority, *Submission PA14*, 16; NSW Department of Justice, *Submission PA32*, 26.
30. Recommendation 7.4(2).
31. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137B, s 143B.
32. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 223(1).

custody. The fact that "manifest injustice" is narrowly defined and not easily used in the context of revocation decisions means it does not significantly alleviate the inflexibility of the 12 month rule.

Process for considering "manifest injustice" applications

12.27 Legal Aid NSW submitted that:

> A more formal and transparent process is required in relation to 'manifest injustice' applications … it is not clear how SPA processes and considers manifest injustice applications … There is a need for clarification around the application process and the process if SPA forms the view that the offender's circumstances do not constitute manifest injustice.[33]

12.28 In particular, Legal Aid NSW was concerned that there is no provision for an offender to apply for a review hearing if SPA determines that a manifest injustice application should not be granted.[34]

12.29 We agree that it would be beneficial for the CAS Act to clarify the process for decision making under the "manifest injustice" exception. At the same time, it is important for the efficiency of SPA's operations that any process is not overly complex or burdensome.

12.30 In consultations, legal practitioners noted the distinction between SPA's consideration of a manifest injustice application, and its fresh consideration of parole if circumstances of manifest injustice are found.[35] We agree that these two decisions should be distinct.

12.31 In our view, the CAS Act should provide that an offender may make an application for parole on the basis of circumstances of manifest injustice. SPA should be able to refuse to consider the application if, in its view, the application is frivolous, vexatious or has no prospect of success. SPA should consider whether the offender's circumstances constitute manifest injustice at a private meeting. If SPA rejects the application, SPA should notify the offender and provide brief reasons for its decision. If SPA accepts that the offender's circumstances constitute manifest injustice, it should then continue to consider parole in the normal way using the procedures outlined in the previous sections of this chapter, including the offender's right to apply for a review hearing if SPA refuses parole.

12.32 We consider it unnecessary to provide a mechanism for review hearings when SPA decides that an offender's circumstances do not constitute manifest injustice. As an exception to the 12 month rule, the manifest injustice avenue acts as a safeguard on the usual framework for decisions. In this context, it would be overly burdensome for SPA if an offender was also entitled to apply for a review of SPA's decisions about this safeguard. By relaxing the 12 month rule, Recommendation 12.1 will reduce the importance of the manifest injustice exception and make a system of review hearings of these decisions unnecessary.

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33. Legal Aid NSW, *Submission PA4*, 19.
34. Legal Aid NSW, *Submission PA4*, 19.
35. Roundtable: legal practitioners, *Consultation PAC21*.

Recommendation 12.2: Process for "manifest injustice" applications

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended so that:

(a) there is a formal avenue for offenders to apply for the State Parole Authority to consider release on parole after an offender becomes eligible for parole, on the basis of manifest injustice

(b) the State Parole Authority must consider any such application at a private meeting but may refuse to consider the application if it is satisfied that the application is frivolous, vexatious or has no prospect of success

(c) if the Authority decides that to deny an early application for parole would not constitute a manifest injustice, it must give the offender brief reasons, and

(d) if the Authority decides that to deny an early application for parole would constitute a manifest injustice, the Authority must determine the offender's application for parole according to the processes that apply to applications for parole in normal circumstances.

13. Appeals and judicial review of State Parole Authority decisions

In brief

The rights of the offender and the State to apply to the Supreme Court for a declaration that the State Parole Authority relied on false, misleading or irrelevant information in certain circumstances have little value and should be repealed.

Two avenues of appeal

13.1 There are currently two avenues available to offenders and the State to apply to the Supreme Court for a review of State Parole Authority (SPA) decisions in NSW:

- judicial review at common law and under s 69 of the *Supreme Court Act 1970* (NSW), and
- the statutory review avenues under s 155, s 156, s 177 of the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) (for parole decisions) and under s 176 of the CAS Act (for revocation decisions).

13.2 Neither the statutory avenues nor common law judicial review allows the Supreme Court to consider the merits of a decision except in the very narrow sense specified in the relevant legislation.

13.3 Since 1999, 32 SPA decisions have been subject to review by the Supreme Court or Court of Criminal Appeal. Twenty eight of these cases involved applications by the offender under s 155 of the CAS Act. Two cases were applications on behalf of the State under s 156 of the CAS Act. There were ten applications for common law judicial review (of these ten, eight[1] were also pursued through the statutory review avenue). No applications appear ever to have been made under s 177. Very few applications have been made under s 176 and none have been successful.

1. *Boatswain v State Parole Authority* [2014] NSWSC 501; *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223; *Al Qatrani v State Parole Authority* [2007] NSWSC 1270; *Wray v State Parole Authority* [2007] NSWSC 1032; *St Alder v State Parole Authority* [2007] NSWSC 345; *Hall v State Parole Authority* [2006] NSWSC 1411; *Attorney General (NSW) v State Parole Authority* [2006] NSWSC 865; *Esho v State Parole Authority* [2006] NSWSC 304.

Table 13.1: Use of Supreme Court review avenues since 1999

	Section 155 only	Section 155 and judicial review	Section 156 only	Section 156 and judicial review	Judicial review only	TOTAL
Total applications	22	6	0	2	2	32
Successful applications	1	3	0	0	0	4

13.4 The fact that fewer cases were pursued through common law judicial review may be partly explained by the observation of some Legal Aid NSW practitioners that "it is complex, expensive and difficult to win".[2] Legal Aid NSW also submitted that the alternative avenue provided by s 155 and 156 of the CAS Act are "rarely, if ever, relied on as an avenue of review by Legal Aid NSW" because "this avenue of review is very limited" and "in practice ... can be very difficult to prove". As such, Legal Aid NSW will "ordinarily use" s 69 of the *Supreme Court Act 1970* (NSW).[3]

Judicial review at common law

13.5 At common law and under s 69 of the *Supreme Court Act 1970* (NSW), SPA's decisions are 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.[4]

Applications for directions that SPA relied on false, misleading or irrelevant material

13.6 Four provisions allow the offender and the State (through either the Attorney General or the Director of Public Prosecutions) in certain limited circumstances to apply to the Supreme Court for a direction that information on which SPA based a decision about parole was "false, misleading or irrelevant". The provisions apply as follows:

- If SPA decides that an offender should not be released on parole, the offender may apply to the Supreme Court for a direction as to whether the information on which SPA based its decision was false, misleading or irrelevant. The Supreme Court can only consider the application if it is satisfied that the application is "not an abuse of process and that there appears to be sufficient evidence to support the application". (Section 155)

2. 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.
3. Legal Aid NSW, *Submission PA4*, 23.
4. *Kirk v Industrial Relations Commission* [2010] HCA 1, 239 CLR 531 [98]-[100]; *Esho v State Parole Authority* [2006] NSWSC 304 [30]; see *Attorney General (NSW) v Chiew Seng Liew* [2012] NSWSC 1223.

- If SPA decides to release a serious offender on parole, the State may apply to the Supreme Court for a direction as to whether the information on which SPA based its decision was false, misleading or irrelevant (s 156).
- If SPA decides to revoke a parole order (or intensive correction order or home detention order), the offender may apply to the Supreme Court for a direction as to whether the information on which SPA based its decision was false, misleading or irrelevant. The Supreme Court can only consider the application if it is satisfied that the application is "not an abuse of process and that there appears to be sufficient evidence to support the application" (s 176).
- If SPA refuses or fails within 28 days to revoke a serious offender's parole when the State has requested a revocation on the "ground that the order has been made on the basis of false, misleading or irrelevant information", the State may apply to the Supreme Court for a direction to be given to SPA as to whether the information was false, misleading or irrelevant and the Court may give "such directions with respect to the information as it thinks fit" (s 177).

13.7 Each provision expressly provides that it "does not give the Supreme Court jurisdiction to consider the merits of the Parole Authority's decision otherwise than on the grounds referred to".[5] The Supreme Court can only consider the material that SPA used to inform its decision.

13.8 The legislation does not specify the consequences of a Court direction that SPA relied on false, misleading or irrelevant information but it may lead SPA to reconsider its decision.

The provisions are of limited use

13.9 In 1996, we proposed repealing the limited statutory rights to apply to the Supreme Court[6] on the grounds that they were "narrowly drawn power, interpreted strictly ..." and "lack[ed] any real utility".[7] At common law, reliance on material that is false, misleading or irrelevant constitutes an error of law and is cause for common law judicial review.[8] There appears to be no value in maintaining the provisions as separate statutory review avenues since they allow cases to be reviewed only on the same grounds already available under judicial review at common law.

13.10 The Supreme Court has commented upon the apparent inefficacy of the powers that s 155 and s 156 confer.[9] In *LMS v Parole Board*, the Court commented:

> The absence from the Sentencing Act of anything which clearly states what effect is intended for directions concerning information this Court may make under the sections is yet another unsatisfactory aspect of them.[10]

5. *Crimes (Administration of Sentences) Act 1999* (NSW) s 155(4), s 156(3), s 176(4), s 177(2).
6. Then contained in *Sentencing Act 1989* (NSW) s 23, s 34A, s 41, s 41A.
7. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [11.81].
8. *Craig v South Australia* (1995) 184 CLR 163, 179.
9. *Lee v State Parole Authority* [2006] NSWSC 1225; *Whalan v Parole Board* [2005] NSWCCA 445; *McPherson v Offenders Review Board* (1991) 23 NSWLR 61; *LMS v Parole Board* [1999] NSWCCA 371, 110 A Crim 172; *R v Naudi* [2003] NSWCCA 160.
10. *LMS v Parole Board* [1999] NSWCCA 371, 110 A Crim 172, [25].

13.11 The Supreme Court has also raised concerns that s 155 is misleading for offenders who may mistakenly think that it provides an avenue for merits review. In *McCallum v Parole Board*, Justice Greg James stated:

> The existence of [s 155 of the CAS Act] suggests to prisoners the possibility of having their refusals of parole reviewed on the merits in this court. No such jurisdiction is conferred by that section.
>
> I would again urge the legislature to re-consider whether the section should remain in force.[11]

13.12 In their submission to the 2005 statutory review of the CAS Act, the NSW Public Defenders maintained that:

> Sections 155, 156…create the false impression that a review of the merits of the Parole Board's decision is available. As a consequence most of the appeals brought to the Court by prisoners are dismissed as being misconceived.[12]

13.13 Justice Simpson further echoed this statement in *Whalan v Parole Board of NSW*:

> Reform is urgent. There is a tendency quite unfairly to mislead offenders to believe that this Court is able to provide a remedy.[13]

13.14 Since 1999, only one of the 22 cases that have pursued the statutory avenue alone through s 155 has led to a "direction" from the Supreme Court that SPA had relied on material that was false, misleading or irrelevant.[14] We consider it likely that many of the futile attempts before the Supreme Court can be attributed to confusion about the review system among self represented offenders, who mistakenly believe the review will take into account the merits of their matter.

13.15 We acknowledge that this situation may have been remedied in 2008 through the insertion in each provision of a subsection that confirms that each provision does not give the Supreme Court jurisdiction to consider the merits of the SPA's decision "otherwise than on the grounds referred to". However, given that common law judicial review has wider scope, we do not think it necessary to retain the provisions.

13.16 Section 177 is in similar terms to s 156 and does not seem to have been used at all since its introduction.

13.17 Very few applications have ever been made to the Supreme Court under s 176. All have been unsuccessful.[15] The Supreme Court has commented on its very limited

11. *McCallum v Parole Board* [2003] NSWCCA 294, [4]-[5].
12. Cited in I Moss, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005) 113.
13. *Whalan v Parole Board* [2005] NSWCCA 445, [5].
14. *Clark v State Parole Authority* [2011] NSWSC 1220.
15. See *Blanch v State Parole Authority* [2014] NSWSC 835; *Hall v State Parole Authority* [2006] NSWSC 1411; *Trinh v State Parole Authority* [2006] NSWSC 1352; *Rozynski v Parole Board* [2003] NSWCCA 214; *Townsend v Parole Board* [2001] NSWCCA 379.

function under s 176 in examining the information provided to SPA.[16] The existing s 176 adds nothing to what is available under common law judicial review.

13.18 Some stakeholders did not see the need for any change to the avenues for review of SPA's decisions.[17] Other stakeholders submitted that the statutory review avenue has little utility and should be broadened to allow for a merits review.[18] Some stakeholders supported repealing s 155 and s 156 on the basis that these provisions have "little utility"[19] and their effect is adequately covered by the common law.[20]

13.19 In light of the limited use and limited usefulness of the statutory review provisions, we recommend that s 155 and s 156 (and the accompanying procedural provision s 157) and s 176 and s 177 be repealed. If SPA makes a decision on the basis of false, misleading or irrelevant information, the relevant parties can still apply to the Supreme Court under common law judicial review.

Recommendation 13.1: No statutory review by the Supreme Court

The *Crimes (Administration of Sentences) Act 1999* (NSW) should be amended to remove statutory review by the Supreme Court of State Parole Authority decisions.

No need for merits review

13.20 The "extremely limited"[21] nature of the Supreme Court's role in hearing applications for directions under s 155, s 156, s 176 and s 177 has led some stakeholders to submit that the broad executive powers exercised by SPA should be subject to a "true appeal" mechanism.[22]

13.21 Justice Action submitted that the Supreme Court should be permitted to consider the merits of SPA decisions, rather than merely issues of procedural fairness.[23] This aligns with the proposal by the Aboriginal Legal Service (ALS) that there should be an appeal from SPA's decisions by "on merit by right," similar to Local Court appeals under the *Crimes (Appeal and Review) Act 2001* (NSW). The ALS submitted that this should be especially available in cases where the decision of

16. *Townsend v Parole Board* [2001] NSWCCA 379 [15]; *Trinh v State Parole Authority* [2006] NSWSC 1352 [11]-[12], [45].
17. NSW, State Parole Authority, *Submission PA19*, 9; NSW Young Lawyers Criminal Law Committee, *Submission PA21,* 20; Police Association of NSW, *Submission PA25,* 26; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 9; Probation and Parole Officers' Association of NSW, *Submission PA50*, 9.
18. NSW Bar Association, *Submission PA31*, 12; Justice Action, *Submission PA29*, 3; Legal Aid NSW, *Submission PA4,* 23; *PA33*, 32; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 12.
19. NSW Bar Association, *Submission PA11*, 10.
20. NSW Young Lawyers Criminal Law Committee, *Submission PA 8*, 19-20; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA16*, 6.
21. *Lee v State Parole Authority* [2006] NSWSC 1225 [6].
22. Justice Action, *Submission PA13,* 7.
23. Justice Action, *Submission PA29*, 3.

SPA to refuse parole results in the offender having no supervision upon release after serving the full head sentence.[24] The ALS also suggested that appeals on merit could be limited to defined circumstances, such as where SPA's decision means the offender will serve out the whole or a major part of the sentence in custody.[25]

13.22 Legal Aid NSW agreed that changes should be made to enable offenders to have a full right to appeal rather than a limited right of review. It was also of the opinion that this right should extend to appeals from all parole decisions, including SPA decisions to revoke parole, by way of re-hearing before a single judge of the Supreme Court.[26] The NSW Bar Association was in favour of a simplified method of appeal on a question of law, or with leave, mixed fact and law and power to remit a matter to SPA for decision according to law, including by a differently constituted SPA.[27]

13.23 The majority of stakeholders did not comment on this issue. The only objection to introducing a "true appeal" mechanism was submitted by SPA which argued that there should be no changes to the current review procedures.[28]

13.24 No other Australian jurisdiction provides a "true appeal" mechanism beyond the internal merits review provided by their parole decision makers. We would question the value of any further layer of merits review of the decisions of a specialist body like SPA, especially one that involved the courts. A true appeal mechanism would be very resource intensive to implement for SPA, Corrective Services NSW, legal practitioners and the courts.

13.25 The parole system in NSW provides an opportunity for offenders to apply for consideration on a regular basis and for SPA to review its own decisions in an open and transparent way that is not available in any other Australian jurisdiction. In these circumstances, we do not support extending appeal rights to include a full merits review.

24. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 11.
25. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 12.
26. Legal Aid NSW, *Submission PA4,* 23
27. NSW Bar Association, *Submission PA31*, 12.
28. NSW, State Parole Authority, *Submission PA14*, 15.

14. Case management and support in custody and in the community

In brief

The main thrust of Corrective Services NSW case management policy is appropriate but its implementation can be improved. Corrective Services NSW should conduct a comprehensive review of policy implementation to identify the main points at which case management fails. Corrective Services NSW should consider remodelling some of the non-government programs it funds so that they include more "in-reach" into prisons shortly before release on parole. Corrective Services NSW should also evaluate its Funded Partnership Initiative to ensure parolees are provided with effective levels of support. The Government should consider different models for improving cooperation and coordination between the government agencies that provide services and support to parolees.

14.1 This chapter looks at Corrective Services NSW case management of offenders in custody and in the community. We examine how offenders are prepared for, transitioned to and supported on parole. This chapter is closely related to:

- Chapter4, which covers the way the State Parole Authority (SPA) takes into account various aspects of an offender's time in custody when it is deciding whether to grant or refuse parole
- Chapter 9, which looks at parole conditions, and
- Chapter 10, which examines the way Community Corrections officers handle and report parole breaches.

14.2 During this reference, Corrective Services NSW began to develop a new case management framework to manage offenders in custody through to the community more effectively. As we do not have any detailed information about what the new framework will look like, this chapter focuses on case management as it existed in 2013 and 2014.

Corrective Services NSW goals and approach

14.3 In the correctional context, "case management" means developing and implementing individualised plans for offenders that cover what needs to be done with them while they are under Corrective Services NSW control. A system of case management co-ordinates an offender's participation in work, education, training, rehabilitation programs, substance abuse treatment and many other activities.

14.4 The ultimate goal of case management is the same as the overall goal of the parole system: to reduce the risks of reoffending.[1] Corrective Services NSW uses the risk-needs-responsivity approach to case management to ensure that it achieves this goal:

- **Risk principle**. The intensity of intervention and management should be matched to an offender's risk of reoffending. Widely recognised research has shown that a reduced risk of reoffending is best achieved when resources – including services, interventions and programs – are targeted at higher risk offenders. Lower risk offenders who receive excessive management and intervention may actually have an increased chance of reoffending.[2]
- **Needs principle**. Intervention and management should target an offender's criminogenic needs. As we discussed in Chapter 4, criminogenic needs relate to those dynamic risk factors that have a known association (demonstrated in the criminological literature) with elevated risks of reoffending. Common examples

1. Corrective Services NSW, *Case Management of Offenders Policy and Procedures* (2013) 1.
2. See, eg, C T Lowenkamp and E J Latessa, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-risk Offenders*, Topics in Community Corrections (National Institute of Corrections, 2004); C T Lowenkamp and E J Latessa, *Evaluation of Ohio's Community Based Correctional Facilities and Halfway House Programs: Final Report* (University of Cincinnati, 2002); D A Andrews and others, "Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-analysis" (1990) 28 *Criminology* 369; C Dowden and D A Andrews, "What Works for Female Offenders: A Meta-Analytic Review" (1999) 45 *Crime and Delinquency* 438; C Dowden and D A Andrews, "What Works in Young Offender Treatment: A Meta-Analysis" (1999) 11 *Forum on Corrections Research* 21.

are substance abuse issues, low educational attainment, pro-criminal attitudes and values, poor financial management, negative family environment, and poor engagement with employment.[3]

- **Responsivity principle**. Intervention and management should be delivered in a way that caters to an offender's individual learning style to maximise the offender's responsiveness. For example, programs and services might need to be designed to take into account an offender's cognitive impairment.[4]

14.5 Overall, the risk-needs-responsivity approach aims to ensure that Corrective Services NSW programs, services and resources are directed at higher risk offenders, focused on the factors most likely to produce a reduction in reoffending, and delivered in a way that will maximise results.

14.6 At the same time, Corrective Services NSW also aims to achieve "throughcare". In essence, throughcare involves using time in custody to prepare offenders to live lawfully in the community and then building on these efforts in an integrated way once offenders are released. The aim is seamless continuity of care from an offender's time in custody through to the parole period in the community in order to facilitate reintegration and reduce reoffending. Throughcare may require Corrective Services NSW to pay some attention to an offender's non-criminogenic needs. For example, an offender without adequate proof of identification documents upon leaving custody might find it very difficult to manage daily life in the community. In some programs, Corrective Services NSW also supplements the risk-needs-responsivity model with the "good lives" model, which is a strength based approach that focuses on "primary goods" (that is, "goods" such as knowledge, relatedness, community and creativity, that each individual will value with a different priority) and an offender's interests, abilities and aspirations to achieve change.[5]

14.7 Overall, quality case management – informed by the risk-needs-responsivity model and a throughcare approach – is essential for the parole system to achieve its goal of reducing reoffending. Only through integrated and effective case management can Corrective Services NSW ensure that offenders receive the programs, services and interventions that will increase their chances of living successfully in the community and reduce their reoffending risk. Although they may be expensive, options that improve case management and support can provide more benefit than cost if they reduce reoffending rates.

14.8 This chapter divides the issue of case management into three stages: management in custody, transition to parole, and management in the community. These are the three phases across which integrated case management needs to occur in order to achieve reductions in reoffending.

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3. See para [4.49].
4. See D A Andrews and J Bonta, *The Psychology of Criminal Conduct* (Anderson, 4th ed, 2006).
5. Corrective Services NSW, "Sex and Violent Offender Therapeutic Programs"<http://www.correctiveservices.justice.nsw.gov.au/programs/sex-and-violent-offender-therapeutic-programs/treatment>; T Ward and M Brown, "The Good Lives Model and Conceptual Issues in Offender Rehabilitation" (2004) 10(3) *Psychology Crime and Law* 243, 246-247; T Ward, P M Yates and G M Willis, "The Good Lives Model and the Risk Need Responsivity Model: A Critical Response to Andrews, Bonta and Wormith" (2012) 39 *Criminal Justice and Behavior* 94.

Management in custody

14.9 Successful in-custody management of offenders:

- identifies offenders' criminogenic needs early in the non-parole period
- makes sure that, as far as possible, offenders have completed any necessary interventions targeted at their criminogenic needs by the end of the non-parole period, and
- makes sure that, as far as possible, offenders have been provided with any necessary programs, services and referrals to address their non-criminogenic needs before release on parole.

Current system of in-custody management

14.10 Case management teams in correctional centres prepare case plans for offenders when they are sentenced to imprisonment. Generally, case management teams are made up of one of the correctional centre's senior custodial officers and one of the officers at the correctional centre who provides services and programs to offenders (for example, a welfare officer, an education officer or an alcohol and other drug worker). The individual officers who attend each case management team meeting to consider an offender may be different at each meeting. The offender usually participates in preparing the case plan.[6]

14.11 Case plans should include details of the treatment, services and programs that are recommended for the offender, the offender's health care needs, planned pre-release assistance for the offender and strategies to mitigate the effects of any disability.[7] A good case plan is clear and concise, provides a synopsis of an offender's relevant risks, needs, responsivity issues, strengths, and legal obligations, and clearly identifies appropriate casework steps to address these.[8] The goals and interventions outlined in the case plan are developed taking into account:

- information obtained in the initial reception and screening process,
- advice from relevant experts within Corrective Services NSW (such as Statewide Disability Services, Aboriginal Assessment and Support Officers and the Personality and Behavioural Disorders Unit), and
- results of the Level of Service Inventory–Revised (LSI-R) assessment tool.

14.12 We discuss the LSI-R in Chapter 4.[9] The LSI-R assessment is generally administered by a Community Corrections officer from the Parole Unit attached to the correctional centre where an offender is placed in the first 12 weeks after

6. *Crimes (Administration of Sentences) Regulation 2014* (NSW) pt 3 div 3; Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 11.1 (v1.4, 2014); ch 13.1 (v1.5, 2014); Information provided by Corrective Service NSW (19 December 2014).
7. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 25.
8. Corrective Services NSW, *Guide to Case Plans* (2013) 1.
9. Para [4.47]-[4.52].

sentencing.[10] As part of this process, the Community Corrections officer can update and amend an offender's initial case plan.[11] For serious sexual and violent offenders, the case plan can also be informed by more in-depth psychological assessments carried out by the Serious Offenders Assessment Unit.[12] The case management team updates case plans annually.[13]

14.13 A custodial officer is assigned to an offender as a case officer who administers the offender's case plan day to day.[14] The case officer monitors the offender's progress and makes referrals to appropriate services, such as Justice Health, the correctional centre psychologist or welfare staff. Case officers are not solely responsible for case management of an offender. Other in-custody officers, such as welfare officers and other services and programs officers can be involved in implementing the case plan. Corrective Services NSW policy states that implementing a case management plan "is the responsibility of the offender and any staff members who [have] significant contact with the offender".[15]

Security classification and placement

14.14 A complex system of security classification and placement operates alongside the in-custody case management process. Case management teams review offenders' security classifications and placements as part of the annual review of case plans.[16] The available security classifications are set out in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) (CAS Regulation). Table 14.1 shows the security classifications for male and female offenders.

Table 14.1: Security classifications in Corrective Services NSW correctional centres

MALES		FEMALES	
Classification	**Description**	**Classification**	**Description**
AA	Inmates that represent a special risk to national security and that should be confined at all times by a secure physical barrier in a special facility that includes towers or electronic surveillance equipment	Category 5	Inmates that represent a special risk to national security and that should be confined at all times by a secure physical barrier in a special facility that includes towers or electronic surveillance equipment

10. Corrective Services NSW, *Case Management of Offenders Policy and Procedures*(2013) 3-8; Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 3.1 (v 1.2, 2014) 7; ch 7.1 (v 1.2, 2014) 3; ch 13.1 (v 1.5, 2014) 4; Information provided by Corrective Services NSW (12 November 2013).
11. Corrective Services NSW, *Case Management of Offenders Policy and Procedures*(2013) 3-5.
12. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 18.2 (v 1.1, 2013) 2; ch 26.2 (v 1.1, 2012) 4. See also NSW Department of Justice, *Submission PA32*, 12.
13. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 7.1 (v 1.2, 2014) 7.
14. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 3.1(v 1.2, 2014) 6; ch 3.2 (v 1.2, 2014) 2-4.
15. Corrective Services NSW, *Case Management of Offenders Policy and Procedures* (2013) 7.
16. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 11; Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 14.1 (v 1.5, 2014) 3-4.

A1	Inmates that represent a special risk to good order and security and that should be confined at all times by a secure physical barrier in a special facility that includes towers or electronic surveillance equipment	Category 4	Inmates that should be confined at all times by a secure physical barrier that includes electronic surveillance equipment
A2	Inmates that should be confined at all times by a secure physical barrier that includes towers, other highly secure perimeter structures or electronic surveillance equipment		
B	Inmates that should be confined by a secure physical barrier at all times		
C1	Inmates that should be confined by a secure physical barrier unless accompanied by a correctional officer	Category 3	Inmates that should be confined by a secure physical barrier unless accompanied by a correctional officer
C2	Inmates that need not be confined by a secure physical barrier but need some level of supervision by a correctional officer	Category 2	Inmates that need not be confined by a secure physical barrier but need some level of supervision by a correctional officer
C3	Inmates that need not be confined by a secure physical barrier and need not be supervised	Category 1	Inmates that need not be confined by a secure physical barrier and need not be supervised

Source: Crimes (Administration of Sentences) Regulation 2014 (NSW) cl 12(1), cl 13(1).

14.15 In addition to the main list of security classifications outlined in Table 14.1, an offender who has committed an escape offence is classified as either:

- **E1:** an offender who should be confined at all times by a secure physical barrier that includes towers, highly secure perimeter structures or electronic surveillance equipment, or
- **E2:** an offender who should be confined at all times by a secure physical barrier.[17]

14.16 Table 14.2 shows the number of sentenced offenders at each of the classification levels as at 30 June 2014.

Table 14.2: NSW sentenced inmates' security classifications as at 30 June 2014

MALES			FEMALES		
Classification	**Number**	**%**	**Classification**	**Number**	**%**
AA	7	0.1%	Category 5	0	0.0%
A1	17	0.2%	Category 4	26	5.3%
A2	602	8.5%			
B	1245	17.6%			

17. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 14(1).

E1	106	1.5%	E1	0	0.0%
E2	338	4.8%	E2	18	3.7%
C1	1389	19.6%	Category 3	67	13.7%
C2	2937	41.5%	Category 2	325	66.6%
C3	316	4.5%	Category 1	43	8.8%
Unclassified	125	1.8%	Unclassified	9	1.8%
TOTAL:	**7082**		**TOTAL:**	**488**	

Source: Corrective Services NSW, NSW Inmate Census 2014 (2014) Table 1.4. Totals may not add to 100% due to rounding. Totals do not include 34 male offenders being held in the Compulsory Drug Treatment Correctional Centre.

14.17 Offenders can also be designated as:

- **high security:** offenders that are considered a danger to others or a threat to good order and security
- **extreme high security:** offenders that are considered an extreme danger to others or an extreme threat to good order and security, or
- **extreme high risk restricted:** offenders that are considered an extreme danger to others or an extreme threat to good order and security, and there is a risk that the offender may engage in, or incite others to engage in, activities that constitute a serious threat to peace, order or good government.[18]

14.18 Offenders with these designations are managed differently from other offenders.[19] As at 31 December 2013, there were 22 offenders designated as high security, 50 offenders designated as extreme high security and one offender designated as extreme high risk restricted.[20]

14.19 An offender's security classification influences many aspects of his or her time in custody. It is an important factor determining the correctional centre in which an offender will be placed, as most correctional centres are designed to accommodate offenders who are subject to only a certain number of security classifications.[21] The rehabilitation programs, services, work and education opportunities available to an offender will, therefore, vary from one correctional centre to another.

14.20 Security classification is also used directly in Corrective Services NSW's policies to determine eligibility for some rehabilitation programs.[22] Before they can participate offenders may be required to progress to a lower security classification, for example, a B classification for some programs, or a C or low C classification for

18. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 15.
19. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 16.
20. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 13.
21. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 8.1 (v 1.1, 2012).
22. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26 (v 1.1, 2012).

other programs.[23] Similarly, offenders' access to different types of escorted and unescorted pre-release leave is tied to their progression through the three C classification levels.[24]

14.21 Corrective Services NSW has a range of policies that can restrict progression in security classification. For example, offenders classified at C2 (or Category 2) are not allowed to progress to C3 (or Category 1) within three months of a positive urinalysis result.[25] Offenders that are liable to be deported from Australia upon release from custody cannot progress beyond C2 (or Category 2).[26] Serious offenders only progress in classification according to strict timeframes counted back from the date when the non-parole period will end.[27]

Offenders under Serious Offender Review Council management

14.22 Some offenders are subject to an additional layer of in-custody management by the Serious Offenders Review Council (SORC) in addition to management by the case management team:

- **Serious offenders:** Decisions about the classification, placement and case management of serious offenders are made personally by the Commissioner of Corrective Services, who must seek SORC's advice before making a decision.[28] In order to make its recommendations, SORC reviews a serious offender's security classification, placement in a prison and case plan and interviews the offender and relevant Corrective Services NSW officers involved with the offender at regular intervals over the course of his or her sentence.[29] As well as making recommendations about serious offenders' progression to lower security classifications, SORC makes recommendations to the Commissioner about serious offenders' suitability for external leave. Serious offenders are not considered for external leave without SORC's approval.[30] Chapter 5 discusses the definition of "serious offender" and the role of SORC in parole decision making for serious offenders.
- **Offenders with an E classification:** Offenders with an escape risk classification can only move to a regular classification on the personal decision of the Commissioner. The Commissioner must seek SORC's advice before moving an offender with an E classification to a new classification. SORC

23. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26 (v 1.1, 2012).
24. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 19.1 (v 1.1, 2013; ch 20 (v 1.4, 2014). We discuss access to pre-release leave at para [15.12]-[15.38].
25. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 14.5 (v 1.2, 2014) [14.5.1].
26. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v 1.5, 2015) [20.2.15.3].
27. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 18.1 (v 1.3, 2014) [18.1.10].
28. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 11, cl 19, cl 23, cl 29.
29. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) [2.1].
30. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.7 (v 1.3, 2014) [20.7.6]; ch 20.2 (v 1.5, 2015) [20.2.11].

provides advice and recommendations about varying and revoking escape risk classifications to the Commissioner through its Escape Review Committee.[31]

- **Offenders with a security designation:** The Commissioner personally makes decisions about the classification, placement and case planning of these offenders. SORC, through its High Security Inmate Management Committee, provides advice and recommendations to the Commissioner about the case plans and placement of these offenders, including whether they should continue to be subject to security designations.[32]

- **Public interest inmates:** Corrective Services NSW has a policy of deeming some offenders to be "public interest inmates". The category "public interest inmates" includes any offender who:

    - has committed "an offence which is the subject of wide public interest"
    - has committed an offence of solicit or conspiracy to commit murder
    - is serving a non-parole period of more than three years for manslaughter, firearms offences, driving causing death or grievous bodily harm, child sex offences or offences committed while the employee of a criminal justice or customs agency
    - is serving a non-parole period of five years or more for people smuggling offences
    - is an unlawful non-citizen liable to deportation
    - has committed a serious domestic violence offence, or
    - is deemed to be a public interest inmate by the Commissioner or the Commissioner's delegate.[33]

  Public interest inmates cannot progress to the lowest security classification (C3 or Category 1) or participate in unescorted external leave without the Commissioner's personal approval. SORC's Pre-Release Leave Committee (PRLC) provides advice and recommendations to the Commissioner on whether to reduce the classification of such offenders to the lowest level and whether they should be able to access unescorted pre-release leave. In 2013, the Committee considered 129 applications for pre-release leave from public interest inmates and recommended that 82 be approved. The Commissioner approved 53 of these recommendations.[34]

Case management towards the end of the non-parole period

14.23 Community Corrections officers come into the case management process again for most potential parolees towards the end of the offender's time in custody. For offenders serving sentences of more than three years, a Community Corrections

31. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 17(1); NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) [4.1]-[4.2].
32. *Crimes (Administration of Sentences) Regulation 2014*(NSW) cl 11, cl 22, cl 23, cl 24, cl 28, cl 311(1)(c)-(d); NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 13-14.
33. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 18.4 (v 1.4, 2014) [18.4.3].
34. NSW, Serious Offenders Review Council, *Annual Report 2013* (2014) 16.

officer from the Parole Unit attached to the offender's correctional centre takes over responsibility for the case plan 12 months before the end of the non-parole period.[35] This officer is also responsible for the pre-release report on the offender that goes to SPA and for assessing whether the offender is ready for parole.

14.24 An offender serving a sentence of three years or less who is due to be released on a court based parole order is allocated to a Community Corrections officer from the Parole Unit up to six months before the offender is due to be released. This is for the purpose of identifying post-release accommodation and making arrangements with the relevant Community Corrections office for pre-release home visits and other preparations for the post-release supervision of the offender. The case management team continues to have carriage of the offender's case plan, however, the Community Corrections officer will update the case plan three weeks before release. The update focusses on post-release issues rather than the offender's custodial management.[36] The Community Corrections officer will request that SPA revoke the court based parole order if accommodation cannot be arranged for the offender or there is another reason why the offender should not be released on parole.[37] In 2013 SPA revoked 235 parole orders before release, while 5574 offenders were released on parole, 4603 of whom were released on court based parole orders.[38] Community Corrections officers do not have any involvement with court based parolees without a supervision condition (approximately 100 offenders per year).[39]

Problems with the current system

14.25 Many stakeholders made general comments about in-custody case management being inadequate in their experience.[40] A range of specific issues also emerged from submissions and consultations.

- **Offenders are not ready for parole by the end of the non-parole period**. Often offenders have not completed all the necessary activities (in particular, rehabilitation programs and external leave) by the end of the non-parole period. Waiting lists, scheduling problems, unexpected transfers between correctional centres and reclassification all hinder offenders' access to in-custody programs and activities. Stakeholders highlighted the issues of:

35. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section K, part 1 [1.3.3].
36. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section K, part 2 [2.3]; Information provided by Corrective Services NSW (19 December 2014).
37. See para [3.18]-[3.59].
38. Information provided by Corrective Services NSW (19 December 2014).
39. Information provided by Corrective Services NSW (23 October 2013). As SPA always adds supervision as a condition of parole, all SPA parolees are supervised by Community Corrections.
40. Public Interest Advocacy Centre, *Submission PA1*, 11-13; Public Interest Advocacy Centre, *Submission PA23*, 4-5; NSW, State Parole Authority, *Submission PA14*, 10; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 13-14; Legal Aid NSW, *Submission PA4*, 16-17; Legal Aid NSW, *Submission PA33*, 2-4; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 7; Women in Prison Advocacy Network, *Submission PA20*, 12; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 1; Shopfront Youth Legal Centre, *Submission PA40*, 1.

- poor case planning, where activities are only identified as necessary for an offender when a Community Corrections officer becomes involved towards the end of the non-parole period, and

- poor case plan implementation, where offenders are not assisted to implement their case plan and must navigate complex administrative policies and procedures to access necessary activities.[41]

- **The system "moves the goalposts" near the end of the non-parole period**. Stakeholders submitted that expectations are not clearly communicated to SPA parolees until near the end of the non-parole period,[42] and that the system often "moved the goalposts" for offenders. This may happen because Community Corrections officers – the officers with the most skills and knowledge about parole preparation and SPA's requirements – are not involved in case management until the last year of the non-parole period.[43] Stakeholders also submitted that the Commissioner (in submissions made to SPA at the time of parole consideration) may introduce new requirements that were not previously part of the offender's case plan.[44]

- **The security classification system hinders parole preparation**.[45] In particular, security classification can frustrate case management when SORC has recommended a lower security classification for a serious offender but the Commissioner declines to reduce the offender's classification.[46] Legal Aid NSW also submitted that E classifications are "a significant barrier for offenders having optimal case management in custody".[47]

- **It is inappropriate for custodial officers to be case officers**. There may be inherent difficulties in expecting custodial officers, who are responsible for security and enforcement, also to perform case management roles as case officers. Offenders may be reluctant to engage with these officers due to an "us versus them" mentality and officers may have difficulty reconciling their supportive and coercive functions and insufficient training in relevant fields.[48] On

41. Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 7; NSW, State Parole Authority, *Submission PA14*, 10; NSW, State Parole Authority, *Submission PA19*, 1-2; Shopfront Youth Legal Centre, *Submission PA40*, 2; Legal Aid NSW, *Submission PA4*, 12-13; Legal Aid NSW, *Submission PA33*, 7; Women in Prison Advocacy Network, *Submission PA20*, 12-13; Public Interest Advocacy Centre, *Submission PA1*, 7-8; Public Interest Advocacy Centre, *Submission PA23*, 8; Justice Action, *Submission PA13*, 3; Mental Health Commission of NSW, *Submission PA56*, 3. See also L Schetzer and Streetcare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 23; A Grunseit, S Forell and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 63, 170-172.

42. Legal Aid NSW, *Submission PA4*, 13, 16; Legal Aid NSW, *Submission PA33*, 2-3; NSW Young Lawyers Criminal Law Committee, *Submission PA8,* 13; NSW Bar Association, *Submission PA11*, 7; Justice Action, *Submission PA13*, 2; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 1.

43. NSW Bar Association, *Submission PA11*, 7; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 1.

44. Roundtable: legal practitioners, *Consultation PAC21*; Roundtable: legal practitioners, *Consultation PAC28*.

45. Public Interest Advocacy Centre, *Submission PA23*, 9; NSW Bar Association, *Submission PA31*, 2.

46. NSW, State Parole Authority, *Submission PA19*, 1; NSW Bar Association, *Submission PA31*, 2; Legal Aid NSW, *Submission PA33*, 5-6.

47. Legal Aid NSW, *Submission PA33*, 6.

48. A Grunseit, S Forell, and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 243-244; Mental Health Coordinating

the other hand, custodial officers are likely to be the Corrective Services NSW employees most accessible to offenders and with whom they have the most contact.[49]

- **Case management is fragmented**. An offender's allocated case officer will change every time they are moved between correctional centres.[50] Stakeholders also submitted that case officers have only minimal contact with offenders and may have unrealistically large caseloads.[51]
- **The system is inadequate for offenders with limited time as sentenced prisoners.**[52] Corrective Services NSW is only required to prepare a case plan for offenders who have at least six months to serve in custody when they become sentenced prisoners.[53] We discuss the problem of case management for short sentences in Chapter 16.

Difficulty and importance of improving the current system

14.26 Effective case management is not easy. Many offenders have significant issues or deficits in terms of education, employability, cognitive and mental health impairments, trauma and victimisation, physical health, institutionalisation, anger and impulse control, homelessness, family and relationship breakdown, debt, drug and alcohol dependence and other addictions. Offenders may be unwilling to participate in recommended activities, or may only become willing late in the non-parole period when it is too late to provide the required interventions.

14.27 Corrective Services NSW has to marshal scarce resources for programs and services across multiple correctional centres. Many other factors can be practical impediments to effective case management, including:

- sentence length and sentence structure
- association and protection issues that prevent certain offenders from mixing
- outstanding court matters
- correctional centre capacity and location

Council, *Submission PA37*, 2; Shopfront Youth Legal Centre, *Submission PA40*, 1; Women in Prison Advocacy Network, *Submission PA20*, 12; Justice Action, *Submission PA28*, 1.

49. Mental Health Coordinating Council, *Submission PA37*, 2; A Grunseit, S Forell, and E McCarron, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008) 243-244.
50. Legal Aid NSW, *Submission PA4*, 17; Public Interest Advocacy Centre, *Submission PA1*, 13; Shopfront Youth Legal Centre, *Submission PA40*, 1.
51. Shopfront Youth Legal Centre, *Submission PA40*, 1; Women in Prison Advocacy Network, *Submission PA20*, 12.
52. NSW, State Parole Authority, *Submission PA19*, 2; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 3; Public Interest Advocacy Centre, *Submission PA23*, 9-10; Australian Community Support Organisation, *Submission PA27*, 4-5; Justice Action, *Submission PA28*, 3; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 2; NSW Bar Association, *Submission PA31*, 3; Legal Aid NSW, *Submission PA33*, 9; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 6;Shopfront Youth Legal Centre, *Submission PA40*, 4; Law Society of NSW, *Submission PA45*, 2; Mental Health Commission of NSW, *Submission PA56*, 3.
53. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 24(2).

- limited resources, and
- security concerns.

14.28 At the same time, ineffective in-custody case management has emerged as a key issue in this reference. An offender's time in custody is a crucial opportunity to make changes that will reduce the chances of reoffending. It seems that, at least to some extent, this opportunity is not being maximised. As far as these problems cause otherwise suitable offenders to be refused parole by SPA, they result in a large and unnecessary cost to the community. Refusing parole because of administrative barriers may also frustrate and demotivate an offender, undoing any rehabilitative gains from time in custody.

14.29 We expect that many of the problems that stakeholders have identified will become more severe due to the increasing number of prisoners in custody. Stakeholders have noted that crowding leads to more frequent transfers of offenders between correctional centres as administrators try to juggle the number of inmates, inmates' characteristics, needs and risk levels, and the characteristics and security of the available beds at different wings and centres. As prisoner numbers increase, the number of hours each prisoner can spend outside cells may reduce. This limits the opportunities for offenders to participate in rehabilitation programs, work, education and treatment.[54]

Options for change put forward by stakeholders

14.30 Stakeholders put forward several possible reforms which might improve the effectiveness of in-custody case management.

Community Corrections could be responsible for in-custody case management

14.31 Several stakeholders suggested that Community Corrections officers should be responsible for in-custody case management.[55] Currently, a Community Corrections officer is generally involved at the beginning of an offender's time as a sentenced prisoner, since the officer administers the LSI-R and may update the case plan. Community Corrections officers also take over the case plan in the last months of an offender's time in custody and then carry this responsibility into the community. However, Community Corrections officers currently have no involvement with the bulk of in-custody management.

14.32 Community Corrections officers could develop and update a case plan throughout the offender's sentence. Officers could take on an activist role, advocating for offenders to ensure that case plans are implemented and offenders are able to access all the key interventions in the time available. Officers are skilled in identifying criminogenic needs and have expertise in case management.

54. Probation and Parole Officers' Association of NSW Inc, *Submission PA55*, 4, 6; Roundtable: legal practitioners, *Consultation PAC28.*

55. NSW, State Parole Authority, *Submission PA14*, 10; NSW Bar Association, *Submission PA11*, 7; Aboriginal Legal Service (NSW/ACT), *Submission PA2*, 7; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 1, 4.

Community Corrections officers will have knowledge of the factors most likely to lead to a successful return to the community. They will also have an interest in ensuring that offenders are well prepared for parole. Community Corrections officers are also well placed to judge whether an offender must complete a particular activity in custody or whether the offender can undertake the activity in the community.

14.33 The aim of such a reform is to improve the quality and completeness of case plans. It also aims to improve the implementation of case plans during an offender's non-parole period. This could lead to reduced numbers of otherwise willing and suitable offenders being refused parole because they have not completed necessary activities, and reduced instances of "moved goalposts" for offenders near the end of the non-parole period.

14.34 However, making Community Corrections responsible for case management would be costly. The custodial officers who would no longer be case officers would likely still be needed for security and enforcement. It would be difficult for a Community Corrections case manager to have sufficiently regular contact with an offender in custody. It would also be difficult for a Community Corrections officer to work in the custodial environment, ensuring that an offender can access the necessary programs, services and resources.[56] Custodial officers who work inside correctional centres and have regular contact with offenders are better placed to navigate the correctional system and implement the case plan. For these reasons, we do not think that the potential benefits of Community Corrections responsibility for in-custody case management would outweigh the costs and difficulties.

SORC could have final say about serious offenders' case management

14.35 As a substitute or additional option for serious offenders, some stakeholders suggested that SORC should be solely responsible for making security classification and placement decisions without reference to the Commissioner.[57] The Chairperson of SORC supports such an approach because SORC has advice from Corrective Services NSW and the necessary experience and expertise to make the decisions, and leaving the matter to SORC would streamline the process.[58] As an alternative, SPA, the NSW Bar Association and Legal Aid NSW suggested that the Commissioner should only be able to disregard SORC's recommendations in exceptional circumstances.[59] Stakeholders considered a change of this nature would streamline serious offenders' progress in custody and ensure that suitable offenders are able to achieve the goals in their case plan before the end of the non-parole period. However, the Commissioner has responsibility for the security of the whole Corrective Services NSW system, and security classification is an important aspect of this responsibility. In our view, it could be very problematic to carve out

56. Probation and Parole Officers' Association of NSW Inc, *Submission PA55*, 10-11.

57. NSW, State Parole Authority, *Submission PA19*, 1; NSW Bar Association, *Submission PA31*, 2; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 16.

58. Information provided by R O Blanch, Chairperson, Serious Offenders Review Council (11 November 2014).

59. NSW Bar Association, *Submission PA11*, 8; NSW, State Parole Authority, *Submission PA14*, 11-12; Legal Aid NSW, *Submission PA33*, 5-6.

security classification for serious offenders and allocate decision making power to SORC.

Security classifications could be simplified

14.36 Stakeholders also suggested that the security classification system should be simplified.[60] The CAS Regulation could be amended so that offenders are simply classified as maximum, medium or minimum security. Within these classifications, it could be decided on a case by case basis what activities were suitable and safe for an offender. This might reduce the barriers to accessing programs and other activities that are caused by delays and difficulties in progressing through the classifications. Simplified and reduced classifications might allow case management teams to focus less on navigating offenders through the classifications and more on actual case management.

A parole agreement scheme could be developed

14.37 Finally, several stakeholders supported developing a "parole agreement" scheme.[61] Such an agreement would be negotiated between an offender, Corrective Services NSW and SPA early in the offender's non-parole period.

14.38 In North Carolina, some offenders are offered the opportunity to participate in the Mutual Agreement Parole Program. Selected offenders who agree to participate are 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 behavioural change, rewards appropriate behaviour, evaluates an offender's readiness for release and prepares an offender for successful re-entry into society". In 2012, about 10% of eligible offenders participated in the program.[62]

14.39 We understand the attractions of a parole agreement scheme. An early agreement could ensure that expectations are clearly defined and communicated to offenders early in the non-parole period. It might also give offenders a sense of ownership of their own progress. SPA oversight of the agreement could potentially improve implementation and increase the number of offenders who have completed the necessary programs, interventions and other activities before the end of the non-parole period.

14.40 However, such a scheme would be difficult to implement in a way that did not just create extra administrative burdens. It is not clear to us what a parole agreement

60. NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 16; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5.

61. Law Society of NSW, *Submission PA5*, 5; K Marslew, *Submission PPA5,* 1; Legal Aid NSW, *Submission PA4*, 13, 16; Legal Aid NSW, *Submission PA33*, 2; Justice Action, *Submission PA13*, 2.

62. North Carolina, Post-Release Supervision and Parole Commission, *Report on the Status of the Mutual Agreement Parole Program* (2012) 2-3.

would contain beyond simply duplicating the case plan. It is also not clear how such an agreement would clearly communicate expectations to an offender early in the non-parole period but also be flexible enough to remain relevant at the end of the non-parole period. There could also be circumstances where SPA might need to refuse parole even though the offender honoured the agreement. This could create resentment and a perception of unfairness. We are not in favour of a parole agreement scheme.

Our view

14.41 As already noted, Corrective Services NSW has begun a review of case management and started to develop "a new model of case management, from reception to completion of an order in the community".[63] The NSW Department of Justice submitted that the new model:

> will focus interventions for higher risk offenders within the custodial period prior to release. The model will streamline and simplify the system to reduce the time required to progress through the three security classifications.[64] Improvements in data entry in relation to program scheduling will facilitate completion of programs prior to consideration for parole. This will address competition between services and programs towards the end of the custodial period. Additional services at times of transition will be provided through partnerships with external providers. These changes will be introduced throughout 2014.[65]

14.42 Because the new model of case management was being developed while we were completing this report, we do not have any detailed information about the changes that will be made. Our recommendations in this section are, therefore, limited to a few areas that we think should be highlighted.

Comprehensive review of case management implementation

14.43 All of the options put forward by stakeholders aim to increase the gains from an offender's time in custody and reduce the number of otherwise suitable offenders who are refused parole due to administrative problems. We note, however, that many of the options would involve a major change to Corrective Services NSW case management policy.

14.44 The main thrust of Corrective Services NSW current case management policies seem adequate and appropriate. The policies incorporate the key aspects of internationally recognised best practice, in that all offenders are screened and triaged based on risk level, case management is based on a single case plan, intervention is targeted at higher risk offenders, and interventions focus on criminogenic needs.[66]

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63. NSW Department of Justice, *Submission PA54*, 1.
64. The submission refers to the security classifications described in Table 14.1 as 3 grouped classifications: maximum (AA, A1 and A2 classif), medium (B) and minimum security (C1, C2 and C3).
65. NSW Department of Justice, *Submission PA54*, 1.
66. See, eg, K Warwick, H Dodd and S R Neusteter, *Case Management Strategies for Successful Jail Reentry* (National Institute of Corrections, 2012).

14.45 In our view, most of the problems with the current system identified by stakeholders stem more from problems with *implementing* current case management policies rather than deficiencies in the policies themselves.

14.46 We do not consider that we have sufficient facts and data to pinpoint accurately all the causes of implementation failures. For this reason, we recommend that Corrective Services NSW commission an independent review of case management implementation that follows offenders through their time in custody and on parole. It would gather longitudinal information and identify the points at which case management policies are failing in practice. The review should develop recommendations to improve policy implementation and reduce problems with case management.

Clarify and simplify policy

14.47 Although we support the spirit of Corrective Services NSW policy, Corrective Services NSW currently has a proliferation of different written policy documents that govern aspects of in-custody management and parole preparation. We have seen references to the:

- Throughcare Strategic Framework
- Corrective Service Industries Policy Manual
- Policy for External Program Providers in Correctional Settings
- Operations Procedures Manual
- Custodial Policy and Procedures
- Offender Classification and Case Management Policies and Procedures Manual
- Case Management of Offenders Policy and Procedures
- Community Corrections Policy and Procedures Manual
- Case Management of Offenders Policy Statement
- Guide to Case Plans, and
- a number of policy Memoranda issued by the Commissioner and Assistant Commissioners.

14.48 We are not sure whether all of these policies are currently in force. Despite the *Government Information (Public Access) Act 2009* (NSW), only some of these policy documents are publicly available and it is not clear whether there are reasons for withholding the rest.[67] We have found the policies that we have viewed to be generally long, complex and unclear in their descriptions of how decisions are made and actions taken. The central document for in-custody case management – the

67. Under the Act, government agencies are required to make public their policy documents unless there is an overriding public interest against doing so: *Government Information (Public Access) Act 2009* (NSW) s 6, s 18, s 23. Publicly available policies (or parts of policies) are published on the Corrective Services NSW website: <http://www.correctiveservices.justice.nsw.gov.au/related-links/publications-and-policies/policies-defined-gipa-act>.

Offender Classification and Case Management Policies and Procedures Manual – runs to almost 500 pages and was, on our reading, confusing, repetitive and sometimes contradictory.

14.49 It may well be that case planning and case management functions are not properly implemented because some staff members have difficulty understanding the requirements and goals of their role or are unsure of official policy. Simplifying and streamlining relevant policy documentation may help staff to deliver more effective case management.

Reduce diffusion of responsibility

14.50 Currently, responsibility for developing and implementing a case plan is shared between a Community Corrections officer, a custodial case officer, the case management team, welfare officers and Services and Programs officers. Corrective Services NSW policy states that "implementation of case management plans is the responsibility of the offender and any staff members who [have] significant contact with the offender".[68] There is no single Corrective Services NSW staff member who is responsible for ensuring that a robust case plan is developed and implemented and that an offender is as ready for parole as is possible by the end of the non-parole period. This diffusion of responsibility may increase the likelihood of case plans being poorly formulated or not fully implemented.

14.51 We consider that diffusion of responsibility for case management is a key problem in the current system. As we discussed earlier in paragraphs 14.31-14.33, stakeholders proposed that responsibility for case management should be transferred to Community Corrections. Concentrating case management functions in Community Corrections would resolve the current fragmentation of responsibility. However, for the reasons noted at paragraph 14.34, we are not confident that this is the best solution to the problem.

14.52 We recommend that, in reviewing its case management practices and implementing model of case management, Corrective Services NSW should make changes to reduce diffusion of responsibility. Such changes might include Community Corrections officers being involved with case management teams in the annual review and update of case plans. A new framework might also make clear that custodial case officers, or the case management team, are ultimately responsible for ensuring that an offender's case plan is as fully implemented as is possible by the end of the non-parole period.

Simplify security classification system

14.53 We agree with stakeholders that the security classification system needs to be simplified. In practice, case management teams seem to be primarily concerned with managing offenders through the complex system of security classification and possible placements. Security classification influences many aspects of an offender's case management and time in custody. This is particularly so for serious offenders, who are restricted in their classification progression by the amount of

68. Corrective Services NSW, *Case Management of Offenders Policy and Procedures* (2013) 7.

time left to serve before the end of the non-parole period. As an offender's classification is generally only reviewed annually, classification can frustrate timely implementation of the case plan and prevent offenders from being adequately prepared for parole.

14.54 Security classification has an important place in managing security risk, especially for those offenders who need to be confined in high security facilities. But the current system has multiple sublevels and a high degree of complexity that would appear to add little to managing an inmate's security risk.

14.55 In our view, the system of security classifications should be simplified, particularly for those offenders subject to extra requirements and personal decisions from the Commissioner. Groups of offenders worth investigating in this regard might include serious offenders, offenders with an E classification and public interest inmates. Corrective Services NSW has informed us that it has already begun to consider how the current system could be streamlined into fewer consolidated classifications.

Recommendation 14.1: Changes to in-custody case management

(1) Corrective Services NSW should commission an independent review of the implementation of its case management policies.

(2) Corrective Services NSW should review its current policy documents that relate to in-custody management, case management and parole preparation with a view to consolidating, clarifying and simplifying these policies.

(3) Any case management framework that Corrective Services NSW implements should aim to reduce the diffusion of responsibility for case management and parole preparation that currently exists among custodial case officers, case management teams, welfare officers, other services and programs officers and Community Corrections officers.

(4) Corrective Services NSW should review the current system of security classification, with the aim of simplifying and streamlining it.

Planning and supporting the transition to parole

14.56 Shortly before release, all offenders are given *Planning Your Release: NSW Exit Checklist*, a booklet prepared by Corrective Services NSW and the non-government Community Restorative Centre (CRC).[69] It contains a checklist of tasks, such as:

- obtaining identification documents
- arranging accommodation
- opening bank accounts, organising welfare payments from Centrelink and dealing with creditors

69. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 7.2 (v 1.2, 2014) [7.2.5].

- organising a family or social support person to help adjust to community life
- organising health services and referrals in the community, and
- obtaining clothes, transport and a special gratuity from Corrective Services NSW on day of release (in some cases).

14.57 Offenders should also be given CRC's *Getting Out* handbook, which includes chapters on obtaining accommodation, health, returning to the family, dealing with government agencies and coping with isolation and depression.[70]

14.58 Corrective Services NSW runs the Nexus group program to guide offenders through the tasks in the *Checklist*. Offenders can also get release planning and transition support from:

- pre-release expos where government and non-government service providers (such as Roads and Maritime Services, TAFE NSW, Housing NSW, Centrelink and community housing providers) meet prisoners and provide information about applying for services[71]
- weekly Exit Planning Team meetings, involving Corrective Services NSW officers and members of the Inmate Development Committee (an elected body of offenders), that use the *Getting Out* handbook to help inmates complete tasks, and prepare for pre-release expos
- in-prison visits by Centrelink and Housing NSW staff to help with applications for housing and benefits,[72] and
- arrangements by Justice Health for medication and health referrals to be made available at the time of release.[73]

14.59 Offenders who need individualised assistance can approach a welfare officer in the correctional centre. Welfare officers can help offenders to fill in application forms, contact agencies such as Housing NSW and Centrelink on an offender's behalf, and provide advice about post-release services.[74] Any offenders due to be released on parole (or due to be considered for parole) can also approach their assigned Community Corrections officer for help in the last few months of their non-parole period.

14.60 There are also currently two specialised transitional centres that run programs focused on managing the transition to the community for female offenders. We discuss the role of such transitional centres and other possible models to create a structured transition experience in Chapter 15.

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70. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 7.2 (v 1.2, 2014) [7.2.7].
71. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 7.2 (v 1.2, 2014) [7.2.7].
72. Community Restorative Centre, *Getting Out: Your Guide to Surviving on the Outside* (2007) 15, 23.
73. Corrective Services NSW, *Operations Procedures Manual* section 11 (v 1.8, 2014) [11.1.5.2].
74. Community Restorative Centre, *Getting Out: Your Guide to Surviving on the Outside* (2007).

Problems raised by stakeholders

14.61 In submissions and consultations, stakeholders argued that the existing transition supports are inadequate in a number of ways:

- **Offenders receive insufficient information before release**. Offenders may not be given adequate information before their release about what they should be doing or who could help them with essential tasks.[75] The Shopfront Youth Legal Centre submitted that, in practice, offenders are often unaware of the *Planning Your Release: NSW Exit Checklist*, the Nexus program or the possibility of expos.[76]

- **Offenders receive insufficient support and assistance immediately before and after release**. Although the *Planning Your Release: NSW Exit Checklist* booklet is helpful, many offenders who receive it will be unable to take the initiative – due to cognitive impairments, poor literacy, poor decision making and planning skills, limited funds or other reasons – and are not aided in following through on the suggested tasks. It is unrealistic in many cases to expect offenders to be proactive in preparing for their own release.[77] Welfare officers are available to offenders to assist with pre-release tasks but this resource still relies on offenders proactively managing their own release preparation and seeking assistance. Offenders also seem to have chronic difficulties in accessing welfare officers.[78] Community Corrections officers generally do not provide proactive detailed assistance at the transition point as they are primarily concerned with arranging accommodation and ensuring rehabilitation programs are completed. They also have large caseloads and, in the case of court based parolees, only very limited time to assist the offender before release.[79]

- **In-custody activities are insufficiently oriented towards preparation for community life**. Several stakeholders submitted that in-custody opportunities for work are not adequately linked to post-release employment, and that education and training opportunities in custody are unlikely to help offenders

75. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 5; Public Interest Advocacy Centre, *Submission PA1*, 11-12; Public Interest Advocacy Centre, *Submission PA23*, 12-13; L Schetzer and Streetcare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 19-20; M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 145-146.

76. Shopfront Youth Legal Centre, *Submission PA40*, 7. See also E Baldry and others, *Ex-Prisoners and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration?* Final Report No 46 (Australian Housing and Urban Research Institute, 2003) 10.

77. NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA35*, 9; Shopfront Youth Legal Centre, *Submission PA40*, 7; Mental Health Coordinating Council, *Submission PA37*, 3; Australian Community Support Organisation, *Submission PA27*, 4-5.

78. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 5; Public Interest Advocacy Centre, *Submission PA1*, 13; Public Interest Advocacy Centre, *Submission PA23*, 4-5. See also L Schetzer and Streetcare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 20-22; M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 113; A Grunseit, S Forell, and E McCarron, *Taking Justice Into Custody: The Legal Needs Of Prisoners* (Law and Justice Foundation of NSW, 2008) 165-166.

79. Shopfront Youth Legal Centre, *Submission PA40*, 7.

gain post-release employment in practice.[80] Others submitted that offenders are not given sufficient training in technology and access to computers to enable them to have realistic prospects of obtaining employment, and that there is a lack of living skills programs in custody that provide offenders with basic preparation for community life, such as cooking, cleaning and budgeting.[81]

- **Offenders lack access to future community supports**. Offenders have limited pre-release contact with non-government organisations (NGOs) that may be able to support and assist them while they are on parole.[82] Some correctional centres do not allow NGOs much access to offenders in custody.[83] Stakeholders also commented that working partnerships between Corrective Services NSW and NGOs need to improve.[84] There also seem to be problems with linkages between in-custody and post-custody government services. For example, stakeholders commented that in-custody disability services provided by Corrective Services NSW do not link smoothly to services provided in the community by the NSW Department of Family and Community Services. Similarly, stakeholders saw a gap between in-custody health services provided by Justice Health (a specialised network in NSW Health), and community based treatment provided by Local Health Districts.[85]

Our view

14.62 Overall, the current approach to release preparation seems to rely mostly on offenders taking the initiative in accessing the activities necessary to prepare themselves for release. Offenders must proactively manage their own release preparation and successfully navigate a complex administrative system. Only limited active assistance is provided with the detail of the transition to parole. This seems to be exacerbated by lack of access to welfare officers and low levels of access to NGOs. In our view, this is an unrealistic way to manage release preparation and transition support.

14.63 Corrective Services NSW tries to focus its case management and transition preparation on criminogenic needs under the risk-needs-responsivity model. Many of the issues that offenders face as part of the detail of their transition to the

80. Legal Aid NSW, *Submission PA33*, 9; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 4; Justice Action, *Submission PA28*, 3; Australian Community Support Organisation, *Submission PA27*, 3; Law Society of NSW, *Submission PA45*, 2-3; Mental Health Coordinating Council, *Submission PA37*, 2; Women in Prison Advocacy Network, *Submission PA20*, 13-14.

81. Public Interest Advocacy Centre, *Submission PA23*, 12; Public Interest Advocacy Centre, *Submission PA1*, 8; Shopfront Youth Legal Centre, *Submission PA40*, 3; Women in Prison Advocacy Network, *Submission PA20*, 13; Justice Action, *Submission PA28*, 3; Law Society of NSW, *Submission PA45*, 2; NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA35*, 9.

82. Shopfront Youth Legal Centre, *Submission PA40*, 2; Women in Prison Advocacy Network, *Submission PA20*, 18.

83. Roundtable: non-government service providers, *Consultation PAC4*; Roundtable: advocacy and representative groups, *Consultation PAC2*; Shopfront Youth Legal Centre, *Submission PA40*, 2.

84. Public Interest Advocacy Centre, *Submission PA23*, 5; Shopfront Youth Legal Centre, *Submission PA40*, 2; Information provided by NSW Ministry of Health (19 December 2014).

85. NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 10, 13; Roundtable: Wagga Wagga government agencies, *Consultation PAC15*; Mental Health Commission of NSW, *Submission PA56*, 4; Information provided by NSW Ministry of Health (19 December 2014).

community – such as getting proof of identification, or opening a bank account – are not directly linked to criminogenic needs. Stakeholders identified a lack of life skills programs as a problem for offenders' transition to parole but the evidence suggests that such programs have no effect on reoffending risk.[86] In this context, we understand why Corrective Services NSW has not chosen to direct more resources towards transition assistance for offenders.

14.64 However, we think it reasonable to conclude that an adequately planned and supported transition would improve the chances of an offender complying with parole conditions and successfully transitioning to life outside prison. At the very least, poor planning and low levels of support are likely to increase offenders' stress and dislocation at the crucial point of transition. Such transition issues can also present practical barriers to an offender being able to engage with interventions that do target criminogenic needs. In effect, some transition problems could be considered "responsivity" issues. For example, an offender immediately after release might have difficulty finding a bulk billing general practitioner who can be reached by public transport from the offender's new address. Without assistance, the offender might struggle to get a fresh prescription for his or her drug replacement therapy and the offender's substance abuse treatment plan could fail.

Increased proactive transition support

14.65 This situation would be improved if offenders had a single person responsible for proactively assisting them to plan for transition and access the supports and services that they need before and after release. Some stakeholders suggested that Corrective Services NSW should employ specialised transition officers who would be responsible for managing the detail of an offender's transition to the community.[87] These workers could be well networked with NGOs and would be able to provide intensive transition support and life skills training to offenders pre- and post-release. However, this alternative would be expensive and might exacerbate the already problematic complexity of in-custody case management.

14.66 A better option would be for NGOs to fill the gap in detailed and proactive transition planning and support.[88] An NGO transition worker could work in cooperation with an offender's Community Corrections officer on the detail of the transition. The transition worker would need to be well networked with other non-government and government agencies.

14.67 With sufficient access to correctional centres, transition workers from NGOs could contact offenders a few months before the end of the non-parole period and be responsible for making sure that all necessary transition tasks are completed and

86. 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; P Dawson and others, *An Evaluation of the Diamond Initiative: Year Two Findings* (London Criminal Justice Partnership, 2011); J A Wilson and R C Davis, "Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program" (2006) 5) *Criminology and Public Policy* 303.

87. Legal Aid NSW, *Submission PA33*, 5; Shopfront Youth Legal Centre, *Submission PA40*, 7; Public Interest Advocacy Centre, *Submission PA23*, 12-13; Probation and Parole Officers' Association of NSW Inc, *Submission PA55*, 10.

88. Public Interest Advocacy Centre, *Submission PA23*, 5.

supports are in place. Such "in-reach" would allow an NGO worker to build trust and a working relationship with the offender before the offender is destabilised by the experience of leaving custody.[89] Support could continue for the first part of an offender's parole period. This would achieve "continuity of care" for the offender and make it more likely that the offender will follow through with planned community supports and services.[90]

14.68 The investment in such NGO transition workers might be worthwhile if it reduced overall reoffending by helping offenders achieve a more stable and supported transition to parole. A small number of high needs parolees have been supported in this way in the past, for example through the CRC's intensive Parolee Support Initiative.

Transition support under the new funding model

14.69 Corrective Services NSW has recently reviewed and restructured the funding it provides to NGOs, including the CRC and its Parolee Support Initiative. From late 2014 to 2017, the new Funded Partnership Initiative will provide $13.7 million (up from $5.3 million under the previous Community Funding Program) to fund NGOs to provide supported accommodation, case work, brokerage and other services to high needs parolees, generally for the first three months after leaving custody.

14.70 As most of these services will only assist parolees once they are in the community, we discuss the main features of this new community based Funded Partnership Initiative in the next section of this chapter (which looks at management in the community)[91] and in Chapter 3 (which looks at availability of post-release accommodation).[92] However, one part of the Initiative – called the Extended Reintegration Service (ERS) – will provide some "in-reach" transition support that starts before the offender is released. The CRC will deliver the ERS effectively as a continuation of the Parolee Support Initiative.[93]

14.71 The ERS will be available to offenders who are assessed as being at medium-high or high risk of reoffending and who will be paroled to live in south western Sydney. Participants must also have no suitable accommodation and have a mental health impairment, a cognitive impairment, or both. Offenders accepted into the ERS program will be supported by non-government case workers for up to 12 months, including up to 12 weeks before they are due to be paroled.[94]

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89. See M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report to the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 74.
90. K Warwick, H Dodd and S R Neusteter, *Case Management Strategies for Successful Jail Reentry* (National Institute of Corrections, 2012) 6.
91. Para [14.86]-[14.89].
92. Para [3.38].
93. Corrective Services NSW, "Service 3: Extended Reintegration Service" <www.correctiveservices.justice.nsw.gov.au/community/funded-partnerships-initiative-fpi/service-3-extended-reintegration-service>.
94. Corrective Services NSW, *Funded Partnership Initiative: Extended Reintegration Service: Factsheet* (2014).

14.72 It is not clear how many offenders will be able to access the ERS program. Other aspects of the Funded Partnership Initiative will not involve any custody "in-reach" to support offenders to plan post-release proof of identity, finances, transport, medical care or deal with other issues. For this reason, we are concerned that the new funding model will not offer sufficient transition support to offenders to solve the problems that stakeholders have identified.

14.73 We recommend that, once the Funded Partnership Initiative has been in place for at least 12 months, Corrective Services NSW should evaluate how the Funded Partnership Initiative is working to help offenders with their immediate transition to parole. In particular, the evaluation should consider whether the limited level of "in-reach" and linkage with offenders before they leave custody is sufficient to ensure adequate transition support.

Transitions between government agencies

14.74 We also think that there needs to be improvement in the cooperation and coordination of effort between government agencies who work with offenders in custody (primarily Corrective Services NSW and Justice Health) and in the community (primarily Corrective Services NSW, NSW Health Local Health Districts, and the NSW Department of Family and Community Services). We discuss options to create a greater level of collaboration between Corrective Services NSW and other government agencies in the following paragraphs.

Recommendation 14.2: Increased transition support through non-government organisations

Corrective Services NSW should evaluate the effectiveness of the Funded Partnership Initiative in assisting offenders with the transition to parole. In particular, the evaluation should consider whether the limited level of "in-reach" and linkage with offenders before they leave custody is sufficient to ensure adequate transition support.

Management in the community

14.75 When offenders begin their parole period, the case plan from their time in custody carries over into the community. The offender's supervising Community Corrections officer updates the case plan eight weeks after the start of the parole period. If for some reason a Community Corrections officer cannot administer the LSI-R or have input into a case plan while the offender was in custody (for example because the offender was a sentenced prisoner for only a short period), a case plan will be developed within the first eight weeks of the parole period. Community Corrections does not case manage the few parolees without a supervision condition.

14.76 The intensity of Community Corrections involvement with supervised parolees is determined by a combination of the LSI-R and the Community Impact Assessment. The LSI-R rates parolees as a low, medium or high risk of reoffending and the Community Impact Assessment rates them as tier 1, tier 2 or tier 3 seriousness of reoffending. Together, these two ratings create nine different supervision levels from Tier 1/Low to Tier 3/High. A parolee's assigned supervision level determines how frequently the supervising Community Corrections officer has contact, how

frequently the case plan is reviewed and updated, and what kind of interventions (such as programs, services and referrals) are arranged for the parolee.[95]

Problems raised by stakeholders

14.77 In submissions and consultations, stakeholders raised a range of issues with the way parolees are case managed and supported in the community, including:

- supervision is too compliance focused and pays insufficient attention to helping parolees overcome obstacles to reintegration[96]
- parolees' negative behaviour is punished but there is no mechanism for rewarding positive behaviour[97]
- Community Corrections officers have large caseloads that prevent individualised support[98]
- Community Corrections officers are not well networked with government and non-government service providers that parolees need to access or that could help support them on parole[99]
- case management is fragmented and not well coordinated across Community Corrections and other agencies (for example, a parolee might have a Community Corrections officer "case manager" and case plan but also a case manager and plan at a health service and a case manager and plan at a supported accommodation service)[100]
- government agencies (particularly in the areas of health, housing, disability and child protection) operate in silos, with limited correlation of services for individual clients[101]
- there is inherent conflict between Community Corrections officers (who can direct parolees) and other agencies who work only with voluntary and/or self-referred clients[102]

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95. Corrective Services NSW, *Community Corrections Policy and Procedures Manual* (2013) section A part 6.
96. Shopfront Youth Legal Centre, *Submission PA40*, 9; Legal Aid NSW, *Submission PA33*, 15; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 10, 14.
97. Women in Prison Advocacy Network, *Submission PA20,* 19.
98. Shopfront Youth Legal Centre, *Submission PA40*, 9; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 13; Probation and Parole Officers' Association of NSW Inc, *Submission PA55*, 11, 17; Roundtable: Non-government service providers, *Consultation PAC4*.
99. Shopfront Youth Legal Centre, *Submission PA40,* 2, 10-11; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 8; Public Interest Advocacy Centre, *Submission PA23*, 15; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 10, 13, 14.
100. Roundtable: Non-government service providers, *Consultation PAC4*; Roundtable: Wagga Wagga government agencies, *Consultation PAC15*; Roundtable: Wagga Wagga non-government service providers and advocacy groups, *Consultation PAC17*.
101. NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 10, 14; Roundtable: Wagga Wagga government agencies, *Consultation PAC15*.

- there are shortages of key services, especially supported housing and mental health treatment[103]
- work done with parolees in the community does not link to and build on work done in custody[104]
- rehabilitation programs run by Community Corrections repeat work done in custodial programs, are not available in modified forms for offenders with cognitive impairments and are sometimes not available due to scheduling problems,[105] and
- there are insufficient programs and services to help parolees with reintegration in areas such as life skills, parenting and access to children.[106]

Our view

14.78 The list of problems with community case management put forward by stakeholders includes many problems that are extremely difficult, if not impossible, for Corrective Services NSW to solve. For example, a key requirement for receiving health treatment (including drug treatment and most mental health treatment) is that it must be voluntary. Parolees, however, must be managed on a mandated order. This creates tension between Corrective Services NSW and other government and non-government agencies working with a parolee. Similarly, Community Corrections officers must perform a dual role; both supportive case management and monitoring compliance. Inevitably, there must be some tension between these two functions.

14.79 As we discussed earlier in this chapter, Corrective Services NSW focuses on offenders' criminogenic needs so its effort is directed at the things most likely to reduce reoffending. Community Corrections officers focus on interventions that target criminogenic needs, and focus on higher risk offenders, using the risk-needs-responsivity model. This means that lower risk offenders may not receive much time or support from supervising officers. Similarly, offenders' non-criminogenic needs will not be a focus of their parole supervision. This approach could be contributing to stakeholders' perceptions that parolees get little individualised support or reintegration assistance from their Community Corrections officers.

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102. NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 14; Roundtable: Non-government service providers, *Consultation PAC4*.
103. NSW Department of Justice, *Submission PA54,* 17; Public Interest Advocacy Centre, *Submission PA1*, 11; NSW Young Lawyers Criminal Law Committee, *Submission PA8*, 12; NSW, State Parole Authority, *Submission PA14*, 8; Mental Health Commission of NSW, *Consultation PAC3*; City Community Corrections Office management team, *Consultation PAC8*; NSW Department of Family and Community Services, *Consultation PAC10*; NSW Health, *Consultation PAC11*; Wagga Wagga Community Corrections Office, *Consultation PAC14*; Roundtable: legal practitioners, *Consultation PAC21*; Roundtable: legal practitioners, *Consultation PAC28*. See also L Schetzer and Streetcare, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013) 80.
104. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 9.
105. Legal Aid NSW, *Submission PA33*, 21; Law Society of NSW, *Submission PA45*, 6; Public Interest Advocacy Centre, *Submission PA23*, 19-20; NSW Bar Association, *Submission PA31*, 8; NSW, State Parole Authority, *Submission PA19*, 5-6; Shopfront Youth Legal Centre, *Submission PA40*, 12; NSW Department of Family and Community Services (Ageing Disability and Home Care), *Submission PA35*, 12-13. See also NSW Department of Justice, *Submission PA54,* 18.
106. Roundtable: Advocacy and representative groups, *Consultation PAC2*.

14.80 Lack of resources also underpins many of the issues of concern to stakeholders. Shortages of public housing, other supported accommodation and mental health treatment affect many people in NSW, not just parolees. Scarcity of resources contributes to the large caseloads of Community Corrections officers, making it difficult for them to provide individualised support to parolees. Large caseloads may also contribute to a compliance focus (or perceptions of a compliance focus), where officers have little time to devote to helping parolees to meet the obligations of their orders.

14.81 Despite these difficulties and caveats, we see room for three key recommendations to improve community case management and support for parolees.

Increased quality of individualised case management

14.82 In its submission, the NSW Department of Justice stated that:

> The key areas for ongoing improvement are the quality of one-to-one interactions between supervising officers and offenders, and implementing the responsivity principle across both custody and community…the responsivity principle means that interventions or treatments must be delivered in a manner that is appropriate to the learning style and capabilities of the offender…
>
> … not all offenders have the capabilities or learning styles to benefit from group programs, and a group program may not be available for an offender due to its scheduling or where the offender is serving a short sentence.[107]

14.83 We take this to be an acknowledgement that parole supervision could be more individualised. Community Corrections officers need to be encouraged and supported to make sure that parolees' criminogenic needs are addressed even when, for whatever reason, they do not fit into the administrative structures set up for programs and intervention in the community. The Department further submitted:

> An area for improvement is one-to-one engagement with offenders by supervising officers… One-to-one interactions between an offender and their supervising officer can be very effective if cognitive-behavioural concepts, similar to group work programs, are used. Community Corrections has identified the improvement of the qualitative aspects of supervisor interaction in line with current literature as a priority.[108]

14.84 We support this change of emphasis to ensure that individualised attention is paid to supervisor interactions and responsivity issues.

Increased proactive support through non-government organisations

14.85 Beyond the work that Community Corrections officers do with offenders on their criminogenic needs and responsivity issues, many parolees are likely to need a more proactive level of day to day support in adjusting to community life. We recommend that Corrective Services NSW strengthen its funding and working relationships with NGOs, which can provide this detailed level of support.

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107. NSW Department of Justice, *Submission PA54*, 14.
108. NSW Department of Justice, *Submission PA54*, 14.

14.86 As already noted, Corrective Services NSW has recently made changes to the funding it provides to the NGOs that provide parolees with community support under the new Funded Partnership Initiative. In paragraphs 14.69-14.73, we described the aspects of the Funded Partnership Initiative that would provide support to some high needs offenders before they leave custody.

14.87 The Initiative also funds NGOs to provide two other services to parolees once they are in the community: a transitional supported accommodation program and the Initial Transition Service. The transitional supported accommodation program will provide higher risk offenders with up to 12 weeks of supported post-release housing at locations around NSW.[109] The Initial Transition Service will involve non-government case workers assisting higher risk offenders with housing, access to mental health treatment, access to alcohol and drug treatment, pro-social community activities, employment and education. Support will initially be available for 12 weeks but this period can be extended if necessary.[110]

14.88 As these new funding relationships unfold, they may effectively implement our recommendation. We note, however, that stakeholders have expressed some concerns about the level and duration of transition support that will be available to offenders.[111] Although some offenders will be able to access extensions to the three month support package (up to a total of 12 months), this will not be available for most parolees. Corrective Services NSW has advised that, under current funding arrangements, any increases in time allocated to support will result in a reduction in the number of offenders who can take part in the scheme. The intent of the scheme is to target medium-high to high risk offenders at the most critical point after release.[112] Existing non-government service providers in this area have argued that such short time horizons do not allow for meaningful support to be provided to the parolee.[113] Some research shows that most reoffending occurs in the first three months that an offender spends back in the community,[114] however, it is not clear that support confined to this period will be effective in reducing reoffending risks.

14.89 We recommend that, once the Funded Partnership Initiative has been in place for at least 12 months, Corrective Services NSW should evaluate the implementation of the Initiative. The evaluation should aim to determine whether support is provided for a sufficient period and also the level of unmet demand for support among parolees. Either as part of this evaluation or separately, we also recommend that Corrective Services NSW should evaluate the effect that support under the Funded Partnership Initiative has on reoffending. Corrective Services NSW should use these evaluations to inform its future funding arrangements with NGOs.

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109. Corrective Services NSW, "Service 1: Transitional Supported Accommodation" <www.correctiveservices.justice.nsw.gov.au/community/funded-partnerships-initiative-fpi/service-1-transitional-support-accommodation>.
110. Corrective Services NSW, *Funded Partnership Initiative – Initial Transition Service: Factsheet* (2014).
111. See, eg, ABC Radio National, "Back to Prison", *Background Briefing* (18 May 2014).
112. Information provided by Corrective Services NSW (19 December 2014).
113. Roundtable: non-government service providers, *Consultation PAC4*.
114. C Jones and others, *Risk of Re-offending Among Parolees*, Crime and Justice Bulletin No 91 (NSW Bureau of Crime Statistics and Research, 2006) 9.

Improved collaboration with other government agencies

14.90 Almost every area of government service provision struggles with the complex administrative cooperation necessary to provide coordinated and joined up services. At the same time, organisational silos within and among key agencies – principally Corrective Services NSW, the NSW Department of Family and Community Services and NSW Health – waste resources and make "throughcare" almost impossible to achieve for many parolees. Community Corrections officers find it very difficult to leverage other government agencies to provide critical services to parolees. Effort, information and case management can also become fragmented across different agencies and services. In our consultations with stakeholders in Wagga Wagga, we found that human services agencies had limited contact with each other, with Community Corrections, and with NGOs even though all had contact with the same parolee population and faced similar barriers to successful service delivery.[115]

14.91 There are a few options to try to improve this situation. The UK uses teams of government agencies and NGOs, known as "multi-agency public protection arrangements" (MAPPA) to manage sexual and violent offenders in the community. MAPPA teams are usually led by the police or the National Offender Management Service (the UK equivalent of Community Corrections). MAPPA teams work together to coordinate monitoring and providing services and programs to offenders through regular case meetings and sharing of reports and information. A key feature of the MAPPA system is that all the agencies on the team are under a positive legal duty to cooperate with the lead agency. Participating agencies draw up a Memorandum of Understanding outlining how they will work together to manage the offender in the community. The responsibilities and roles of each agency are defined and the agreement provides for them to participate in regular meetings, provide each other with reports on the offender and exchange information.[116]

14.92 In our 2013 report on sentencing, we recommended that the Government consider introducing a similar model to support service provision for offenders serving intensive community based sentences.[117] We suggested that a MAPPA-type model might help Corrective Services NSW to lead and promote inter agency cooperation for these offenders.

14.93 The Government has recently put into place a similar model for the management of offenders on extended supervision orders under the *Crimes (High Risk Offenders) Act 2006* (NSW). New provisions in the Act have created a High Risk Offenders Assessment Committee to oversee the management of these offenders. The Committee includes representatives from Corrective Services NSW, the NSW Department of Family and Community Services, Housing NSW, Ageing Disability and Home Care, the Justice and Forensic Mental Health Network, the NSW Ministry of Health, the NSW Police Force and the NSW Department of Justice.[118] The Committee's functions will include to coordinate and facilitate cooperation between the agencies involved with this group of offenders, promote information sharing and

115. Wagga Wagga Community Corrections Office, *Consultation PAC14*; Roundtable: Wagga Wagga government agencies, *Consultation PAC15*; Roundtable: Wagga Wagga non-government service providers and advocacy groups, *Consultation PAC17*.
116. National MAPPA Team and others, *MAPPA Guidance 2012 Version 4* (2012) 11-12.
117. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) recommendation 11.5(2).
118. *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AB.

identify gaps in service provision.[119] Under new provisions of the *Crimes (High Risk Offenders) Act 2006* (NSW), all the agencies involved have a legal duty to cooperate in managing these offenders, including sharing information with each other and providing each other with reasonable assistance and support.[120]

14.94 This type of model may help to improve coordination and cooperation between government agencies who are involved with parolees. On the other hand, agencies already have the intention to cooperate and coordinate in their service provision. Existing memoranda of understanding record this intention. It is not clear what a legal duty to cooperate adds in practice to the current environment, as the difficulties are mainly ones of implementation, not intention.

14.95 Another option would be for Corrective Services NSW and other relevant agencies to develop local re-entry working groups to improve coordination and linkage of services provided to parolees. Such working groups could recognise that parolees are likely to be resource intensive for many different agencies and that all agencies can benefit if a transition to stability can be achieved. Local working groups could operate with representatives from many agencies to try to find cooperative solutions at a more specific level than the Memoranda of Understanding and policies that already exist at an agency level.

14.96 On balance, we think that both of these options should be considered to improve the management of parolees. We recommend that, once the high risk offenders model has been in place for one to two years, the Government should review its operation and effectiveness. If the model is shown to have improved agency coordination, information and service provision, the Government should explore options for extending it to parolees (and perhaps also offenders serving intensive community based sentences, in line with the recommendation from our sentencing report). At the same time, the Government could consider creating smaller, more local and more flexible re-entry working groups to deal with the day to day difficulties of implementing cooperation. Relevant NGOs that work with parolees in that area could also be involved.

Recommendation 14.3: Improving case management and support for parolees in the community through non-government organisations

(1) Corrective Services NSW should continue its efforts to improve the quality of interactions between Community Corrections supervisors and individual parolees.

(2) Corrective Services NSW should evaluate the Funded Partnership Initiative to determine:

  (a) whether support is provided for a sufficient period and also the level of unmet demand, and

  (b) the effect that support provided under the Initiative has on rates of reoffending among parolees.

119. *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AC.

120. *Crimes (High Risk Offenders) Act 2006* (NSW) s 24AF.

(3) If the new model of interagency cooperation set up under the *Crimes (High Risk Offenders) Act 2006* (NSW) is successful, the Government should consider extending this model to the management of parolees.

(4) The Government should consider establishing local informal re-entry working groups to address the current gaps and difficulties in managing parolees. The aim of the groups would be to coordinate government agencies better and to improve information sharing and cooperation. Relevant government agencies in each location (including agencies covering housing, health, corrections, mental health, and disability services) should participate. Relevant non-government organisations in each location could also participate.

Evaluating rehabilitation programs

14.97 A large part of the case management that Corrective Services NSW does both in custody and the community aims to ensure that offenders are "treated" through completing rehabilitation programs that reduce the risk of reoffending. The full range of rehabilitation programs delivered by Corrective Services NSW – both in custody and in the community – is outlined in the *Compendium of Correctional Programs in NSW*. The introduction to the *Compendium* states:

> By including programs in the Compendium, [Corrective Services NSW] indicates that it has subjected these to scrutiny and can vouch for their suitability as interventions that can reasonably be expected to contribute to a reduction in the risk of re-offending.[121]

14.98 At the same time, only one program run by Corrective Services NSW – the CUBIT sex offender program – has had an evaluation published in a peer reviewed academic journal.[122] Other programs have not been evaluated for their effect on recidivism, or have been evaluated by university students or consultants in unpublished theses or reports that are not publicly available.[123]

14.99 Several stakeholders stressed the need for programs to be evaluated and effective, given the importance that SPA places on program completion.[124] Some stakeholders also referred to the importance of transparent and independent evaluations of rehabilitation programs.[125]

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121. Corrective Services NSW, *Compendium of Correctional Programs in NSW* (2013) 2.
122. A C Woodrow and D A Bright, "Effectiveness of a Sex Offender Treatment Programme: A Risk Band Analysis" (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 43.
123. See the research cited against each program entry in the *Compendium of Correctional Programs in NSW.*
124. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 4; K Marslew, *Submission PA15, 2*; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 2; Police Association of NSW, *Submission PA25*, 9; NSW Bar Association, *Submission PA31*, 2; Legal Aid NSW, *Submission PA33*, 7; NSW Department of Family and Community Services (Ageing, Disability and Home Care),*Submission PA35*, 5.
125. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 2; NSW Bar Association, *Submission PA31*, 2; Legal Aid NSW, *Submission PA33*, 7; Shopfront Youth Legal Centre, *Submission PA40*, 2.

14.100 The NSW Auditor-General's 2013 Financial Audit Report stated that Corrective Services NSW currently has no measures of the effectiveness of individual prisoner rehabilitation programs, despite spending $23.4 million on delivering such programs in 2012-13. The Auditor-General recommended that Corrective Services NSW conduct individual program evaluations employing experimental methods to determine the effectiveness of the programs offered.[126]

14.101 Evaluations using experimental methods are the "gold standard" and are very difficult to undertake in the correctional context. Corrective Services NSW has used other methods within tight budgets to evaluate its programs as far as possible. In our view, however, it is critical for rigorous outcome evaluations to be factored in as part of program design, funding and implementation. The NSW Government's *Program Evaluation Framework* was introduced in 2013 and requires all agencies in the public sector to embed evaluation as part of the design and funding of programs. The *Framework* also makes clear that, wherever possible, program evaluations should be published to increase transparency and accountability.[127]

14.102 We support rehabilitation programs and acknowledge the importance of offenders completing such programs before parole will be granted. Wide ranging international meta-analyses have shown that in-custody programs can be effective in reducing reoffending,[128] particularly well implemented programs that use cognitive behavioural therapy techniques.[129] However, it is hard to overstate the importance of ensuring that Corrective Services NSW only funds effective programs and that only effective programs are recommended for offenders before parole is granted.

14.103 We recommend that Corrective Services NSW ensure that all of its rehabilitation programs are evaluated for their effect on recidivism. Where possible, an independent individual or agency should be involved in the evaluation in collaboration with Corrective Services NSW staff. Future programs should have a rigorous outcome evaluation planned for and funded before the program commences. All future evaluations should be published online.

14.104 Corrective Services NSW has already begun some work to implement this approach. The NSW Bureau of Crime Statistics and Research is currently collaborating with Corrective Services NSW on evaluations of programs for violent offending, sex offending and intensive alcohol and drug treatment.[130] Corrective Services NSW has advised us that it also has several evaluation studies planned for publication.[131]

126. Auditor-General of NSW, *NSW Auditor-General's Report: Financial Audit Volume Six Focusing on Law, Order and Emergency Services* (Audit Office of NSW, 2013) 18.
127. *NSW Government Evaluation Framework* (2013).
128. 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.
129. M W Lipsey, N A Landenberger and S J Wilson, "Effects of Cognitive-Behavioral Programs for Criminal Offenders" (2007) 6 *Campbell Systematic Reviews*.
130. NSW Department of Justice, *Submission PA54*, 4.
131. Information provided by Corrective Services NSW (28 April 2014).

Recommendation 14.4: Evaluating rehabilitation programs

Corrective Services NSW should ensure that all the rehabilitation programs it offers are evaluated for their effectiveness in reducing reoffending. Evaluation should be embedded in the design and funding of future programs in accordance with the NSW Government's Program Evaluation Framework. An independent individual or agency should be involved in such evaluations, where possible. All evaluations should be published online.

15. Pre-parole programs

In brief

Existing mechanisms intended to aid the transition from custody to parole and, accordingly, help reduce rates of parole breach and reoffending include external leave and transitional centres. There is scope for improving these existing transition options. There would also be value in introducing a new transition option: a back end home detention scheme. This would provide a more intensive transition process for appropriate offenders, allowing them to establish community supports before they are released on parole.

15.1 Virtually all offenders sentenced to a term of imprisonment will eventually be released into the community. A case management approach that focuses on preparing offenders for parole during the final months of their non-parole period can help facilitate their reintegration. There are a number of approaches that could help

offenders establish links with community based services to address their criminogenic needs,[1] providing a support structure that could help prevent reoffending.

15.2 In this chapter we examine the effectiveness of existing transition schemes in NSW, how they could be improved and what other approaches may be beneficial. We begin by considering the features of an effective transition scheme. We go on to examine the existing transition options in NSW, which are:

- external leave programs, and
- transitional centres.

15.3 We examine and reject two overseas options:

- day reporting centres, and
- day parole.

15.4 Finally, we examine and recommend back end home detention. This model has been successfully used in other jurisdictions and could benefit NSW.

Features of an effective transition scheme

15.5 Transition schemes in NSW and other jurisdictions share several attributes against which we can measure their potential effectiveness. Primarily, the transition process aims to establish a framework that helps newly released offenders live a lawful life in the community. This benefits the community by reducing reoffending rates and the cost of imprisonment. However, these benefits need to be balanced with community expectations about punishment and concerns about community safety during the transition process.

Community reintegration

15.6 Transition arrangements are designed to aid offenders' reintegration into the community and gauge their readiness to adapt to life outside prison. This is especially important for long term prisoners. An offender who has become accustomed to very rigid routines in custody can find unstructured time challenging and may need to relearn basic living skills. They may be released to a community that bears little resemblance to the one they lived in before imprisonment. The pace of technological change regularly affects the ways in which society interacts and carries out business. Assisting offenders to re-enter the community should reduce parole breaches and reoffending.

15.7 An effective transition scheme prepares offenders for parole and community life by establishing links with community support networks and services. A scheme that can be accessed from or near the community in which the offender intends to live will provide the greatest continuity of support.

1. See para [4.49].

15.8 An appropriate balance of structured and unstructured time allows offenders to experience more independence within a regulated environment. Offenders can use unstructured time to arrange post-release accommodation and employment or rebuild disrupted family and social relationships. They can also begin to establish connections with community based medical practitioners and any rehabilitative, mental health and other specialist services that might assist their reintegration following release.

Cost and administrative efficiency

15.9 While the purpose of transition schemes is not to mitigate the cost of imprisonment, they may have the added advantage of being comparatively cost effective. In this respect, a scheme that moves offenders out of full time custody and into home detention or supported accommodation during a portion of the non-parole period could be particularly beneficial. For example, the Auditor-General's 2010 performance audit of home detention found that it was cost effective compared to full time imprisonment. It noted that the net operating expenditure per prisoner per day on home detention was about $47 compared to $187 for a prisoner held in minimum/medium security imprisonment.[2] However, the cost of a transition scheme could be affected by the risk level of the offenders targeted and the level of supervision they require.

Community safety and expectations

15.10 The community's concern to protect the integrity of a sentence is a legitimate concern that must be recognised in the design of a transition scheme. There is an expectation that an offender should serve the entire non-parole period in custody. Although each of the transition schemes discussed in this chapter is restrictive, they all impinge on this expectation to some extent as they all involve spending some period of time out of custody before the non-parole period has expired. However, we do not consider that any of the transition schemes we support or recommend in this section necessarily undermine the integrity of the sentence. Our primary concern is to ensure that the transition process is effective, and the offender has the best chance of not reoffending.

15.11 The benefits of reintegrating offenders back into the community need to be balanced against any risks to community safety that arise during the transition process. There will always be offenders who are unsuitable for a transition scheme due to the risk they pose to the community. However, an overly restrictive approach would be counterproductive. A transition scheme needs to be sufficiently flexible to manage the particular risks posed by each offender and provide the maximum benefit to the community by reducing recidivism.

2. NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 26.

Pre-release external leave programs

15.12 Corrective Services NSW currently runs a suite of pre-release external leave programs that allow some offenders to experience community activities before they are eligible for parole. Pre-release external leave is aimed toward gradually reintegrating long term offenders into the community. External leave allows these offenders to steadily adjust and relearn basic living skills, re-establish family relationships and community supports or to connect with and undertake employment, education and training that may continue after the offender is released. These programs can also test how an offender responds to supervision in the community, providing an indication of whether they are ready for release on parole. Corrective Services NSW includes participation in external leave programs in the case plans of offenders with sentences of 12 months or more.[3]

15.13 Sections 6 and 26 of the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) allow the General Manager of a correctional centre or the Commissioner of Corrective Services to permit an offender to leave a correctional complex. Under s 6, the General Manager may direct an offender to undertake community service work, or any work for Corrective Services NSW or a public or local authority:

- within the offender's correctional centre
- within the offender's correctional complex but outside the correctional centre, or
- outside the offender's correctional complex.

Section 26 authorises the Commissioner of Corrective Services to issue a local leave permit allowing an offender to be absent from a correctional centre for any purpose the Commissioner considers appropriate.

15.14 These provisions underpin Corrective Services NSW's leave programs policy. On the face of the legislation, there is some overlap in the operation of s 6 and s 26 in that they can both be used to allow an offender to undertake work outside the correctional complex. However, in practice, Corrective Services NSW will generally only use s 6 orders where the offender will be supervised while outside the correctional centre.[4] With the exception of some external sporting and recreational activities, s 6 is used for escorted external leave and s 26 for unescorted external leave.

Escorted leave

15.15 Corrective Services NSW policy provides that, under s 6 of the CAS Act, the General Manager can grant a:

- s 6(1) order, which requires an offender to undertake work *inside* the correctional centre

3. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 7.1 (v1.2, 2014) [7.1.9].
4. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 19.1 (v1.1, 2013) [19.1.7].

- s 6(2) ON order, which allows an offender to undertake escorted work or other activities *within* the grounds of a correctional complex but *outside* the correctional centre, or
- s 6(2) OFF order, which allows an offender to undertake escorted work or other activities *outside* the grounds of a correctional complex.[5]

15.16 Offenders with the second lowest security classification (C2 for male offenders and Category 2 for female offenders) or lowest security classification (C3 for male offenders and Category 1 for female offenders) may participate in work or programs under a s 6(2) OFF order.[6] The general manager must also be satisfied that:

- the offender does not pose a security risk
- the offender's behaviour and attitude justifies approval of their participation in the program, and
- if the activity is a program, the program is reflected in a requirement of the offender's case plan.[7]

Offenders may also undertake escorted sporting and leisure activities under a s 26 permit.[8]

Unescorted external leave

15.17 Corrective Services NSW policy provides that the Commissioner of Corrective Services may issue a permit under s 26 of the CAS Act to allow offenders to participate in unescorted external leave programs.

15.18 Unescorted external leave programs include:

- **Day leave**: offenders are permitted to be absent from the correctional centre with an approved sponsor and at approved locations from 8:00am to 8:00pm. Offenders must be within nine months of the end of their non-parole period. Day leave can be undertaken once every 28 days.
- **Weekend leave**: offenders are permitted to be absent from the correctional centre with an approved sponsor at approved locations from 4:00pm Friday to 8:00pm Sunday. The offender must have successfully completed three day leaves and be no more than two months from the end of their non-parole period or fixed term. Weekend leave can be undertaken weekly.
- **Work, education and vocational training leave**: offenders perform approved employment, education or vocational training in the community while continuing to serve their sentence in minimum security conditions.

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5. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 19.1 (v1.1, 2013) [19.1.3], [19.1.3.1], [19.1.3.2].
6. On security classifications, see para [14.14]-[14.21].
7. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 19.1 (v1.1, 2013) [19.1.4.4]. The final criterion does not apply to approved group cultural programs.
8. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.7 (v1.3, 2014) [20.7.5].

- **Leave for life skills programs, community based projects, industrial training or work experience**: offenders undertake approved programs relevant to their employability or life skills development in the community, usually on a part time basis.

15.19 The policy states that, to be eligible, offenders must have:

- a C3 (male offenders) or Category 1 (female offenders) security classification
- a fixed sentence or non-parole period of 24 months or more
- completed half their minimum term
- no outstanding court matters that may result in a change to the earliest possible release date on their current sentence (this does not include appeals against conviction or sentence lodged by the offender), and
- not returned a positive urinalysis test in the three months before progression to a C3 or Category 1 security classification.[9]

These criteria apply across all unescorted external leave programs.[10]

15.20 Offenders may only be considered for unescorted external leave programs if their participation in such programs is included in their case plans.[11] The policy identifies the primary candidates for these programs as offenders who are serving a sentence of more than three years whose release on parole will be determined by the State Parole Authority (SPA).[12] When making decisions or providing advice or recommendations about external leave, Corrective Services NSW staff must consider that it will assist an offender successfully reintegrate into the community. Staff must also consider:

- public interest and safety
- public confidence in the administration of criminal justice
- comments and recommendations of the sentencing court
- registered victims, and
- prior breaches of conditions.[13]

15.21 In early 2014, Corrective Services NSW implemented amendments to its unescorted external leave policy. The rationale for these changes was to ensure that access to leave programs is assessed on the basis of risk and benefit, rather than being viewed as an entitlement.[14] Offenders must now have a leave plan that

9. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.5].
10. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.3].
11. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.1 (v1.4, 2014) [20.1.8].
12. We discuss the way SPA takes leave into account in para [4.96]-[4.106].
13. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.3].
14. Information provided by Corrective Services NSW (19 May 2014).

has been approved by the General Manager of the offender's correctional centre, the Serious Offenders Review Council (SORC) (for serious offenders) or SORC's Pre-Release Leave Committee (PRLC) (for public interest inmates). The plan must include all relevant information concerning the offender's leave conditions such as his or her location, sponsor or employer.[15]

15.22 The eligibility criteria and timeframe requirements were also revised. Adult offenders must have a sentence of 24 months or more (previously 12 months for male offenders and six months for female offenders). Day leave can be accessed nine months before, and weekend leave two months before, the end of the non-parole period (previously 18 months before the end of the non-parole period for both programs). Work and education leave can be accessed within the final 18 months of the non-parole period (previously two years).[16]

15.23 Offenders who do not satisfy these criteria may still be considered for participation in particular leave programs where special circumstances exist and participation is considered to be a significant step in an offender's reintegration.[17] To access leave, serious offenders and public interest inmates require the approval of the Commissioner of Corrective Services. The Commissioner must consider recommendations by SORC, or the PRLC in the case of public interest inmates.[18]

Problems accessing unescorted external leave programs

15.24 In submissions, stakeholders reported that some offenders experience difficulty accessing unescorted external leave programs and a lack of participation can result in SPA refusing parole.[19] The Aboriginal Legal Service submitted that a lack of external leave participation is often the only barrier to parole for some offenders.[20]

15.25 The numbers accessing work release in particular appear to be relatively small. As at 29 June 2014, only 83 offenders were participating in work release.[21]

15.26 Lack of unescorted external leave appears to be a particular problem for serious offenders as they spend long periods in custody and SPA and Community Corrections consider external leave to be necessary to mitigate institutionalisation.

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15. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.4].
16. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.5]; ch 20.2 (v1.4, 2013) [20.2.4]. These timeframes also apply to offenders with fixed term sentences. It is not entirely clear how this is consistent with the policy that case plans for offenders with sentences of 12 months or more must include leave (though that policy would also apply to escorted leave).
17. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.5].
18. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.11].
19. NSW, State Parole Authority, *Submission PA19*, 1; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 3; Public Interest Advocacy Centre, *Submission PA23*, 9; Justice Action, *Submission PA28*, 4; NSW Bar Association, *Submission PA31*, 3; Legal Aid NSW, *Submission PA33*, 10; Shopfront Youth Legal Centre, *Submission PA40*, 5; Law Society of NSW, *Submission PA45*, 2.
20. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 3
21. Corrective Services NSW, *Offender Population Report: Week Ending 29 June 2014* (2014) 8.

We reviewed a three month sample[22] of SPA parole refusals and a lack of unescorted external leave participation arose as a significant issue in 12 of the 17 cases concerning serious offenders. This was a problem in only one case concerning a non-serious offender who had spent most of his adult life in custody.

15.27 In the sample, offenders were often ineligible to participate in unescorted external leave programs due to their security classification. SPA also refused to grant parole where the offender had undertaken unescorted external leave but SPA and Community Corrections considered that more was required before the offender would be ready for release. In some cases the failure to participate could be attributed to the offender's poor behaviour in custody. In others, the cause of the delay was difficult to identify.

Policy implementation difficulties

15.28 Serious offenders and public interest inmates sometimes have difficulty obtaining a favourable recommendation from SORC or the approval of the Commissioner of Corrective Services to progress to the lowest security classification or undertake unescorted external leave. SPA submitted that its decision making process would be assisted by the Commissioner providing reasons for classification decisions.[23] Legal Aid NSW submitted that the Commissioner should be required to provide SPA with written reasons where a favourable recommendation from SORC is not followed.[24] SPA also suggested that consideration be given to SORC having the authority to make classification and external leave determinations directly.[25]

15.29 The sponsorship criteria for day and weekend leave were also raised by stakeholders as a barrier to unescorted external leave participation. Some stakeholders suggested that the sponsorship criteria are too restrictive and could be softened.[26] SPA submitted that consideration should be given to allowing day and weekend leave to be undertaken at Community Offender Support Program centres.[27] Other stakeholders suggested that Corrective Services NSW engage with community organisations to provide volunteer sponsors for offenders unable to find someone suitable.[28] The NSW Department of Justice noted in its submission that Corrective Services NSW is considering partnerships with non-government organisations (NGOs) to provide sponsors for offenders to undertake day leave.[29]

15.30 Stakeholders also expressed concern that offenders do not have enough time to complete a sufficient amount of unescorted external leave before SPA considers release on parole. The Aboriginal Legal Service submitted that in many cases this is

22. See Appendix D for more information about our review of parole refusal decisions.
23. NSW, State Parole Authority, *Submission PA19*, 1.
24. Legal Aid NSW, *Submission PA33*, 10.
25. NSW, State Parole Authority, *Submission PA19*, 1.
26. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5; Law Society of NSW, *Submission PA45*, 2.
27. NSW, State Parole Authority, *Submission PA19*, 1.
28. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5; Justice Action, *Submission PA28,* 4; Shopfront Youth Legal Centre, *Submission PA40*, 5; Law Society of NSW, *Submission PA45*, 2.
29. NSW Department of Justice, *Submission PA54*, 8.

caused by delays in an offender being considered for a lower security classification. Some stakeholders suggested that simplifying the security classification system would reduce delay, ensuring that offenders could obtain a low security classification in time to participate in external leave programs.[30] Others submitted that there needs to be more intensive case management of those offenders expected to undertake external leave.[31]

Revised unescorted external leave policy

15.31 Corrective Services NSW's amended leave policy, described earlier at paragraphs 15.21-15.22, has restricted the group of offenders who may be permitted to access unescorted external leave by raising the minimum sentence threshold. It also confines access to these programs to a later stage of an offender's sentence than previously. Delaying unescorted external leave participation to a later stage of an offender's sentence may result in offenders and case management teams deferring administrative arrangements such as finding a suitable sponsor. A delay in the process may result in more offenders not having sufficient time to undertake enough, or any, unescorted external leave before SPA considers parole.

15.32 It is unclear how these changes will help ensure that unescorted external leave is evaluated in terms risk and benefit. Rather it appears that unescorted external leave is still broadly available. In practice, it seems that a lack of unescorted external leave participation is not a significant barrier to parole for non-serious offenders unless they have a significant history of incarceration.

Our view

An improved framework for leave decision making: External leave must have a purpose

15.33 Preparing offenders for release on parole through participation in unescorted external leave programs is an accepted part of correctional practice intended to help reduce rates of parole breach and reoffending. However, it is not necessary for every offender, who is technically eligible, to undertake external leave. It is counterproductive for offenders to remain in custody unnecessarily beyond the end of their non-parole period in order to start or continue unescorted external leave unless there is an objective that needs to be achieved before release on parole. Confining unescorted external leave to those cases where it has a purpose linked to risk management may help to refine the type and amount of external leave an offender is required to undertake.

15.34 Corrective Services NSW's current policy is complex. While it sets out purposes for leave, and some criteria to be mindful of,[32] it does not provide a clear framework for

30. NSW, State Parole Authority, *Submission PA19*, 1; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*¸3; Public Interest Advocacy Centre, *Submission PA23*, 9; NSW Bar Association, *Submission PA31*, 3.
31. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*¸ 3; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5; Legal Aid NSW, *Submission PA33*, 10
32. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.1 (v1.4, 2014) [20.1.4], [20.1.8].

timely decision making about unescorted external leave, or offer clear guidance to assist case management teams identify those cases where unescorted external leave is necessary to prepare an offender for parole and those cases where it is not. Developing a policy framework for assessing unescorted external leave against objectives and outcomes would focus case planning and management and reduce delay.

15.35 In making these statements, we do not intend to restrict access to leave, rather we are articulating reasons why unescorted external leave may or may not be necessary in each case. For those offenders not requiring unescorted external leave, failure to participate should not be a barrier to parole.

Recommendation 15.1: Identify the purpose and objectives of unescorted external leave

(1) Corrective Services NSW should review its unescorted external leave policy with a view to simplifying it, and providing a policy framework that identifies the purpose and objectives of pre-release unescorted external leave programs and the criteria for assessing whether a prisoner should be granted such leave, or more leave, before release on parole.

(2) From early in an offender's sentence, the need for and timing of unescorted external leave should be considered as part of the case plan, but such leave should only be required if needed to address particular identified issues.

Reducing delays for offenders who need to undertake external leave

15.36 In our view there is scope to improve the accessibility of unescorted external leave programs for those offenders who require a structured transition process.

15.37 In Chapter 14, we discuss the complexity of the current security classification and placement system and how it can frustrate case management and the timely completion of programs. In that chapter, we recommend that Corrective Services NSW review its current system of security classification to make it less complicated.[33] The primary purpose of the security classification system is to assist with the management of offenders in custody. For this reason, we consider that the Commissioner of Corrective Services should retain the power to make determinations about classification and pre-release external leave for offenders, including serious offenders. However, simplifying and streamlining the security classification system could help minimise unnecessary delays in security classification progression, providing more time for offenders to undertake unescorted external leave programs.

15.38 Offenders who have spent long periods in custody may have few, if any, supportive friends and family in the community. This can make finding a suitable sponsor for day and weekend leave extremely difficult. We think there is merit in Corrective Services NSW developing partnerships with NGOs to provide volunteer sponsors

33. Recommendation 14.1(4).

for the day leave program to ensure that offenders are not excluded from participating because they cannot fulfil the sponsor requirement.

Recommendation 15.2: Volunteer sponsors for day leave

Corrective Services NSW should develop partnerships with non-government organisations for providing volunteer sponsors for the day leave program.

Transitional centres

15.39 Transitional centres provide an opportunity for offenders serving their non-parole period to move out of custody to a centre that provides access to support services that assist offenders prepare for life in the community.

15.40 There are currently two female only transitional centres run by Corrective Services NSW: Bolwara House Transitional Centre and the Parramatta Transitional Centre. Offenders reside in transitional centres on a s 26 Local Leave Permit and they are eligible to participate in unescorted external leave programs.[34] They may undertake activities in the community such as shopping, family counselling and visiting the doctor with the approval of the manager of the transitional centre.[35]

15.41 Bolwara House opened in 2002. It accommodates up to 16 female offenders with between three and 12 months of their non-parole period or fixed sentence left to serve and a Category 1 or 2 security classification.[36] As at 29 June 2014, it housed 15 offenders.[37] The centre targets Aboriginal women serving long sentences with a history of drug and alcohol problems and reoffending.[38] Residents spend the first four weeks undertaking in-house programs before beginning to access community based programs relevant to the causes of their offending.[39]

15.42 The Parramatta Transitional Centre opened in 1996. It houses 21 female offenders with between six and 18 months of their non-parole period or fixed sentence left to serve and a Category 1 security classification.[40] As at 29 June 2014, there were

34. *Crimes (Administration of Sentences) Act 1999* (NSW) s 26(2)(j); Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.7].
35. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 20.2 (v1.4, 2014) [20.2.7].
36. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.18 (v1.2, 2014) [26.18.3]; NSW Premier's Council on Homelessness, *Homelessness Issues for People Leaving Custody*, Non-Government Members Submission (2012) 35.
37. Corrective Services NSW, *Offender Population Report: Week Ending 29 June 2014* (2014) 2.
38. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.18 (v1.2, 2014) [26.18.3].
39. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.18 (v1.2. 2014) [26.18.2].
40. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.19 (v1.1, 2013) [26.19.3]; NSW Premier's Council on Homelessness, *Homelessness Issues for People Leaving Custody,* Non-Government Members Submission (2012) 35.

14 offenders living in Parramatta Transitional Centre.[41] Corrective Services NSW describes it as a community based centre for offenders "who wish to work intensively on post-release goals".[42] The centre promotes the development of post-release support networks and offenders participate in community based programs relevant to their assessed needs. Women with children may be accommodated when approved by the Mothers' and Children's Committee.[43]

15.43 Corrective Services NSW is also responsible for other residential style accommodation units to assist female offenders reintegrate into the community, including:

- the "Co-existing Disorder Residential Centre" at Cessnock (Miruma) that accommodates female offenders with mental health and drug and alcohol problems. This centre offers a residential alternative to full time custody for eligible offenders. The centre provides supervision; referrals to community agencies including Centrelink, TAFE NSW, Housing NSW and rehabilitation programs and drug and alcohol services; and assistance with life skills to help offenders reintegrate into the community.
- an independent living unit adjacent to Dilwynnia Correctional Centre where female offenders can gradually undertake the transition process through staged participation in external leave programs.[44]

15.44 There are no designated transitional centres for male offenders.

15.45 A 2001 assessment of the Parramatta Transitional Centre found that it has a lower offender cost per day than mainstream correctional centres and a low rate of reoffending, with only one former resident returning to custody within two years of release.[45] A 2011 research bulletin published by Corrective Services NSW found that Bolwara House residents were approximately 30% less likely to reoffend than a matched sample of non-residents.[46]

15.46 Most stakeholders had a positive view of transitional centres and supported increasing their resources and availability.[47] The NSW Department of Justice

41. Corrective Services NSW, *Offender Population Report: Week Ending 29 June 2014* (2014) 2.
42. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.19 (v1.1, 2013) [26.19.2].
43. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* ch 26.19 (v1.1, 2013) [26.19.2].
44. NSW Department of Justice, *Annual Report 2011-12* (2012) 61; NSW Premier's Council on Homelessness, *Homelessness Issues for People Leaving Custody,* Non-Government Members Submission (2012) 34. A second Residential Centre (Biyani at Parramatta) closed in March 2014: Corrective Services NSW, *Offender Population Report: Week Ending 29 June 2014* (2014) 12.
45. Corrective Services NSW, Corporate Development Planning Unit, *Evaluation of the Parramatta Transitional Centre* (2011); NSW Department of Justice, *Submission PA54*, 9.
46. M Kevin, *Corrections Treatment Outcome Study (CTOS) on offenders in drug treatment: Results from the Drug Summit demand reduction residential programs*, Research Bulletin 31 (Corrective Services NSW, 2011) 17, 19; NSW Department of Justice, *Submission PA54*, 9.
47. NSW, State Parole Authority, *Submission PA19*, 2; Women in Prison Advocacy Network, *Submission PA20*, 16; Public Interest Advocacy Centre, *Submission PA23*, 11; Justice Action, *Submission PA28,* 4; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 2; Legal Aid NSW, *Submission PA33*, 10-11; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 7; Mental Health Coordinating Council, *Submission PA37*, 3; Law Society of NSW, *Submission PA45*, 4.

considered that transitional centres provide a link between custody and parole that allows staff to case manage female offenders intensively in the community. The NSW Department of Justice submitted that transitional centres have proven effective at helping offenders to develop community support networks that they can continue to access post-release and this plays a significant role in reducing reoffending.[48] Legal Aid NSW submitted that, anecdotally, fewer offenders appear to return to custody after residing at a transitional centre.[49] Shopfront Youth Legal Centre submitted that it has found transition centres to be "extremely valuable".[50]

15.47 Some stakeholders submitted that there needs to be further evaluation of the effectiveness of these centres before increasing their capacity or creating new centres for a wider range of offenders.[51] However, NSW Young Lawyers noted that assessing the effectiveness of transitional centres is difficult due to the small number of offenders who can access this option.[52] Justice Action and Shopfront Youth Legal Centre also submitted that lengthy waiting lists mean that some offenders are unable to access transitional centres until after the end of their non-parole period, extending their period in custody where SPA considers an offender needs to spend time in a transitional centre before they are released on parole.[53]

Our view

15.48 Transitional centres are set up on the basis that they offer intensive case management and strong community supports to help offenders with complex needs successfully adapt to community life. The accessibility of transitional centres is limited in terms of both the capacity of the existing centres and the absence of centres for male offenders.

15.49 In our view, transitional centres may offer a cost effective means for offenders to undergo a more rigorous transition process that could lower recidivism. Addressing criminogenic needs[54] in a facility that gradually reintroduces an offender to the community and develops strong post-release supports seems likely to reduce reoffending. However, evidence about the effectiveness of transitional centres is limited. As a first step, the performance of existing transition centres should be evaluated for their effectiveness in reducing reoffending. This evaluation should provide a basis for considering whether further groups, including male offenders, could be more effectively managed in this way.

48. NSW Department of Justice, *Submission PA54*, 9.
49. Legal Aid NSW, *Submission PA33*, 11.
50. Shopfront Youth Legal Centre, *Submission PA40*, 5-6.
51. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 6; NSW Bar Association, *Submission PA31*, 4.
52. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 6.
53. Justice Action, *Submission PA28*, 4; Shopfront Youth Legal Centre, *Submission PA40*, 5-6.
54. See para [4.49].

Recommendation 15.3: Further evaluation of existing transitional centres

The NSW Department of Justice should evaluate the effectiveness of Bolwara House and the Parramatta Transitional Centre in reducing reoffending and improving outcomes for participating offenders. The evaluation should be used to identify further opportunities for expanding transition centres for female and male prisoners.

Day reporting centres

15.50 Day reporting centres (DRCs), in the US, are facilities that provide offenders with supervision and access to services to help them reintegrate into the community. These offenders are on parole and will return to normal parole supervision once their DRC referral has expired.

15.51 DRCs are used throughout the US and the detail of how they operate varies from state to state. Generally, offenders referred to a DRC reside in the community and are required to report daily to the DRC for a certain period. Offenders are required to submit to treatment planning based on their assessed needs which can involve education courses, vocational training, and substance abuse programs. The supervision of offenders may entail drug testing, a curfew, community service or compliance with other conditions.

15.52 Research indicates that DRCs may not be an effective model for transitioning offenders from custody to parole. A recent study conducted an experimental evaluation of New Jersey DRCs for parolees at risk of revocation or increased sanctions as a result of technical violations of their parole conditions. The study found outcomes in terms of rates of rearrest and conviction for offenders referred to a DRC are no better, and in some cases are far worse, than those subject to normal parole supervision. This was particularly so for medium and high risk offenders. The authors observed considerable unstructured time in the DRCs. On the other hand, they noted that the length of participation (90 days in the New Jersey DRCs) may not have been sufficient to alter long term offending behaviours.[55]

15.53 DRCs do not help prepare offenders for parole because offenders only access them on release. Offenders are released into the community before they have established links to community based services and DRCs provide structure for the parole period. The vast majority of NSW parolees are subject to supervision as a condition of their parole. This condition requires the parolee to report to their supervising Community Corrections officer as directed and undertake programs, employment and training as instructed.[56] In this context, we cannot see what is gained by requiring some parolees to report to a centre for programming and supervision they already receive. This approach may require a significant infrastructure investment that would be better spent on accommodation and improved case management.

55. D Boyle, and others, "An Evaluation of Day Reporting Centers for Parolees: Outcomes of a Randomized Trial" (2013) 12 *Criminology and Public Policy* 119, 133-136.

56. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 219(2)(b) and (h). For further discussion of supervision as a condition of parole, see para [9.8]-[9.17].

Day parole

15.54 Day parole is a form of conditional release used in Canada. An offender is released for a period (generally during the day) and required to return to mandated residence, such as a correctional centre or a transition centre, at a specified time (generally each night).[57]

15.55 In the Canadian day parole model, eligibility depends on the sentence and the length of time until the offender is eligible for parole.[58] The Canadian Parole Board may grant parole (including day parole) if it is of the view that offenders do not present an "undue risk to society" and their release will contribute to the protection of society by facilitating reintegration.[59] Day parole can only be granted for a period not exceeding six months but may be continued for additional periods of up to six months.[60] When the day parolee reaches full parole eligibility, the Canadian Parole Board must determine if the offender should be released on full parole or if the offender would benefit from an additional period of day parole.[61]

15.56 An evaluation found the Canadian day parole scheme to be an effective form of sentence management that assists offenders to reintegrate into society.[62] There have also been positive descriptive results indicating that offenders who successfully completed day parole had "lower rates of readmission, technical violations, recidivism and violent recidivism after full release".[63]

15.57 In submissions, most stakeholders viewed day parole as beneficial for reintegrating offenders into the community.[64] SPA submitted that day parole allows offenders to demonstrate a capacity to comply with conditional release before being granted full parole.[65] Offenders could use unstructured time to prepare for parole and participate in community life by searching for employment and developing community supports.[66] It could be a useful transition option for offenders who are denied parole due to a lack of suitable accommodation.[67]

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57. *Corrections and Conditional Release Act,* SC 1992 c 20 (Can) s 99(1) definition of "day parole".
58. For the complete eligibility criteria, see *Corrections and Conditional Release Act,* SC 1992 c 20 (Can) s 119; and also Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (2014) Annex A.
59. *Corrections and Conditional Release Act*, SC 1992 c 20 (Can) s 102.
60. *Corrections and Conditional Release Act*, SC 1992 c 20 (Can) s 122(5).
61. Parole Board of Canada, *Decision-Making Policy Manual for Board Members* (2014) [4.1.15].
62. B Grant and M Gal, *Case Management Preparation for Release and Day Parole Outcome*, (Correctional Service of Canada, 1998) vi.
63. B Grant and M Gal, *Case Management Preparation for Release and Day Parole Outcome*, (Correctional Service of Canada, 1998) v.
64. NSW Office of the Director of Public Prosecutions, *Submission PA17*, 1; NSW, State Parole Authority, *Submission PA19*, 3; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 4; NSW Bar Association, *Submission PA31*, 4; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 8; Mental Health Coordinating Council, *Submission PA37*, 3; Shopfront Youth Legal Centre, *Submission PA40*, 6; Law Society of NSW, *Submission PA45,* 3.
65. NSW, State Parole Authority, *Submission PA19*, 3.
66. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 7.
67. NSW Bar Association, *Submission PA31*, 4.

15.58 Some stakeholders expressed concern that a day parole scheme would have only limited benefit in NSW. Legal Aid NSW thought it may divert resources that could be better used on other initiatives such as increasing the number of transitional centres.[68] NSW Young Lawyers noted that the value of day parole would depend on whether the offender's correctional centre was close to where the offender intends to live and work.[69] Several stakeholders also observed the similarities between day parole and existing unescorted external leave schemes.[70] The NSW Department of Justice submitted that it was unclear what benefits a day parole scheme would have in addition to those of pre-release unescorted external leave, especially if day parolees are required to return to custody.[71]

15.59 As day parole is designed to prepare an offender for full parole and release, focusing on social support networks, accommodation and employment, it is best that they undertake day parole in their community.[72] Correctional centres are predominately outside major metropolitan areas and are difficult to access by public transport. A 1998 report on the Canadian scheme found that 96% of day parolees resided at community based residential facilities, which included community correctional centres and privately operated centres. The remaining 4% resided in institutions.[73] However, in NSW there is currently a lack of transitional centres and community based housing options and considerable investment would be required to increase capacity to accommodate day parolees.

15.60 Day parole may result in net widening, particularly if it is used as an option for offenders with unsuitable or unstable accommodation. The Aboriginal Legal Service was concerned that day parole would be viewed as a necessary prerequisite for full parole.[74] In Canada, in 1998, approximately 30% of day parolees were granted day parole before the end of their non-parole period.[75] A day parole system that is used as an alternative to full parole may result in offenders unnecessarily spending more time in custody and, subsequently, a less efficient parole system.

15.61 We agree with the observation of the NSW Department of Justice that a day parole scheme would offer little in addition to existing pre-release unescorted external leave programs, particularly without accommodation options that would allow day parolees to be co-located with their community.

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68. Legal Aid NSW, *Submission PA33*, 11.
69. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 7.
70. Legal Aid NSW, *Submission PA33*, 11; Shopfront Youth Legal Centre, *Submission PA40*, 6; NSW Department of Justice, *Submission PA54*, 10.
71. NSW Department of Justice, *Submission PA54*, 10.
72. W Gibbs, "Day Parole and Halfway Houses in Canada" (2006) International Centre for Criminal Law Reform and Criminal Justice Policy <dspace.cigilibrary.org/jspui/bitstream/123456789/25466/14/Chapter%204-K.pdf> 1.
73. B Grant and M Gal, *Case Management Preparation for Release and Day Parole Outcome*, (Correctional Service of Canada, 1998) iv.
74. Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 4.
75. B Grant and M Gal, *Case Management Preparation for Release and Day Parole Outcome*, (Correctional Service of Canada, 1998) 29.

"Back end" home detention

15.62 Home detention currently operates in NSW as a "front end" scheme, where an offender is sentenced to a term of imprisonment and allowed to serve the duration of that term in home detention. However, it can operate as a "back end" scheme in which an offender is transferred from full time custody to home detention for the final phase of the non-parole period.

Other jurisdictions

15.63 Back end home detention is currently used in SA and England and Wales and, until recently, was used in NZ and Victoria. The operation of back end home detention varies across jurisdictions and it has been implemented with varying levels of success. However, these schemes commonly involve offenders serving most of their non-parole period in full time custody followed by a period on home detention just prior to becoming eligible for release on parole.

15.64 Back end home detention was introduced in SA in 1987[76] and began to operate statewide in 2001.[77] Between 1 July 2013 and 30 June 2014, 254 offenders commenced back end home detention, 297 offenders were discharged from back end home detention to parole, and 18 offenders had their back end home detention orders revoked.[78] On 30 June 2014, 85 offenders were serving a period on back end home detention.[79]

15.65 In England and Wales, most offenders subject to determinate sentences of over 12 months are automatically released on parole after half of their sentence has expired (known as release on licence).[80] The Home Detention Curfew (HDC) scheme commenced in 1999[81] and provides for the release of offenders with determinate sentences up to 135 days before their release on licence, provided they submit to curfew conditions that require them to remain in particular locations and to electronic monitoring.[82] These offenders are subject to the HDC until they are released on parole.[83]

15.66 Victoria had a back end home detention pilot program until 2011, when back end home detention and the sentence of home detention were abolished[84] to "ensure truth in sentencing and restore the community's confidence that jail means jail".[85]

76. *Correctional Services Act Amendment Act 1986* (SA).
77. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 7.
78. SA, Department for Correctional Services, *Annual Report 2012-13* (2013) 142.
79. SA, Department for Correctional Services, *Annual Report 2012-13* (2013) 142.
80. *Criminal Justice Act 2003* (UK) s 244(1), s 244(3)(a).
81. Originally under *Criminal Justice Act 1991* (UK) s 34A and s 37A (now repealed).
82. *Criminal Justice Act 2003* (UK) s 246, s 253.
83. *Criminal Justice Act 2003* (UK) s 253(3).
84. *Sentencing Legislation Amendment (Abolition of Home Detention) Act 2011* (Vic).
85. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 June 2011, 2199.

Concerns were also raised that home detention was having a negative effect on offenders' families, particularly financially.[86]

15.67 NZ cited similar reasoning when it repealed back end home detention.[87] In 2007, back end home detention was replaced with a "residential restrictions" scheme that allows the NZ Parole Board to impose home detention as a parole condition.[88] These amendments followed a recommendation by the NZ Law Commission that back end home detention should only be available after the offender's parole eligibility date, as this was how the scheme was operating in practice. The NZ Law Commission was also concerned that the program offended truth in sentencing.[89]

15.68 Throughout the rest of this chapter, we draw most heavily from the SA experience as this model appears to be the most successful and sustainable.

Previous reviews

15.69 The NSW Legislative Council Standing Committee on Law and Justice conducted an inquiry into the possibility of introducing a back end home detention scheme in NSW in 2005.[90] The Standing Committee recommended that the NSW Government introduce a back end home detention scheme following an evaluation of a pilot program.[91] It specified that back end home detention should not compromise truth in sentencing and recommended that an offender's eligibility be determined by the sentencing court at the time of sentencing (and later reviewed closer to the commencement of the back end home detention period).[92] The Standing Committee found that most of the inquiry's participants supported back end home detention.[93]

15.70 We also considered back end home detention in our 1996 and 2013 reports on sentencing. In 1996 we concluded that NSW should not introduce a back end home detention scheme due to concerns about the offender spending less of the non-parole period in custody and differing stakeholder views about how it should operate.[94] Greater consensus emerged in stakeholder submissions for the 2013 reference. Although we did not make any recommendations concerning back end

86. Victoria, *Parliamentary Debates*, Legislative Assembly, 16 June 2011, 2199.
87. *Parole Amendment Act 2007* (NZ) s 20.
88. *Parole Act 2002* (NZ) s 15(3)(ab), s 33-38.
89. NZ, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006) [199]-[201].
90. The NSW Legislative Council Standing Committee on Law and Justice made its recommendations for back end home detention as part of its report on community based sentencing options: NSW, Legislative Council Standing Committee on Law and Justice, *Back-end home detention* (2005) 2; NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xviii-xix.
91. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) recommendation 40.
92. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) recommendation 44.
93. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) xviii.
94. NSW Law Reform Commission, *Sentencing*, Report 79 (1996) [7.30]-[7.31].

home detention, we considered that the concept warranted further consultation and development.[95]

Stakeholder views

15.71 Stakeholders generally supported the concept of back end home detention.[96] However, there were some concerns about the possible limitations and implementation difficulties of such a scheme. Legal Aid NSW submitted that back end home detention may divert resources away from other transition initiatives while only benefitting a small number of offenders due to the geographic, housing and offence related restrictions of the existing home detention regime.[97] There was also concern that a back end home detention scheme would not benefit homeless offenders and could be difficult for offenders with an intellectual disability.[98] Other stakeholders were opposed to back end home detention as they considered it to place an enormous burden on the families of offenders and could be inappropriate for female offenders who have reported experiencing domestic violence.[99]

15.72 In a submission to our most recent sentencing reference, Corrective Services NSW indicated that it supports a form of back end home detention being introduced as a means of transitioning offenders from custody to the community.[100] The submission supported a Standing Committee on Law and Justice recommendation that the sentencing court should determine an offender's eligibility for back end home detention.[101] Corrective Services NSW proposed that SPA should then assess suitability for back end home detention at the end of the non-parole period, with Corrective Services NSW providing SPA with a report and recommendation.

15.73 In submissions to this reference, some stakeholders supported this proposal.[102] However, NSW Young Lawyers did not favour the sentencing court determining eligibility for back end home detention. They were of the view that SPA, or another entity, should determine eligibility towards the end of the non-parole period as this provides offenders with an opportunity to rehabilitate and have their progress monitored.[103]

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95. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [6.158].
96. NSW Office of the Director of Public Prosecutions, *Submission PA17*, 1; State Parole Authority, *Submission PA19*, 3; NSW Young Lawyers, Criminal Law Committee, *Submission PA21*, 7; Aboriginal Legal Service (NSW/ACT) Ltd, *Submission PA22*, 4; Legal Aid NSW, *Submission PA33*, 11; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 7; Mental Health Coordinating Council, *Submission PA37*, 3; Shopfront Youth Legal Centre, *Submission PA40*, 6; Law Society of NSW, *Submission PA45*, 3.
97. Legal Aid NSW, *Submission PA33*, 11.
98. Public Interest Advocacy Centre, *Submission PA23*, 11; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 7; Shopfront Youth Legal Centre, *Submission PA40*, 6.
99. Women in Prison Advocacy Network, *Submission PA20*, 17; Justice Action, *Submission PA28*, 5.
100. Corrective Services NSW, *Submission SE52*, 4-5.
101. Corrective Services NSW, *Submission SE52*, 5.
102. NSW, Office of the Director of Public Prosecutions, *Submission PA17*, 1; NSW, State Parole Authority, *Submission PA19*, 3; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 3; ; NSW Department of Family and Community Services (Ageing, Disability and Home Care), *Submission PA35*, 7; Law Society of NSW, *Submission PA45*, 3.
103. NSW Young Lawyers, Criminal Law Committee, *Submission PA21*, 7.

Our view

15.74 On balance, we have reached the view that back end home detention offers a cost effective option for gradual transition into the offender's post-release community. A period of back end home detention provides offenders with opportunities to link with employment, training and community based services, and to re-establish family and social support networks, while under more intense supervision than they would experience on parole. The possibility of back end home detention may also provide an incentive for good behaviour and program participation in custody.[104]

15.75 A back end home detention scheme could use the existing supervision framework for the sentence of home detention, which is now available across NSW.[105] We would expect reduced parole breach rates, reduced reoffending and improved family and employment outcomes.[106]

15.76 We acknowledge that back end home detention would likely exclude offenders without stable and suitable housing. It would also be inappropriate where there is a history of domestic violence against potential co-residents. As back end home detainees could be considered prisoners, they may not be eligible for Commonwealth funded services such as Centrelink and Medicare, and may therefore require State provided services. Ideally, the cost savings of a back end home detention scheme would be reinvested in transitional centres and supported, community based housing, allowing these offenders to have the benefit of a structured transition from custody within or near their community. Widening the scheme in this way could allow for further investment in accommodation.

15.77 We recognise that some may see back end home detention as allowing an offender to be out of prison before the expiry of the non-parole period. However, we consider home detention is a significant restriction on personal liberty and retains an element of punishment. Offenders would be confined to their home and subject to monitoring. The availability of home detention for a limited period at the end of a non-parole period offers benefits in assisting transition and reducing reoffending.

15.78 Overall, our view is that an appropriately designed and targeted back end home detention scheme would be a valuable addition to the options available for offenders nearing the end of their non-parole period. It offers a balance of punishment and transition into the community. Access to such a scheme should be tightly controlled and managed. A properly designed and managed back end home detention scheme could be cost effective and assist in reducing reoffending and improving community safety by providing a more graduated transition to the community.

15.79 That said, we have not been able to conduct a cost-benefit assessment of the scheme and we consider that such an assessment is necessary before proceeding.

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104. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [8.18]-[8.19].
105. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [9.26].
106. Melbourne Centre for Criminological Research and Evaluation, *Home Detention in Victoria - Final Evaluation Report*, Report prepared for Corrections Victoria (2006) 75-76 cited in Victoria, Parliamentary Library Research Service, *Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011*, Research Brief No 8 (2011) 7.

As with all policies, a back end home detention scheme should be subject to evaluation after a period of operation.

Recommendation 15.4: Introduction of a back end home detention scheme

Subject to a positive cost-benefit assessment, Corrective Services NSW should introduce a back end home detention scheme based on Recommendations 15.5-15.12. The scheme should be evaluated to ensure it is cost effective and reduces reoffending.

Elements of a back end home detention scheme in NSW

15.80 Although the Standing Committee on Law and Justice recommended introducing back end home detention, its report did not include many detailed recommendations about how such a scheme should look in practice. At a technical level, it is likely that Corrective Services NSW already has the legislative power to implement a back end home detention scheme in NSW through the external leave provisions in the CAS Act.[107] However, in the interests of transparency, we are of the view that it is desirable to develop a separate, legislated model for back end home detention.

Involvement of the sentencing court

15.81 The recommendation of the Standing Committee on Law and Justice that the sentencing court determine eligibility is attractive in that it alleviates, but does not erase, concerns about the integrity of the non-parole period.[108] The Victorian back end home detention scheme allowed the sentencing court to direct that an offender was not entitled to apply for back end home detention.[109]

15.82 However, when an offender is sentenced is not the best time to assess whether he or she should be eligible for back end home detention. The factors comprising that assessment can change considerably during imprisonment. Requiring the sentencing court to undertake an assessment of whether an offender should be eligible for back end home detention could become a burdensome addition to the sentencing process that could involve considering additional reports and subsequent adjournments.

15.83 Determining eligibility at the time of sentencing could permanently exclude offenders who may be able to demonstrate their suitability for back end home detention through good behaviour and program participation. Existing offenders whose eligibility was not considered when they were sentenced would also be barred. It seems counterproductive to exclude these offenders from a program that aims to facilitate rehabilitation and reintegration.

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107. *Crimes (Administration of Sentences) Act 1999* (NSW) s 6, s 26.
108. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) 243, recommendation 44.
109. *Sentencing Act 1991* (Vic) s 14A (repealed).

15.84 Corrective Services NSW suggested that, if the sentencing court determines the eligibility of offenders for back end home detention, SPA should assess their suitability before they are due to commence the back end home detention period. This would be useful in circumstances where offenders have become unsuitable for back end home detention during their imprisonment. However, offenders deemed ineligible by the sentencing court and existing prisoners would still be precluded from accessing back end home detention. It could also be many years before the first eligible offenders have served enough of their non-parole period to commence back end home detention. This would necessitate a delay between the introduction of a back end home detention scheme and it being used to transition offenders from custody to parole.

15.85 We consider that it is impractical for the sentencing court to determine the eligibility of offenders for back end home detention. This approach creates significant constraints in the implementation and availability of a back end home detention scheme that could compromise its effectiveness and efficiency. Concerns about moving offenders from custody to home detention before the end of their non-parole period are understandable as the community generally expects offenders to serve this period in custody. However, as we have already noted, back end home detention is very restrictive and existing decision making frameworks could be extended to a back end home detention scheme rather than involving the sentencing court.

Recommendation 15.5: No involvement for the sentencing court

The sentencing court should not determine the eligibility of offenders for back end home detention at the time of sentencing.

SPA should be the decision maker

15.86 The Commissioner of Corrective Services NSW or a delegate could make the decision to release an offender on back end home detention administratively. In SA, eligible offenders may access back end home detention at the discretion of the Chief Executive of the Department for Corrective Services.[110] Corrective Services NSW already manages schemes for pre-release external leave and thus has a comprehensive decision making framework into which back end home detention could be incorporated, including the role of SORC. This approach is also likely to be quicker as Corrective Services NSW would not have to report to another decision maker.

15.87 On the other hand, SPA decision making offers more transparency and independence, which could generate greater public confidence in the decision making process. This is arguably necessary in a context where offenders would be outside a correctional centre during their non-parole period for a continuous period. The decision to release an offender to back end home detention involves similar considerations to those which apply to releasing an offender to parole. Appointing SPA as the decision maker would provide continuity between back end home detention and parole, allowing offenders who successfully complete back end home

110. *Correctional Services Act 1982* (SA) s 37A.

detention being automatically transitioned to parole. The parole authority was the decision maker in the NZ and Victorian back end home detention schemes.[111]

15.88 For these reasons we consider that SPA is best placed to determine an offender's suitability for back end home detention.

Recommendation 15.6: The State Parole Authority should decide on back end home detention

The State Parole Authority should determine whether an offender can access back end home detention.

Timeframes

15.89 Back end home detention schemes in other jurisdictions have used the length of an offender's non-parole period, the length of time an offender has served in custody and the minimum or maximum length of back end home detention to define when they are able to access the program. However, each has taken a different approach to designing how those timeframes operate.

15.90 The SA scheme links the maximum back end home detention period to the length of the offender's non-parole period and time served. In SA, to be eligible for back end home detention, offenders must serve at least half of their non-parole period and be within the last 12 months of their non-parole period.[112] This means the maximum back end home detention period for offenders with a non-parole period of less than two years varies according to the halfway point of their non-parole period. Those offenders with a non-parole period of two years or more have a maximum back end home detention period of 12 months.

15.91 The England and Wales scheme uses a similar formulation. The HDC program is available to eligible offenders serving a sentence of between three months and four years within the final 135 days before their release on licence.[113] The length of the time an offender must spend in custody and the maximum HDC period varies according to the length of the sentence.[114]

15.92 The NZ scheme simply prescribed a maximum back end home detention period of three months for offenders serving a sentence of two years or more.[115] Offenders serving a sentence of less than two years were only eligible for the front end home detention scheme; although they could apply for home detention at any stage of their sentence provided they had leave to do so from the sentencing court.[116]

111. *Corrections Act 1986* (Vic) s 59 (repealed); *Parole Act 2002* (NZ) s 33 (repealed).
112. *Correctional Services Act 1982* (SA) s 37A.
113. *Criminal Justice Act 2003* (UK) s 246.
114. See HM Prison Service, *Home Detention Curfew*, PSO 6700 (2013) ch 3
115. *Parole Act 2002* (NZ) s 33(2), s 35 (repealed). The Act defined a "long-term sentence" as a determinate sentence of more than 24 months on or after the date of commencement: s 4.
116. *Parole Act 2002* (NZ) s 33(1) (repealed).

15.93 Victoria required an offender to have served two-thirds of their non-parole period and be due for release within six months of the date on which the back end home detention order took effect.[117]

15.94 The sentence of home detention can be onerous and difficult to complete successfully. In contrast to the perception that home detention is a lenient alternative to imprisonment, offenders have reported finding it extremely challenging as it is very restrictive, intrusive and demands a high level of self discipline. Some offenders have reported finding it more difficult than full time custody.[118] Home detention can also be very stressful for the offender's family and co-residents.[119]

15.95 For these reasons, longer periods of home detention have been associated with higher rates of breach and revocation. In 2005, SA restricted back end home detention to the final 12 months of an offender's sentence as experience had shown that the likelihood of breach increased significantly each month after a 12 month period on home detention.[120] The SA Minister for Correctional Services reported to the Standing Committee on Law and Justice that breach rates for offenders who receive home detention for a period exceeding 10 months are higher than those for shorter periods.[121]

15.96 Public confidence in sentence administration means it is important to ensure that offenders spend an appropriate period in full time custody before being moved onto back end home detention. In this sense, the SA design is attractive because the maximum possible back end home detention period is proportionate to the length of the non-parole period for offenders serving shorter sentences. Providing a maximum back end home detention period for offenders serving longer sentences not only ensures that the offender serves a reasonable proportion of their non-parole period in prison but that the back end home detention period is not unduly long.

15.97 In our view, a back end home detention scheme in NSW should be available for eligible offenders after they have served at least half of their non-parole period in full time custody and are within the final 12 months of the non-parole period. In practice, we anticipate that it would be uncommon for an offender to spend longer than six months on back end home detention. However, longer periods may be useful for some highly institutionalised offenders who will require a long transition phase to successfully adapt to the community. Setting the threshold at the halfway point of

117. *Corrections Act 1986* (Vic) s 59(1) (repealed).

118. NSW, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010) 14; NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [7.51]-[7.58]; K Heggie, *Review of the NSW Home Detention Scheme*, Research Publication No 41 (NSW Department of Corrective Services, 1999) 59-86.

119. NSW, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006) [7.63]-[7.71]; K Heggie, *Review of the NSW Home Detention Scheme*, Research Publication No 41 (NSW Department of Corrective Services, 1999) 59-72.

120. SA, *Parliamentary Debates*, Legislative Council, 25 November 2004, 681.

121. T Roberts, Submission No 52 to NSW, Legislative Council Standing Committee on Law and Justice, Inquiry into Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations (2005) 2.

the non-parole period may also make the scheme easier to administer for offenders serving a non-parole period of less than two years.

15.98 We emphasise that back end home detention should only be available as an option during the non-parole period. Extending back end home detention into the parole eligibility period risks significant net widening, and is unnecessary. That said, parole conditions can, if necessary, replicate the main features of home detention.

Recommendation 15.7: Limited timeframes for back end home detention

Back end home detention should be available only when an offender:

(a) is within the final 12 months of the non-parole period, and

(b) has served at least half of the non-parole period.

Eligibility criteria

15.99 Some jurisdictions have provided that certain types of offenders are ineligible for back end home detention. In Victoria, there was an extensive list of offence based exclusions concerning both current and previous convictions that applied to both its front and back end home detention schemes.[122] The England and Wales scheme currently takes a similar approach.[123] The SA legislation does not prescribe that certain offenders are ineligible for back end home detention but it does empower the Minister to determine exclusions for classes of offender.[124] Currently, offenders convicted of homicide, sexual or terrorist offences are ineligible.[125] The NZ scheme did not include offence based exclusions.

15.100 Section 76 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) specifies the offences for which home detention is unavailable as a sentencing option. In our 2013 sentencing report we recommended that the offences that automatically exclude an offender from home detention should be reduced to:

- domestic violence offences committed against a likely co-resident
- murder, and
- offences under Part 3 Divisions 10 and 10A of the *Crimes Act 1900* (NSW) when the victim is under the age of 16 years and the offence carries a maximum penalty of more than 5 years imprisonment.[126]

15.101 It is important to note that, while similar, back end home detention and the sentence of home detention have different purposes and are not targeted toward the same category of offender. Home detention is a sentence that provides an alternative to a

122. *Corrections Act 1986* (Vic) s 60A (now repealed).

123. *Criminal Justice Act 1991* (UK) s 34A(2); *Criminal Justice Act 2003* (UK) s 246(4).

124. *Correctional Services Act 1982* (SA) s 37A(2)(d).

125. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 18; SA, *Parliamentary Debates*, House of Assembly, 30 September 2010, 1531.

126. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) recommendation 9.2.

term of full time imprisonment for low risk offenders. By contrast, back end home detainees may be considered a higher risk to the community due to the nature and seriousness of their offending. However, these offenders have spent a period in custody during which they will have completed programs to reduce their risk of reoffending. Transitional programs are perhaps most important for offenders who have committed serious offences and have been institutionalised by a long period in custody. A highly structured and closely supervised transition from custody to parole could significantly reduce offenders' likelihood of reoffending and it would be counterproductive to exclude them entirely from a back end home detention scheme.

15.102 Rather than being an option that diverts offenders from custody, it is more appropriate to view back end home detention as an option for offender management. It is therefore not appropriate simply to extend the offence based exclusions that exist for front end home detention to a back end home detention scheme. In our view, SPA should take into consideration the nature and circumstances of the offender's offending, guided by reports from Community Corrections and SORC. Such an approach would retain the incentive value of back end home detention and ensure that decisions reflect the risk particular offenders present to the community.

Recommendation 15.8: No offence based exclusions for back end home detention

A back end home detention scheme should not include any offence based exclusions.

Initiating consideration for back end home detention

15.103 The consideration process for eligible offenders could be initiated by an offender applying to SPA. This was the process used in Victoria's back end home detention scheme.[127] In SA, offenders receive a notification letter and their case officer confirms their intentions and eligibility before making an application.[128] The NZ scheme employed a similar approach.[129] Alternatively, Corrective Services NSW could initiate the process by integrating back end home detention into an offender's case plan (similar to that currently used for external leave) and referring eligible offenders to SPA for consideration at the appropriate time.

15.104 A consideration process initiated by an offender's application to SPA without proper management would be burdensome, resource intensive and wasteful. A process driven by case officers and case planning would minimise the number of inappropriate candidates to be considered for back end home detention. It would ensure that offenders are aware of their eligibility from an early stage of their sentence, enabling them to demonstrate their suitability and make any necessary

127. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 21.
128. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 24.
129. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 28.

arrangements for back end home detention. This type of process would be particularly useful in a scheme for offenders with shorter sentences as time is limited. The appropriate length of the back end home detention period could also be considered during the case planning process. It would also reinforce that back end home detention is a tool in the management of an offender's imprisonment that should work together with other programs. No offender is entitled to access back end home detention.

Recommendation 15.9: Include back end home detention in the case plan

Corrective Services NSW should initiate consideration of back end home detention through the case plan process.

Transition from back end home detention to parole

15.105 Positioning a back end home detention scheme towards the end of an offender's non-parole period would help offset any net widening effect which might otherwise result in a more restrictive release process. It is important that back end home detention is not viewed as an additional step that needs to be completed before an offender is considered suitable for parole. Back end home detention should have more structure and a higher level of supervision than parole. It should be viewed primarily as a way of preparing offenders for life in the community to reduce their likelihood of reoffending. While back end home detention has the added benefit of testing an offender's suitability for parole, there is the risk of such a scheme being used as an alternative to parole rather than an alternative to full time custody. This would be counterproductive.

15.106 In this context, there needs to be provision for an efficient transition from back end home detention to parole. In the Victorian scheme, the parole authority made an order for back end home detention and parole at the same point in the decision making process.[130] England and Wales also appears to use a process that automatically releases offenders.[131] In contrast, offenders on back end home detention in NZ had to apply to the NZ Parole Board before being granted parole. Similarly, in SA, as the decision to grant back end home detention is made by Chief Executive of the SA Department for Correctional Services, the parole determination takes place at a later stage. However, we understand that as part of the back end home detention decision making process, officers from the Department will liaise with the parole authority to ensure that back end home detention is only granted to those offenders the authority considers suitable for parole.[132]

15.107 In our view, it would be most effective for offenders who have successfully completed back end home detention to move automatically to parole once their back end home detention period is complete. For offenders serving a head sentence of three years or less, this would involve court based (or statutory) parole

130. M Henderson, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006) 18; SA, *Parliamentary Debates*, House of Assembly, 30 September 2010, 21.

131. *Criminal Justice Act 1991* (UK) s 33(1)(a); *Criminal Justice Act 2003* (UK) s 244(1).

132. Information provided by Corrective Services NSW (3 July 2014).

continuing to operate, meaning back end home detainees would be granted parole at the end of their non-parole period unless SPA decided to revoke the order prior to release. For offenders with a head sentence of more than three years, SPA could make a parole order (to take effect at the end of the non-parole period) when it decides to grant back end home detention. This approach would minimise the administrative burden of a back end home detention scheme.

Recommendation 15.10: Automatic transition to parole for back end home detainees

(1) Back end home detention should not affect the release date for those offenders subject to statutory (or court based) parole.

(2) For offenders with a head sentence of more than three years, the State Parole Authority should have the power to make a back end home detention order and a parole order at the same time. The parole order should take effect at the end of the offender's non-parole period.

Conditions, breach and revocation

15.108 We consider that back end home detention should be subject to the same standard conditions as the sentence of home detention.[133] Although back end home detainees will have reduced their risk to the community by undertaking in-custody programs, there is still risk and the standard conditions are aimed at managing that risk. Having two sets of conditions could be confusing and difficult to implement. SPA should be able to impose such additional conditions as it considers necessary.

15.109 There will always be instances where an offender commits a breach of their back end home detention conditions. However, some breaches will not be serious enough to necessitate SPA revoking back end home detention. Less serious breaches could be more appropriately managed by issuing a formal warning or by imposing more stringent back end home detention conditions. Any ongoing risk continuing into the parole period could be handled with stricter parole conditions electronic monitoring or a curfew, rather than by revoking parole or extending the back end home detention order.

15.110 It is unlikely that there will be circumstances in which SPA would decide to revoke a back end home detention order and not wish to revoke the parole order as well (although it may happen and should not be precluded). Therefore, SPA should have power to revoke parole at the same time as revoking a back end home detention order. This approach would require an amendment to SPA's power to revoke statutory parole before the end of the non-parole period in the case of offenders with a head sentence of three years or less.[134] Parole reconsideration in such cases would be more efficient if SPA had the discretion, as we propose, to override the 12 month rule and reconsider the offender for parole at a time it believes is appropriate.[135] This is an arbitrary threshold and is not appropriate in all cases,

133. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 190.

134. See para [3.18]-[3.59] and Recommendation 3.2.

135. See Recommendation 12.1.

particularly where an offender has made serious efforts to rehabilitate and reintegrate despite having committed a serious breach.

Recommendation 15.11: Breach and revocation of back end home detention

(1) Back end home detention should be subject to the same standard conditions as are currently prescribed for the sentence of home detention.

(2) In addition to the amendments in Recommendation 3.2, the State Parole Authority's power to revoke statutory parole before an offender is paroled (currently contained in the *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222) should include a power to revoke statutory parole if it has revoked a back end home detention order.

(3) When the Authority revokes a back end home detention order in respect of an offender with a head sentence of more than three years, the Authority should also be authorised to revoke the existing (but not yet commenced) parole order.

Number of opportunities to access back end home detention

15.111 We are of the view that in cases where SPA initially refuses or later revokes back end home detention, those offenders should remain eligible to access back end home detention for any remaining segment of the non-parole period. Back end home detention aims to prepare offenders for release on parole. In this context, it makes little sense to restrict the number of opportunities offenders may have to access back end home detention within the relevant portion of the non-parole period. Corrective Services NSW could manage any subsequent opportunities for an offender to access back end home detention. Incorporating back end home detention into an offender's case plan effectively restricts the pool of eligible offenders such that unlimited opportunities are unlikely to impose a significant additional burden on SPA's work load.

Recommendation 15.12: No restriction on the number of back end home detention considerations

No statutory restrictions should be placed on the number of times an offender can be considered for, or access, back end home detention within the relevant portion of the non-parole period.

16. The problem of short sentences

In brief

A significant number of offenders serve short sentences of imprisonment. A lack of pre- and post-release case management and support can contribute to poor outcomes for these offenders after their release. The most effective strategy for dealing with this problem is to reduce the number of offenders serving short prison sentences by strengthening community based custodial sentencing options and increasing the courts' awareness of the problems caused by short sentences.

16.1 Parole is of limited value for offenders who spend short periods as sentenced prisoners. Some of these offenders will spend no time on parole, while others will spend only a short period on parole. The lack of time available for Community Corrections to work with these offenders means parole is not an effective way of reintegrating them into the community. Because there is little effective difference between short sentences with a parole period and short sentences without a parole period, we are considering short sentences of imprisonment whether or not they include parole periods. This chapter, therefore, considers how to reintegrate offenders into the community, thereby reducing their risk of reoffending, without effective supervised release on parole.

16.2 In our recent report on *Sentencing,* we considered the issue of short sentences of imprisonment. In that report we noted:

> Short sentences of imprisonment (normally defined as six months or less) have a number of problems, including:
>
> - they provide limited opportunity for Corrective Services NSW to work with the offender while in prison;
> - they preclude the offender from receiving the kind of supervision on release into the community that might assist his or her reintegration;
> - they can cause a significant disruption in employment, and family and support relationships, including the loss of public housing, without providing any significant degree of community protection or any opportunity for rehabilitative programs;

- they can expose a first offender to undesirable influences that can set the person on the path of further offending.

In some situations, in spite of these disadvantages, courts feel obliged, through lack of other options, to impose a short term of imprisonment because of the need for punishment, denunciation and general deterrence. Some jurisdictions including WA have abolished short sentences of imprisonment.[1]

16.3 We considered and rejected a recommendation to abolish fixed terms of imprisonment of six months or less.[2] Instead we recommended a new Community Detention Order, a custodial sentence served in the community that combines punitive and rehabilitative elements.[3] In this chapter, we look at the issue from the perspective of parole and how the objectives of parole may be effectively achieved for offenders serving short sentences of imprisonment.

Offenders who spend short periods as sentenced prisoners

16.4 When they are sentenced, offenders may have less than six months to serve in prison because:

- they were sentenced to a fixed term of six months or less
- they received a non-parole period of six months or less, or
- they received a longer sentence that was backdated to account for time spent on remand.

16.5 The sentencing court must impose a fixed term if the head sentence is six months or less, meaning these offenders will spend no time on parole.[4] In 2013, 2534 offenders convicted in NSW adult courts received a head sentence of full time imprisonment of six months or less and 1567 were sentenced to three months or less.[5]

16.6 While the proportion of offenders receiving a short fixed term sentence has steadily declined over the past decade, the proportion of offenders receiving a non-parole period of six months or less has increased over the same period.[6] In 2013, 2920 offenders convicted in NSW adult courts received a non-parole period of six months or less[7] and 1190 offenders released on parole spent 91 to 180 days (three to six months) in custody.[8]

1. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [6.96]-[6.97].
2. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) recommendation 6.8. We also recommended that a new Act continue to exclude non-parole periods for head sentences of imprisonment of six months or less: recommendation 6.9.
3. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 11.
4. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 46.
5. NSW Bureau of Crime Statistics and Research (unpublished data, ref: Dg14/12433HcLc).
6. NSW Law Reform Commission, *Sentencing – Patterns and Statistics*, Report 139-A (2013) 30.
7. NSW Bureau of Crime Statistics and Research (unpublished data, ref: Dg14/12433HcLc).
8. NSW Bureau of Crime Statistics and Research (unpublished data, ref: 14-12494).

How these prisoners are managed

16.7 Corrective Services NSW must generally create an initial case plan for inmates as soon as possible after they are convicted.[9] This obligation does not apply to offenders serving fixed terms or non-parole periods of six months or less, although the Commissioner may prepare a plan for providing services and programs for these offenders.[10] For offenders without a case plan, custodial officers and staff will generally identify any immediate risks and needs and make referrals to relevant services during the reception, screening, induction and classification process.[11] Offenders serving less than six months in custody are also provided with a booklet - *Planning Your Release: NSW Exit Checklist* - which is the principal guide for their transition back into the community.[12]

16.8 Short sentences do not provide enough time for offenders to participate in pre-release programs that address their criminogenic needs.[13] For many of these offenders, it will be impossible for Corrective Services NSW to develop and implement a case plan in the time available, although there may be sufficient time to create a case plan that focuses on the offender's immediate transition needs.

16.9 Sentenced offenders with a non-parole period are assigned a Community Corrections officer who helps them make practical arrangements prior to their release, particularly with housing. While these offenders are on parole a Community Corrections officer helps them access services. However, this is of limited assistance where the time spent on parole is minimal. Many offenders with short sentences effectively have to manage their own transition into the community. This can be particularly difficult for offenders with few community supports and some offenders have reported experiencing difficulty accessing pre-release information and assistance.[14]

16.10 Post-release planning and ongoing support can also be complicated when offenders who have been remanded receive a backdated sentence resulting in an unexpectedly short period of imprisonment before release. Some of these offenders may end up spending quite long periods in custody but only short periods as sentenced prisoners. In 2012/13, 51.5% of remand receptions involved over 30 days on remand.[15] Spending a short period as a sentenced prisoner makes it

9. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 15(1).
10. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 15(2), cl 60(4).
11. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* (2013) [7.1.3]. [13.1.3].
12. Corrective Services NSW, *Offender Classification and Case Management Policy and Procedures Manual* (2013) [7.2.3].
13. L Schetzer and StreetCare, *Beyond the Prison Gates: The experiences of people recently released from prison into homelessness and housing crisis* (Public Interest Advocacy Centre, 2013) 23-4; M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report of the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 179. On "criminogenic needs", see para [4.49].
14. E Baldry and others, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?* Report No 46 (Australian Housing and Urban Research Institute, 2003) 24; L Schetzer and StreetCare, *Beyond the Prison Gates: The experiences of people recently released from prison into homelessness and housing crisis* (Public Interest Advocacy Centre, 2013) 19-23.
15. Auditor-General of NSW, *NSW Auditor-General's Report: Financial Audit Volume Six Focusing on Law, Order and Emergency Services* (Audit Office of NSW, 2013) 20.

challenging for offenders to secure accommodation and other supports in advance of their release.[16] Corrective Services NSW is not required to develop case plans for prisoners who have not yet been sentenced. Prisoners on remand are generally not able to access programs and other in-custody rehabilitative services. If these offenders then have less than six months to serve as sentenced prisoners, they will not get a case plan or be able to undertake a program before they are released.

16.11 Offenders who receive a head sentence of more than three years but serve less than six months as sentenced prisoners will still be considered for parole by the State Parole Authority (SPA). However, SPA may refuse parole due to a lack of program participation. In our review of a sample of 97 of SPA's parole refusal decisions, we found four cases that explicitly referred to this issue. However, we suspect it may also have been a problem in other cases where the offender had a shorter non-parole period and had not completed a program in time.[17]

Outcomes for prisoners

16.12 Overall it seems that prisoners with longer periods of imprisonment experience better outcomes when they are released.[18] Stakeholders submitted that the lack of transition support experienced by offenders with short sentences exacerbates their potential to reoffend.[19] A recent Bureau of Crime Statistics and Research study found that parolees who spent less than 180 days (around six months) in prison were more likely to reoffend on parole than those who had spent a longer period in custody, even after other relevant variables were taken into account.[20] Offenders who have reported finding support helpful appear to be less likely to reoffend and return to prison.[21] Without sufficient support, offenders with short sentences can fall into a cycle of release and rearrest that becomes increasingly difficult to break.[22]

Options for reform

16.13 The limited time available for Corrective Services NSW to work with offenders serving short sentences is a considerable obstacle to minimising their risk of reoffending. However, significant benefits to offenders and the community could be

16. L Schetzer and StreetCare, *Beyond the Prison Gates: The experiences of people recently released from prison into homelessness and housing crisis* (Public Interest Advocacy Centre, 2013) 78.
17. See Appendix D for more information about our review of parole refusal decisions.
18. M Willis, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report of the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004) 179.
19. NSW, State Parole Authority, *Submission PA19*, 2; Public Interest Advocacy Centre, *Submission PA23*, 9; NSW Department of Justice, *Submission PA32*, 5.
20. D Weatherburn and C Ringland, *Re-offending on parole*, Crime and Justice Bulletin No 178 (NSW Bureau of Crime Statistics and Research, 2014) 8.
21. E Baldry and others, *Ex-prisoners and accommodation: what bearing do different forms of housing have on social reintegration?* Report No 46 (Australian Housing and Urban Research Institute, 2003) 15-6.
22. M Borzycki and E Baldry, *Promoting Integration: The Provision of Prisoner Post-release Services* Trends and Issues in Crime and Criminal Justice No 263 (Australian Institute of Criminology, 2003) 2.

achieved by developing strategies that link offenders with services that aid their reintegration into the community and by increasing the use of community based sentences.

Implementing sentencing reforms

16.14 Short sentences are imposed for a range of reasons, but often because alternative options are limited or unavailable in the particular case or in the particular region. Our 2013 sentencing report also examined the limitations of current custodial and non-custodial community based options, and recommended a new suite of sentencing options including a Community Detention Order. This order includes punitive and rehabilitative elements, and (similar to home detention and intensive correction orders) allows breaches to be dealt with by SPA. Providing courts with improved community based sentencing options as a substitute for short sentences is, in our view, the best way of reducing the use of short sentences and the problems they create.

Strengthened case planning

16.15 Stronger community based sentencing options would not remove the need for short sentences of imprisonment and they would inevitably continue to be used in appropriate cases. Providing a greater level of case planning and management for offenders serving short sentences could assist with their reintegration.

16.16 Several stakeholders submitted that case planning should start when an offender first enters custody, rather than when the offender becomes a sentenced prisoner.[23] This would mean that case plans could be developed and implemented for prisoners on remand. The Aboriginal Legal Service and the NSW Bar Association suggested that offenders with only short periods in custody under sentence should receive intensive support that focuses on referrals and linkages to community based government and non-government services.[24] Some stakeholders also submitted that programs and services should be adapted so that offenders who only spend short periods in custody are still able to access education, vocational training, work and rehabilitation programs.[25] The NSW Department of Family and Community Services noted that many offenders, particularly offenders with cognitive

23. NSW Bar Association, *Submission PA31*, 2; NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA36*, 4; Women in Prison Advocacy Network, *Submission PA20*, 16; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 3; Australian Community Support Organisation, *Submission PA27*, 4; Justice Action, *Submission PA28*, 3.
24. Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 3; NSW Bar Association, *Submission PA31*, 3.
25. Australian Community Support Organisation, *Submission PA27*, 6; NSW, State Parole Authority, *Submission PA19*, 2; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 5; Aboriginal Legal Service (NSW/ACT), *Submission PA22*, 3; Police Association of NSW, *Submission PA25*, 10; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA30*, 2; Legal Aid NSW, *Submission PA33*, 9.

impairments, experience multiple short episodes in custody but currently these are not linked or managed holistically.[26]

16.17 The NSW Department of Justice reported that Corrective Services NSW is developing a new case management model to be implemented throughout 2014-15.[27] This will include strategies for expanding assistance for offenders serving short sentences. Corrective Services NSW is also considering developing partnerships with government and non-government agencies to provide services for high risk offenders serving short sentences. The Department noted that there was scope to improve the standardisation of programs so that offenders could complete programs commenced in custody after they are released into the community.[28]

16.18 We agree with stakeholders that it would be beneficial for Corrective Services NSW to develop a case management approach for offenders serving short sentences that better develops connections between offenders and community based services. There is also merit in attempting to coordinate in-custody programs with those available in the community. However it is difficult to see how any meaningful interventions could be extended to prisoners on remand without significant practical problems, because of the unpredictable length of remand periods. The new case management model being developed and implemented by Corrective Services NSW may help provide greater assistance to offenders with short sentences. However, as this model is very new it is difficult to assess its effectiveness or evaluate whether there is anything more that can be done.

Retaining links to community based services

16.19 When a short period of imprisonment disconnects the links between offenders and community based services, it may take some time to re-establish these links fully. Rather than severing an offender's relationship with Housing NSW, NSW Health and other agencies, they could remain on a "suspension" caseload during their time in custody. This would mean that an offender's file remains allocated to an officer of that agency and is transferred between that agency's officers as the offender moves between correctional centres. Agencies could then be notified when the offender is released. It may be possible for the NSW Government to reach agreement with the Commonwealth Government to extend this approach to services such as those provided by Centrelink and the National Disability Insurance Scheme.

16.20 There is little sense in disrupting the relationship between offenders serving short sentences and community based services only to have to re-establish that relationship when they are released a few months later. Maintaining such relationships would only concern offenders with established community supports and therefore may not be widely applicable. However, avoiding the cycle of disrupting and re-establishing these services could be highly effective for those offenders. Therefore, we consider that the viability of such a model warrants further

26. NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA6*, 6.
27. NSW Department of Justice, *Submission PA54*, 1, 7; Information provided by Corrective Services NSW (15 April 2015).
28. NSW Department of Justice, *Submission PA54*, 7.

analysis by a working group comprising representatives from Corrective Services NSW and relevant service providers including Housing NSW, NSW Department of Family and Community Services (Ageing, Disability and Home Care), NSW Health and non-government organisations.

Recommendation 16.1: Working group on services for offenders who serve short sentences of imprisonment

A working group should be established to investigate the viability of a system for maintaining connections between offenders who serve short sentences of imprisonment and service providers in the community. The working group should include representatives of Corrective Services NSW and government and non-government service providers covering housing, health, mental health, and disability services.

New awareness program

16.21 The problems Corrective Services NSW faces in administering short sentences, and the extent to which these can frustrate the reintegration of offenders into the community, may not be readily apparent to others. Increasing the awareness of the limitations of short sentences of imprisonment could, for example, encourage the courts to impose community based sentences in appropriate cases. Such information could help practitioners to make submissions and courts to assess if a short sentence is the most appropriate punishment, particularly in cases where rehabilitation is a significant consideration. At the same time, it would be useful to enhance Corrective Services NSW's understanding of how courts approach the sentencing exercise.

16.22 A program could be devised between Corrective Services NSW, SPA and the Judicial Commission to develop a greater understanding of sentencing and sentence administration among participants in the criminal justice system. SPA has expertise in both sentence administration and sentencing practice that the Judicial Commission could use as part of its ongoing professional development program.

Recommendation 16.2: Sentence administration awareness program

Corrective Services NSW, the State Parole Authority and the Judicial Commission of NSW should develop a program to build the awareness of participants in the criminal justice system about sentencing practice and sentence administration, with a particular emphasis on the issues associated with short sentences of imprisonment.

17. Parole for young offenders

In brief

There is general agreement that young people should be treated differently in the criminal justice system. There should therefore be a separate parole system for young offenders set out in the *Children (Criminal Proceedings) Act 1987* (NSW) that would allow a simpler regime with tailored features appropriate to young offenders. The provisions should be drafted in a way that reflects the different focus of the juvenile parole system. It should allow the system to be flexible, less formal and technical, more responsive and transparent and give the Children's Court greater discretion. Within this general approach, we make some specific recommendations about the content of a separate juvenile parole system.

Young offenders in the criminal justice system

17.1 Young offenders are different to adult offenders in significant ways. In our 2005 report on sentencing for young offenders, we outlined the historical development of separate juvenile justice measures in NSW.[1] This development has culminated in a separate juvenile justice system in which:

- the Children's Court (rather than the adult courts) generally deals with young offenders
- there is an emphasis under the *Young Offenders Act 1997* (NSW) on diversion of young offenders from traditional criminal processes
- different criminal procedure rules and sentencing options apply to young offenders under the *Children (Criminal Proceedings) Act 1987* (NSW) (the CCP Act), and
- Juvenile Justice NSW, a specialist correctional agency separate from Corrective Services NSW, generally manages young offenders in custody and the community.

17.2 The juvenile parole system is, accordingly, separate from the adult parole system with features specifically tailored to young offenders. All stakeholders supported a separate juvenile parole system that would ensure the different treatment of young offenders.[2] We support a separate parole system for young offenders under 18 years, and in this chapter make recommendations to improve it.

The basis for treating young people differently: evidence and stakeholder views

17.3 Current research confirms that adolescence is a period of cognitive development where a young person's decision making, risk taking and impulse control may be significantly different from that of an adult.[3] Due to their immaturity and reliance on peer networks, young people are more at risk of a range of problems that are linked to offending, including mental illness, alcohol and drug dependency and peer pressure.[4]

17.4 The inexperience, immaturity and vulnerability of young people and the need to recognise their developmental stages was a particular theme in stakeholder

1. NSW Law Reform Commission, *Young Offenders*, Report 104 (2005) ch 2.
2. NSW Bar Association, *Submission PA31*, 14-15; Juvenile Justice NSW, *Submission PA48,* 1-2; NSW Health (Justice Health and Forensic Mental Health Network), *Submission PA36*, 1; NSW Department of Family and Community Services, *Submission PA38*, 4-5; NSW, State Parole Authority, *Submission PA39*, 1; Shopfront Youth Legal Centre, *Submission PA42*, 1; Corrective Services NSW, *Submission PA49*, 1; Law Society of NSW, *Submission PA46*, 1; Justice Action, *Submission PA47,* 1; Children's Court of NSW, *Submission PA43*, 1; Legal Aid NSW, *Submission PA51*, 3; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 1.
3. NSW Department of Education and Communities, "Closed for Construction – Adolescent Brain Development in the Middle Years" <www.curriculumsupport.education.nsw.gov.au/secondary/pdhpe/prolearn/reading/pr_013.htm>.
4. K Richards, *What Makes Juvenile Offenders Different From Adult Offenders?* Trends and Issues in Crime and Criminal Justice No 409 (Australian Institute of Criminology, 2011) 4.

comments.[5] For many stakeholders, this requires a particularly strong focus on rehabilitation in parole decision making.

17.5 Juvenile Justice NSW noted that there is evidence that frontal lobe development does not culminate until the early to mid-twenties, which means young people exhibit behavioural and emotional shortfalls compared to adults. Young people have less capacity for forward planning, delaying gratification and regulating impulses.[6] Legal Aid NSW submitted that the changes experienced by young people in adolescence have significant implications in the context of the criminal justice system.[7] When developing criminal law policy and legislation, "adolescents should be recognised as being situated within their developmental context, including the family, school, community and society and there should be recognition of their potential for change, the interdependence in these changes and the reciprocal nature of the relations."[8]

17.6 The Children's Court submitted that offenders often exhibit characteristics such as lack of maturity, propensity to take risks and susceptibility to peer influence. The Children's Court noted that common law principles support this,[9] specifically the comment in *R v GDP* taken from *R v Wilcox* that "in the case of a youthful offender… considerations of punishment and of general deterrence of others may properly be largely discarded in favour of individualised treatment of the offender, directed to his rehabilitation."[10]

17.7 Crimes are committed disproportionately by young people. In 2011-12 in NSW, offending rates were second highest in the 15-19 age bracket at 3715.8 per 100 000 and peaked in the 20-24 age bracket at 3876.8 per 100 000. Offending rates across all age brackets were much lower at 1496.7 per 100 000.[11] Young people are also disproportionately the victims of crime. In 2012 in NSW, victimisation rates for assault were highest in the 15-19 age bracket at 2050.5 per 100 000 compared to an overall victimisation rate of 943.0 per 100 000.[12]

17.8 Young offenders in custody are likely to have higher levels of need than adults in several ways. The *2009 Young People in Custody Health Survey* found that 27% of young offenders in detention had been placed in out of home care before the age of 16.[13] Overall, 78% of young people in custody were found to have hazardous or harmful patterns of alcohol consumption, 23% had previously received treatment for

5. Juvenile Justice NSW, *Submission PA48*, 1; Shopfront Youth Legal Centre, *Submission PA42*, 1; Law Society of NSW, *Submission PA46*, 1; Children's Court of NSW, *Submission PA43*, 1, NSW Department of Family and Community Services, *Submission PA38*, 5; Justice Action, *Submission PA47*, 1.
6. Juvenile Justice NSW, *Submission PA48*, 1.
7. Legal Aid NSW, *Submission PA51*, 3.
8. S M Dennison, "Developmental and Life-Course Criminology-Theories, Research and Policy Implications" in A Stewart, T Allard, S Dennison (ed), *Evidence Based Policy and Practice in Youth Justice* (Federation Press, 2011) 48.
9. Children's Court of NSW, *Submission PA43*, 1.
10. *R v GDP* (1991) 53 A Crim R 112, 116; *R v Wilcox* (Unreported, NSWSC, 15 August 1979).
11. Australian Bureau of Statistics, ABS 4519.0 *Recorded Crime – Offenders* (2012).
12. Australian Bureau of Statistics, ABS 4510.0 *Recorded Crime – Victims, Australia* (2012).
13. D Indig and others, *2009 Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice NSW, 2011) 32.

a drug or alcohol problem and 87% had at least one psychological disorder.[14] The young detainees each had an average of 3.3 past or present psychological disorders.[15] Young people in detention are also more likely to have a cognitive impairment than adults in custody.[16]

17.9 As several stakeholders emphasised,[17] different treatment for young offenders reflects the principles in the *United Nations Convention on the Rights of the Child*, which Australia ratified in 1990, and the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (the Beijing Rules). The United Nations Committee on the Rights of the Child has adopted the Beijing Rules as filling out the detail of obligations under the *United Nations Convention on the Rights of the Child*.[18] The Beijing Rules state that "the young, owing to their early stage of human development, require particular care and assistance with regard to physical, mental and social development".[19]

17.10 Rule 28 of the Beijing Rules specifies that parole for juveniles "shall be used to the greatest possible extent, and shall be granted at the earliest possible time".[20] The UN's *Standard Minimum Rules for the Treatment of Prisoners*, which apply to adults, contain no such stipulation.[21] This difference implies that jurisdictions are expected to treat the parole of juveniles differently from the parole of adults.

17.11 Stakeholders submitted that it is important for parole decisions to be made and parole to be supervised by people with specialist expertise in dealing with young offenders and an awareness of development needs and issues affecting young offenders.[22] Stakeholders also noted that a separate juvenile parole system would minimise contact between young offenders and adult offenders during which young offenders may be susceptible to the influence of adult offenders whose criminal tendencies are likely to be more entrenched.[23]

17.12 Australian jurisdictions vary in the extent to which they provide a separate parole system for young offenders (we provide an outline of juvenile parole systems in

14. D Indig and others, *2009 Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice NSW, 2011) 130, 142, 145.
15. D Indig and others, *2009 Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice NSW, 2011) 144.
16. K Richards, *What Makes Juvenile Offenders Different From Adult Offenders?* Trends and Issues in Crime and Criminal Justice No 409 (Australian Institute of Criminology, 2011) 4.
17. Law Society of NSW, *Submission PA46*, 1; Juvenile Justice NSW, *Submission PA48*, 2; Shopfront Youth Legal Centre, *Submission PA42*, 1; Legal Aid NSW, *Submission PA51*, 3.
18. M Wilkie and C Sidoti, *Sentencing Juvenile Offenders*, Human Rights Brief No 2 (Australian Human Rights Commission, 1999).
19. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985) preamble.
20. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985) r 28.
21. Compare *United Nations Standard Minimum Rules for the Treatment of Prisoners,* GA Res 3144, UN GAOR, UN DOC A/9425 (1973) r 60(2).
22. Shopfront Youth Legal Centre, *Submission PA42*, 1; NSW Department of Family and Community Services, *Submission PA38*, 4-5; Corrective Services NSW, *Submission PA49*, 1; Law Society of NSW, *Submission PA46*, 1.
23. Children's Court of NSW, *Submission PA43*, 1; Corrective Services NSW, *Submission PA49*, 1.

other Australian jurisdictions in Appendix E). Victoria, WA, SA, Queensland and Tasmania have established juvenile parole systems which are separate from their main adult parole systems by enacting parole legislation specifically applicable to young offenders.[24] The NT and the ACT do not have separate juvenile parole systems. Their adult parole systems apply to all offenders regardless of age.

The current juvenile parole system

17.13 In NSW, while there is a separate juvenile parole system, the legislative framework governing the juvenile parole system is the same as that for adults. The *Children (Detention Centres) Act 1987* (NSW) (CDC Act) provides that the relevant provisions of the *Crimes (Administration of Sentences) Act 1999* (NSW) (CAS Act) apply to juveniles, except:

- references in the CAS Act to the State Parole Authority (SPA) are taken to be references to the Children's Court, so the Children's Court is the parole decision maker and has the same powers as SPA,[25] and
- the Secretary of the NSW Department of Justice exercises the powers of the Commissioner of Corrective Services in making submissions about the parole of a young offender.[26]

17.14 As a result, the legislative structure of the juvenile parole system in NSW is almost identical to that of the adult parole system.

17.15 What makes the system different is that the Children's Court is the parole authority and makes the parole decisions, and Juvenile Justice NSW prepares young offenders for parole and supervises them on parole. Another difference is that Juvenile Justice NSW is always represented in Children's Court hearings along with a solicitor (typically from Legal Aid NSW) representing the young person. This representation is an exercise of the power of the Secretary of the NSW Department of Justice to make submissions about the parole of young offenders, but the process operates quite differently to the way that the Commissioner of Corrective Services makes submissions to SPA about the parole of adult offenders.

17.16 In outline the system works as follows:

- As for adults, young offenders who have been sentenced to a term of three years or less (that is not a fixed term) have a parole order in place that was made by the sentencing court. The court based parole orders require their

24. *Children, Youth and Families Act 2005* (Vic) pt 5.5; *Young Offenders Act 1994* (WA); *Young Offenders Act 1993* (SA); *Youth Justice Act 1992* (Qld); *Youth Justice Act 1997* (Tas).
25. *Children (Detention Centres) Act 1987* (NSW) s 29(1); *Children (Criminal Proceedings) Act 1987* (NSW) s 33C.
26. *Children (Detention Centres) Act 1987* (NSW) s 29(1); *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6. The Commissioner's powers are under *Crimes (Administration of Sentences) Act 1999* (NSW) s 153, s 141A, s 160AA.

automatic release on parole at the end of the non-parole period,[27] and apply unless the Children's Court revokes them before release.[28]

- The Children's Court considers parole for young offenders who have been sentenced to a term of more than three years. Under the CAS Act, the Children's Court uses the same decision making process and criteria as SPA does for adults.[29] However, Juvenile Justice NSW provides the pre-release report rather than Community Corrections. (This group of offenders must have been sentenced by an adult court according to law, because the Children's Court may only sentence a young offender to detention by imposing a control order of up to 2 years)

- The Children's Court also has the power to deal with breaches of parole by young offenders paroled through the juvenile parole system, exercising the same powers of revocation and variation of parole orders as SPA exercises for offenders paroled through the adult parole system. The same rules and procedures apply to the Court's revocation decision making.[30]

17.17 Later in this chapter we consider the role of Juvenile Justice NSW as the agency that prepares young offenders for release and supervises them while on parole.[31]

The need for a separate legislative framework and its key features

17.18 Our first question is whether there should be separate or stand alone legislation creating a juvenile parole system. We think there should be.

17.19 In our view, the existing legislative arrangements for juvenile parole are unsatisfactory. The framework for both adult and juvenile parole systems is set out in the same provisions of the CAS Act. However, the CAS Act has not been drafted with the juvenile parole system in mind and the legislation is not well adapted to the operations of the Children's Court. It is overly technical and inflexible. Examples of this include that the CAS Act:

- uses definitions that do not readily apply to young offenders detained in Juvenile Justice NSW custody

- contains provisions referring to the Serious Offenders Review Council (SORC), which has no involvement in the management of detainees in juvenile justice centres, and

- imposes complex procedures that may be unsuited to the Children's Court.

17.20 The legislative arrangements for the juvenile parole system are difficult to follow and unnecessarily complicated. A separate set of provisions, outside the CAS Act,

27. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44-46, s 50.
28. *Crimes (Administration of Sentences) Act 1999* (NSW) s 130.
29. *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.
30. See Chapter 10.
31. Para [17.110]-[17.123].

would address these problems. It would also allow the development of a simpler regime with tailored features appropriate to young offenders.

17.21 We canvassed this question in consultation and posed a range of options for a separate legislative regime, including stand alone legislation and inclusion in the CDC Act or the CCP Act.

Stakeholders support a separate legislative framework

17.22 The majority of stakeholders who commented on this issue favoured a separate legislative framework for the juvenile parole system.[32] It was submitted that this would highlight that adult offenders and young offenders should receive different treatment[33] and build on the separate framework that already exists for young offenders in the criminal justice system.[34] One stakeholder supported separate legislation on the condition that the one authority deals with all offenders under 18.[35]

17.23 Some stakeholders supported including the juvenile parole provisions in either the CCP Act or the CDC Act. This would consolidate all legislation on matters to do with young offenders in the criminal justice system in a body of children's law.[36] The Children's Court and Juvenile Justice NSW preferred that the provisions be placed only in the CCP Act.[37]

17.24 Corrective Services NSW and the Police portfolio were of the view that a clear distinction between the adult and juvenile systems could be achieved by either separate legislation or greater clarity within the CAS Act.[38] SPA favoured amending the CAS Act to add a section or part detailing the juvenile parole system.

Our view: include parole provisions in the CCP Act

17.25 In our view, the juvenile parole provisions should be included in the CCP Act. This Act already includes sentencing procedure and it seems sensible also to include parole procedures. This is also the preference of Children's Court and Juvenile Justice NSW, the entities which implement the system.

17.26 We note that adult parole is dealt with in the CAS Act and the analogous legislation for children is the CDC Act. However, we consider that the CCP Act is more closely associated with the Children's Court and therefore a better place for parole provisions that are primarily about Children's Court procedure.

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32. Law Society of NSW, *Submission PA46*, 2; Shopfront Youth Legal Centre, *Submission PA42*, 2; Justice Action, *Submission PA47*, 2; NSW Department of Family and Community Services, *Submission PA38*, 8; Legal Aid NSW, *Submission PA51*, 12.
33. Justice Action, *Submission PA47*, 2; NSW Department of Family and Community Services, *Submission PA38*, 9.
34. Shopfront Youth Legal Centre, *Submission PA42*, 2.
35. NSW Bar Association, *Submission PA31*, 16.
36. Juvenile Justice NSW, *Submission PA48*, 3; Legal Aid NSW, *Submission PA51*, 12.
37. Children's Court of NSW, *Consultation PAC25*; Juvenile Justice NSW, *Consultation PAC26.*
38. Corrective Services NSW, *Submission PA49*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 1.

Recommendation 17.1: Separate juvenile parole provisions

Juvenile parole should be dealt with by separate provisions in the *Children (Criminal Proceedings) Act 1987* (NSW).

Children's Court to be parole decision maker

17.27 The recommendation above assumes the continued responsibility of the Children's Court as parole decision maker. The Children's Court's parole jurisdiction can only be exercised by specialist Children's Magistrates[39] who have particular experience in dealing with offenders who are under 18. We recommend that the Children's Court continue in this role.

17.28 Most stakeholders supported the Children's Court remaining the decision maker in the juvenile parole system,[40] emphasising that the current system appears to work well and Children's Magistrates have the necessary juvenile focused expertise.[41] The Children's Court noted that the body dealing with young offenders' parole must have the appropriate expertise to tailor parole decision making to the needs of young offenders and to assess and address the psychological, social and emotional maturity of the parolee.[42] Legal Aid NSW noted that parole decision making can be enhanced because Children's Magistrates are often familiar with the young offenders who appear before them. In revocation matters involving reoffending, often the fresh offence is dealt with at the same time by the same magistrate, which saves court time and makes it easier to provide continuity of legal representation for the young offender.[43]

17.29 Two stakeholders were of the view that a parole board for young offenders should be established in NSW.[44] SPA suggested that members could include qualified people with appropriate experience in the field of juvenile offending and rehabilitation.[45] The NSW Department of Family and Community Services suggested that if a parole board were established, membership could specifically include a Children's Magistrate, a psychologist, a youth expert, an Aboriginal and Torres Strait Islander representative, a representative for victims and a community representative.[46]

17.30 Using the Children's Court as parole decision maker has widespread stakeholder support and appears to work well. Children's Court Magistrates have the necessary

39. *Children (Detention Centres) Act 1987* (NSW) s 29(1).
40. NSW Bar Association, *Submission PA31*, 15; Law Society of NSW, *Submission PA46*, 1; NSW Department of Family and Community Services, *Submission PA38*, 6; Shopfront Youth Legal Centre, *Submission PA42*, 2; Children's Court of NSW, *Submission PA43*, 2; Juvenile Justice NSW, *Submission PA48*, 2; Justice Action, *Submission PA47*, 1; Legal Aid NSW, *Submission PA51*, 8.
41. Shopfront Youth Legal Centre, *Submission PA42*, 2; NSW Department of Family and Community Services, *Submission PA38*, 6; Legal Aid NSW, *Submission PA51*, 8.
42. Children's Court of NSW, *Submission PA43*, 2.
43. Legal Aid NSW, *Submission PA51*, 8.
44. NSW, State Parole Authority, *Submission PA39*, 1; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 1.
45. NSW, State Parole Authority, *Submission PA39*, 1.
46. NSW Department of Family and Community Services, *Submission PA38*, 6.

expertise and can operate the parole system flexibly and with discretion. If parole is breached by committing an offence, it is useful and efficient to be able to deal with both issues at the one time. While a separate parole authority option has attractions, it would be more complex and costly, and does not appear necessary.

Recommendation 17.2: Children's Court as decision maker

The Children's Court should remain the decision maker in the juvenile parole system.

Objects and principles

17.31 Most statutes that apply to young people in the criminal justice system contain objects or principles that guide decision making or frame the operation of the particular Act. These provisions recognise the special issues associated with young people in the criminal justice system, and the need to focus on rehabilitation and to maintain or rebuild connection with family and community.

17.32 This raises two related questions:

- Should juvenile parole provisions also have principles or objects?
- If parole provisions were to be located in an existing Act, how would the principles or objects in that act relate to parole decision making?

17.33 As background, Table 17.1 sets out legislative provisions for objects and principles in the existing law.

Table 17.1: Principles and objects in statutes dealing with young people in the criminal justice system

Children (Criminal Proceedings) Act 1987 **(NSW)**

6 Principles relating to exercise of functions under Act

In exercising its functions under the Act, the Children's Court must have regard to the following principles:

(a) that children have rights and freedoms before the law equal to those enjoyed by adults and, in particular, a right to be heard, and a right to participate, in the processes that lead to decisions that affect them,

(b) that children who commit offences bear responsibility for their actions but, because of their state of dependency and immaturity, require guidance and assistance,

(c) that it is desirable, wherever possible, to allow the education or employment of a child to proceed without interruption,

(d) that it is desirable, wherever possible, to allow a child to reside in his or her own home,

(e) that the penalty imposed on a child for an offence should be no greater than that imposed on an adult who commits an offence of the same kind,

(f) that it is desirable that children who commit offences be assisted with their reintegration into the community so as to sustain family and community ties,

(g) that it is desirable that children who commit offences accept responsibility for their actions and, wherever possible, make reparation for their actions,

(h) that, subject to the other principles described above, consideration should be given to the effect of any crime on the victim.

***Children (Detention Centres) Act 1987* (NSW)**

4 Objects of Act

(1) The objects of this Act are to ensure that:

(a) people on remand or subject to control take their places in the community as soon as possible as people who will observe the law,

(b) in the administration of this Act, sufficient resources are available to enable the object referred to in paragraph (a) to be achieved, and

(c) satisfactory relationships are preserved or developed between people on remand or subject to control and their families.

(2) In the administration of this Act:

(a) the welfare and interests of people on remand or subject to control shall be given paramount consideration, and

(b) it shall be recognised that the punishment for an offence imposed by a court is the only punishment for that offence.

***Young Offenders Act 1997* (NSW)**

7 Principles of scheme

The principles that are to guide the operation of this Act, and persons exercising functions under this Act, are as follows:

(a) The principle that the least restrictive form of sanction is to be applied against a child who is alleged to have committed an offence, having regard to matters required to be considered under this Act.

(b) The principle that children who are alleged to have committed an offence are entitled to be informed about their right to obtain legal advice and to have an opportunity to obtain that advice.

(c) The principle that criminal proceedings are not to be instituted against a child if there is an alternative and appropriate means of dealing with the matter.

(d) The principle that criminal proceedings are not to be instituted against a child solely in order to provide any assistance or services needed to advance the welfare of the child or his or her family or family group.

(e) The principle that, if it is appropriate in the circumstances, children who are alleged to have committed an offence should be dealt with in their communities in order to assist their reintegration and to sustain family and community ties.

(f) The principle that parents are to be recognised and included in justice processes involving children and that parents are to be recognised as being primarily responsible for the development of children.

(g) The principle that victims are entitled to receive information about their potential involvement in, and the progress of, action taken under this Act.

(h) The principle that the over representation of Aboriginal and Torres Strait Islander children in the criminal justice system should be addressed by the use of youth justice conferences, cautions and warnings.[47]

Views of stakeholders

17.34 Many stakeholders supported having principles that apply to parole decision making involving young offenders, similar to those in the CCP Act and the CDC Act.[48]

17.35 Some stakeholders favoured combining and rationalising the principles in the CCP Act, the CDC Act and the *Young Offenders Act 1997* (NSW) so that the same principles apply to all decisions concerning young offenders, including all parole

47. *Young Offenders Act 1997* (NSW) s 7.

48. NSW Bar Association, *Preliminary submission PPA4*, 2; NSW Bar Association, *Submission PA31*, 15; Juvenile Justice NSW, *Submission PA48*, 2; Law Society of NSW, *Submission PA46*, 2; Children's Court of NSW, *Submission PA43*, 2; Justice Action, *Submission PA47*, 2; Shopfront Youth Legal Centre, *Submission PA42*, 2; NSW, State Parole Authority, *Submission PA39*, 1; NSW Department of Family and Community Services, *Submission PA38*, 7.

decision making.[49] Others, however, were of the view that it is unnecessary to include the principles in the *Young Offenders Act 1997* (NSW) as they were designed for young people who could be diverted from court and custody, not those serving a control order.[50]

17.36 Some stakeholders made specific suggestions about the content of an all inclusive list of principles applicable to young offenders, including:

- the least restrictive form of sanction should be imposed[51]
- arrest, detention and imprisonment should be a measure of last resort[52]
- detention and imprisonment should be for the shortest appropriate period of time[53]
- young offenders should not be kept in detention solely in order to provide them with services[54]
- where appropriate, young people should be dealt with in their communities[55]
- emphasis should be placed on:
  - reintegration of the juvenile into the family and community environment[56]
  - rehabilitation[57]
  - non-return of young offenders to the criminal justice system[58]
  - the right to legal advice[59]
  - community safety,[60] and
  - the importance of acknowledging and taking into account the diversity of young offenders, particularly age, gender, whether a young offender identifies as an Aboriginal and Torres Strait Islander person, and whether a young offender has a disability.[61]

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49. NSW Bar Association, *Preliminary submission PPA4*, 2; NSW Department of Family and Community Services, *Submission PA38*, 6-7; Shopfront Youth Legal Centre, *Submission PA42*, 2; NSW, State Parole Authority, *Submission PA39*, 1.
50. Law Society of NSW, *Submission PA46*, 2.
51. NSW Department of Family and Community Services, *Submission PA38*, 6.
52. Children's Court of NSW, *Submission PA3*, 1-2; Shopfront Youth Legal Centre, *Submission PA42*, 2; Legal Aid NSW, *Submission PA51*, 9.
53. Shopfront Youth Legal Centre, *Submission PA42*, 2.
54. NSW Department of Family and Community Services, *Submission PA38*, 6.
55. NSW Department of Family and Community Services, *Submission PA38*, 6.
56. NSW, State Parole Authority, *Submission PA39*, 1.
57. NSW, State Parole Authority, *Submission PA39*, 1; Shopfront Youth Legal Centre, *Submission PA42*, 2; Legal Aid, *Submission PA51*, 9; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 1.
58. NSW, State Parole Authority, *Submission PA39*, 1.
59. NSW Department of Family and Community Services, *Submission PA38*, 6.
60. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 1.
61. NSW Department of Family and Community Services, *Submission PA38*, 6.

Our view

17.37 In locating the parole provisions in the CCP Act, and retaining the decision making function in the Children's Court, it follows that the principles in s 6 of the CCP Act would apply. For the most part this is appropriate. The principles in (a)-(d) and (h) apply generally. The principle that children should be assisted in reintegrating into the community in (f) has particular importance in parole. Principle (e) stating that the penalty should not be harsher than for an adult, does not apply in its strict terms, but the principle of no harsher treatment is, in its spirit, applicable.

17.38 We therefore have no difficulty with the proposition that the Children's Court apply these principles to parole decision making.

17.39 However, the purpose of parole in protecting community safety is not highlighted, and in our view should be. In the context of young people, rehabilitation is a particular focus of policy and law. We suggest however, that this purpose be expressed as follows:

> That the purpose of parole is to promote community safety, recognising that the rehabilitation and reintegration of children into the community may be a highly relevant consideration in promoting community safety.

Recommendation 17.3: Principles for the juvenile parole system

An additional principle should apply to the new parole provisions in the *Children (Criminal Proceedings) Act 1987* (NSW), namely that the purpose of parole for juveniles is to promote community safety, recognising that the rehabilitation and reintegration of children into the community may be a highly relevant consideration in promoting community safety.

The coverage of the juvenile parole system

17.40 The principle of special treatment for young people under 18 years that is enshrined in the criminal justice system raises questions about the current coverage of the juvenile parole system. Currently, the applicable parole system is not determined by the age of the offender. Young offenders under 18 years of age can be paroled through the adult system and offenders over 18 years of age can sometimes be dealt with in the juvenile system. We recommend this be changed.

Current law

17.41 Under current law, the parole system that applies depends on the type of facility in which the young offender is serving his or her sentence when the non-parole period expires. That is:

- A young offender who is an inmate in a correctional centre at the end of the non-parole period will go through the **adult parole system**, with SPA as the parole decision maker. Young offenders in the adult parole system are prepared for parole by Corrective Services NSW and generally supervised on parole by Community Corrections.

- A young offender who is a detainee in a juvenile justice centre when he or she becomes eligible for parole will go through the **juvenile parole system**, with the Children's Court as the parole decision maker. Young offenders in the juvenile parole system are prepared for parole by Juvenile Justice NSW and can be supervised on parole by either Juvenile Justice NSW or Community Corrections.
- It is possible for an offender who is 18 years or over to be in a juvenile justice centre and therefore subject to the juvenile parole system. Offenders who are well over 18 are also sometimes on juvenile parole orders, and, on breach, must be returned to the Children's Court and, potentially, a juvenile justice centre.

17.42 The ways that a young offender can end up in either a juvenile justice centre managed by Juvenile Justice NSW or a correctional centre managed by Corrective Services NSW at the end of the non-parole period are complicated. We outline the complex law surrounding this in Appendix F.

17.43 In practice, the position will become much simpler because of the Government's decision to cease using the Kariong facility as a juvenile correctional centre run by Corrective Service NSW.[62] Those who would have been housed at Kariong are now to be detained in a juvenile justice centre, subject to Juvenile Justice NSW management. It will still be possible for a person under 18 years of age to be in an adult correctional centre, but it will be less common.

Problems with the current interface between the adult and juvenile parole systems

17.44 Problems can arise as a result of determining eligibility for the juvenile parole system based on the type of custody in which an offender is held.

Some children subject to adult parole system

17.45 Young offenders who are being held in correctional centres at the end of the non-parole period are subject to the adult parole system. These include offenders under 18. This is one way that the current juvenile parole system does not guarantee that all juveniles are treated differently to adults. It is not in line with the underlying rationale of a juvenile parole system: that young people are different to adults and require a separate tailored system.[63] While Kariong Juvenile Correctional Centre operates, transfers to the adult system could be for short periods, due to behavioural issues, and release on parole from correctional centres could have been almost a matter of chance. Such transfers could also occur suddenly, causing difficulties for parole preparation.

17.46 Stakeholders raised concerns about the implications of Community Corrections supervising some young offenders under 18. Stakeholders submitted that these offenders are disadvantaged as they miss out on the intensive support, programs and services provided by Juvenile Justice NSW, raising questions of equity and

62. Attorney General's announcement of 10 September 2014 "Kariong Juvenile Correctional Centre to close", Attorney General's announcement of 18 November 2014 "New future for Aboriginal offenders at Kariong Correctional Centre".

63. See the discussion of this rationale at para [17.3]-[17.12].

adherence to international obligations.[64] Some submitted that Community Corrections officers tend to be less proactive and responsive to the needs of young offenders. These officers are used to dealing with adult offenders, who usually have longer parole periods to work with, and there is an expectation that offenders will be independent and self sufficient.[65]

17.47 Corrective Services NSW noted that Community Corrections staff often appear less confident in managing offenders under 18, as they are a very small proportion of the total workload and most staff will have infrequent involvement in supervising them.[66]

Supervising agency and revocation decision maker can be mismatched

17.48 Juvenile Justice NSW generally hands over the supervision of a young offender to Community Corrections once he or she turns 18.[67] This is an administrative arrangement which is not accommodated by the split between the two parole systems. In these cases, the Children's Court will still be the decision maker on revocation if the young offender breaches parole, even though the offender is over 18, supervised by the adult correctional agency, and any new offences committed by the offender must be dealt with in the adult courts.

17.49 Similarly, in the case of a young offender paroled from a correctional centre under the adult parole system, any reoffending is likely to be dealt with in the Children's Court if the offender is still under 18. The young offender may be settled into the programs and interventions under the new sentence imposed by the Children's Court but can then be recalled to Corrective Services NSW custody because the supervising Community Corrections officer has commenced breach and revocation action with SPA.

17.50 There can also be difficulties when a young offender who is over 18 is paroled from a juvenile justice centre through the juvenile parole system. This can cause some confusion about whether Juvenile Justice NSW or Community Corrections is responsible for the offender's post-release arrangements and parole supervision. The Children's Court can end up dealing with parole breach for a parolee over 18 years. If the parolee has committed a new offence, that matter will be dealt with by an adult court.

Our conclusion: a firmer cut off at 18 years

17.51 The current system of parole based on the facility in which the person is housed gives rise to a range of anomalies. These problems will be reduced, but will not disappear, when Kariong ceases to be a juvenile correctional centre because fewer young people will be released into the adult parole system.

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64. Shopfront Youth Legal Centre, *Submission PA42*, 3-4; Legal Aid NSW, *Submission PA51*, 20; NSW Bar Association, *Submission PA31*, 17; Children's Court of NSW, *Submission PA43*, 3.
65. Legal Aid NSW, *Submission PA51*, 17.
66. Corrective Services NSW, *Submission PA49*, 3.
67. Juvenile Justice NSW, "Working with the Community Offender Service, Corrective Services NSW", *Probation and Parole Procedures* (2009) (under review) [5.1.1].

17.52 In the course of this reference we considered a range of options for allocating responsibility for:

- parole decision making, based on age, or facility (correctional centre or juvenile justice centre), or a combination of both
- parole supervision based on age, or facility (correctional centre or juvenile justice centre) or agency discretion (Community Corrections or Juvenile Justice NSW), and
- decision making about breach and revocation based on age, or system (juvenile or adult).

17.53 In our view, the simplest and fairest of the options is to adopt a cut off age for all areas of responsibility at 18. In our proposal, all young people under 18 would be dealt with in the juvenile parole system, and all those 18 and over would be handled in the adult system. We would make an exception in the case of those young people over 18 who turn 18 during the last 8 weeks of their juvenile sentence. It would be simpler to keep them in the juvenile system in most cases.

17.54 The implications of our recommendation are these:

- SPA would become the decision maker to grant parole in those rare cases where an offender 18 or over is in a juvenile justice centre.
- The Children's Court would be the parole decision maker in those even rarer cases where an offender under 18 is in an adult correctional centre.
- Once a parolee turns 18, Community Corrections would take over parole supervision, provided the parolee had more than 8 weeks remaining on their sentence. This generally happens at the moment and we would expect that the relevant administrative arrangements between Juvenile Justice NSW and Corrective Services NSW would continue to apply. Flexibility not to hand over supervision in some cases would remain.
- The Children's Court would deal with breach of parole by those under 18 and SPA would deal with breach of parole by those 18 and over, whether or not the sentence was a juvenile sentence.

17.55 We considered the option of extending the juvenile regime to people 18 and over who are released from juvenile custody. This group can be immature or vulnerable, for example, because of a cognitive impairment. However, similar vulnerability can easily arise for offenders over 18 who are released from adult custody. The criminal justice system makes a distinction between adults and children and draws the dividing line at 18. A dividing line needs to be drawn in the parole system for the sake of certainty.

17.56 At present, Corrective Services NSW usually ends up supervising the members of this group. The Children's Court must then deal with Community Corrections in relation to parole matters for offenders who may be 20, 21 or older. If such offenders breach their parole by further offending, this can lead to their offences being dealt with in adult court (and offenders potentially being remanded into adult custody if bail is refused), but their parole issues being dealt with by the Children's Court. In our view this situation is unsatisfactory.

Recommendation 17.4: Structuring the juvenile parole system by age

(1) Whether an offender is subject to the juvenile parole system or adult parole system should be determined by the offender's age as follows:

(a) **Parole decision making:** Regardless of where an offender is detained or in custody, the Children's Court should deal with offenders under 18 at the time of the parole decision; the State Parole Authority should deal with offenders who are 18 and over at the time of the parole decision.

(b) **Parole supervision:** Administrative arrangements should continue to provide that, as a general rule, Juvenile Justice NSW should supervise offenders on parole who are under 18 and Community Corrections should supervise offenders on parole who are 18 and over. Juvenile Justice NSW and Corrective Services NSW should continue to make practical arrangements to transfer those who turn 18 to Community Corrections supervision.

(c) **Decision making about breach and revocation:** The Children's Court should deal with parole breaches by offenders who are under 18 at the time of the breach; the Authority should deal with parole breaches by offenders who are 18 and over at the time of the breach.

(2) Offenders who turn 18 during the last 8 weeks of their sentence should generally remain in the juvenile system.

Redrafting the parole regime for young people

17.57 The provisions of the adult parole system, as set out in the CAS Act, currently apply to the juvenile parole system. However, the practice of the Children's Court does not align with all aspects of the CAS Act procedures.[68]

17.58 For example, in practice, after the Children's Magistrate receives a breach report from Juvenile Justice NSW he or she responds to this flexibly. The Children's Magistrate will either make a revocation decision in chambers or call a review hearing. If the decision is made in chambers, a review hearing may be held later. The Children's Court aims to be flexible to the needs of the case at hand.

17.59 Creating a new legislative framework presents an opportunity to consider what the procedures affecting young offenders should be, and in what ways they should differ from current legislation and practice. As the bulk of decisions currently made by the Children's Court are revocation decisions, this section deals mainly with revocation procedures.

68. See para [17.19].

Views of stakeholders

17.60 Most stakeholders who commented on this issue saw the existing practice of the Children Court's as satisfactory and were not in favour of enforcing greater similarity with the adult parole system by simply reproducing the CAS Act in the new provisions.[69] Some stakeholders agreed that the juvenile parole system should remain flexible, inclusive and less formal than the adult process.[70] Other stakeholders were concerned that, under the current system, the parole decision maker may make some decisions in the absence of the offender, which they saw as contravening Article 12 of the *United Nations Convention on the Rights of the Child*. Article 12 requires us to ensure that young offenders participate at all stages of the criminal process, including parole hearings.[71]

Our view

17.61 In our view, new provisions should better reflect, and not needlessly conflict with, the current practice of the Children's Court. While some provisions of the adult regime will be applicable to juvenile parole, the legislative framework for the CCP Act should be drafted in a way that reflects the different features of the regime for young people.

17.62 We are of the view that design of the provisions in the CCP Act should reflect the following principles:

- **Flexibility:** It should be possible for the Children's Court to take the individual circumstances of a young offender into account to determine when to convene a hearing, the timeframe for the hearing, and what the purpose of the hearing is. For example, more than one hearing will be necessary in some cases. Flexibility is also important when the Children's Court is deciding whether to revoke parole or take some alternative action. The Court should not be unduly restrained by prescriptive rules that might inhibit its ability to deal with young offenders as individuals with unique circumstances.

- **Limited technicality:** Procedures should be less formal and technical than in the adult parole system. Certain features of the adult system are unnecessary and can be removed, such as the distinction between serious offenders and non-serious offenders.

- **Responsiveness:** It should be possible for the Children's Court to respond promptly if there is a change of circumstances, so that the young offender spends as little time as possible in custody. For example, if a young offender has had parole revoked and has since shown a marked improvement in attitude and behaviour, for example, as the result of successful drug and alcohol treatment, the Children's Court should be able to set a new parole date.

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69. NSW Bar Association, *Submission PA31*, 16; Law Society of NSW, *Submission PA46*, 3; Shopfront Youth Legal Centre, *Submission PA42*, 3; NSW Department of Family and Community Services, *Submission PA38*, 10; Juvenile Justice, *Submission PA48*, 3; Legal Aid NSW, *Submission PA51*, 13.
70. Shopfront Youth Legal Centre, *Submission PA42*, 3; Law Society of NSW, *Submission PA46*, 3; Legal Aid NSW, *Submission PA51*, 13.
71. Shopfront Youth Legal Centre, *Submission PA42*, 3; Law Society of NSW, *Submission PA46*, 3.

- **Clarity:** The legislation should reflect the current practice of the Children's Court as closely as possible, to provide certainty and clarity to all stakeholders with regards to procedures.

17.63 The approach should continue allow the Children's Court to perform something of a case management role, holding hearings flexibly to perform different functions, including reviewing a revocation decision, assessing whether a breach has occurred, deciding what action to take on a breach, giving a warning to a young offender in person, or a combination of these.

17.64 In the following sections of the report, we make specific recommendations about the content of the juvenile parole system which should be included in the CCP Act. These cover the main issues as we see them.

17.65 We do not make recommendations on all aspects of the juvenile parole system. For completeness, in Table 17.2 at the end of this chapter, we provide commentary on our recommendations for the adult parole system. This table notes equivalent recommendations for the juvenile parole system, or offers preliminary views on whether the recommendations for the adult system are applicable to the juvenile system. In some cases further consideration may be necessary in view of Children's Court rules and practices (for example, the general principle of non-publication of names).

Recommendation 17.5: Design principles to govern the juvenile parole system

In drafting the parole provisions to be included in the *Children (Criminal Proceedings) Act 1987* (NSW), the following principles should be adopted:

(a) Flexibility in when and for what purpose a hearing may be convened by the Children's Court and in what action the Court can take when considering whether to revoke parole or take alternative action.

(b) Limited technicality in revocation procedures, including the removal of features of the adult parole system that are irrelevant to young offenders.

(c) Responsiveness in how the Children's Court can deal with changed circumstances, so that the young offender spends as little time as possible in custody.

(d) Clarity, ensuring the legislation reflects the current practice of the Children's Court as closely as possible.

Specific provisions in the legislation

17.66 In this section we describe the key provisions we consider should be included in juvenile parole provisions, and how they should differ from the adult system. Our starting point is the recommendations we make for the adult system. In general these provide a simpler and clearer framework. In many instances they can and should be carried over into the juvenile system. However, in some areas the juvenile parole provisions need to be adapted to the special needs of young

offenders and can also be simpler and less technical than their adult counterparts, especially in relation to procedure.

Automatic/statutory parole and discretionary parole

17.67 The juvenile parole system currently follows the adult parole system, with a mix of automatic and discretionary parole, with the length of an offender's sentence determining which will apply.

17.68 In Chapter 3 we consider the form of automatic parole currently provided in the CAS Act and recommended replacing court based parole with statutory parole. We make the same recommendation for young people.

17.69 In the case of young offenders, we have also considered whether to do away entirely with discretionary parole and have only statutory parole. This option has some significant attractions and some stakeholder support, though ultimately we have decided to recommend retaining discretionary parole.

17.70 The question we considered was whether if a young person reaches the end of his or her non-parole period before turning 18 (no matter the length of the head sentence), he or she should be automatically released on parole, subject to a power for the Children's Court to revoke pre-release.

17.71 The number of young offenders who are subject to discretionary parole is very small. The Children's Court has reported that very few young offenders are considered for discretionary parole. (Indicative figures from the Children's Court suggest that it made in the region of 7 parole decisions in the first 8 months of 2014, in all cases for people over 18.)[72] Similarly, SPA has reported that very few offenders it considers in the adult system are under 18. In 2013, none were under 18 (and only two were under 19).[73]

17.72 The rarity of these cases raises the question of whether it would be better to implement a one stream system of automatic release. This would reflect the particular desirability of young offenders being released on parole as soon as possible in order to advance the rehabilitation process.

17.73 We considered this option because:

- It would make the system much simpler.
- Very few young people would be affected, and any significant risk they pose could be managed by pre-release revocation.
- It recognises that rehabilitation is a very important factor when considering young people, as recognised for example in Rule 28 of the Beijing Rules which

72. Information provided by the Children's Court of NSW (6 August 2014).
73. Information provided by NSW, State Parole Authority (4 July 2014).

states that parole for juveniles "shall be used to the greatest possible extent, and shall be granted at the earliest possible time".[74]

17.74 On balance however, we prefer the approach of the current law with a mixed statutory/discretionary parole system for juveniles. The very small number of offenders who are under 18 in the discretionary group are the most serious offenders who will have been sentenced by an adult court. They require special focus. The prospect of not being granted parole may provide additional incentive for them to address their offending behaviour in custody, for example, through participation in rehabilitation programs. There is no evidence that parole is being delayed for this group. We also note that retaining a parole decision in these cases allows registered victims to have input into parole decisions, including any necessary conditions attached to parole.

Recommendation 17.6: A mixed system of statutory parole and discretionary parole

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide as follows:

(a) A young offender sentenced to a head sentence of three years or less with a non-parole period must be released on parole at the end of the non-parole period ("statutory parole"), unless the Children's Court has revoked parole.

(b) Such statutory parole should be subject to the standard conditions of parole set out in Recommendation 17.8.

(c) The Children's Court should have the same power to impose any additional conditions as it currently has for court based parole orders.

(d) The Children's Court should continue to consider young offenders with head sentences of more than three years for discretionary parole.

The parole decision

17.75 In the adult system we recommend a new test for granting parole, amended considerations and an amended Community Corrections report. For the most part these recommendations apply equally to the juvenile parole system and decision making by the Children's Court.

17.76 We have recommended replacing the public interest test for discretionary parole with a new test that gives emphasis to community safety and balances whether further detention is required, or whether supervised release on parole better achieves the purposes of parole.[75]

17.77 We consider this test is equally applicable to young people, noting that the principles underlying the CCP Act emphasise rehabilitation, and the Children's

74. *United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules)*, GA Res 40/33, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/33 (29 November 1985) r 28.

75. Recommendation 4.1.

Court has that as a focus. In this context we consider that the adult test is suitable for young people.

17.78 We also consider that the considerations relevant to the parole decision in Recommendation 4.2 and the content of the Community Corrections reports in Recommendation 4.4 are sound and should be applied in the juvenile parole context (to the Children's Court and Juvenile Justice NSW), although consideration should be given during drafting to any necessary adjustments to reflect Juvenile Justice NSW and Children's Court processes.

Recommendation 17.7: A test for discretionary parole

(1) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the Children's Court may grant parole for a young offender if it is satisfied that making the order is in the interests of community safety. In doing so, the Court must take into account:

(a) the risk to community safety of releasing the offender on parole

(b) whether parole supervision is likely to aid in reducing the possibility of the offender reoffending

(c) the risk to community safety if the offender is released at the end of the sentence without a period of parole supervision, or is released at a later date with a shorter period of parole supervision, and

(d) the extent to which parole conditions can mitigate any risk to community safety during the parole period.

(2) The proposals in Recommendations 4.2 and 4.4 about the matters to be taken into account when making a parole decision, and the contents of a parole report, should be included in the *Children (Criminal Proceedings) Act 1987* (NSW), subject to consideration during drafting to any necessary adjustments to reflect Juvenile Justice NSW and Children's Court processes.

Standard conditions and additional conditions

17.79 The standard parole conditions for young offenders are currently the same as for adult offenders.[76]

17.80 We have recommended that the standard conditions for adults be changed, so that the standard conditions require offenders not to commit any offence and submit to supervision.[77] We have also recommended that the list of supervision obligations in cl 219 of the *Crimes (Administration of Sentences) Regulation 2014* (NSW) be reorganised and consolidated.[78]

17.81 We recommend that the same conditions and supervision obligations apply to parole in the juvenile parole system. We acknowledge that some of the obligations

76. *Crimes (Administration of Sentences) Act 1999* (NSW) s 128(1)(a); *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 214, cl 219.
77. See para [9.2]-[9.34] and Recommendation 9.1.
78. See Recommendation 9.2.

may not be directly applicable to the supervision of young offenders. However, the list is sufficiently flexible to accommodate supervision needs and we note that Juvenile Justice NSW officers can give any other reasonable direction not listed in the clause.

17.82 As for adults, we consider that the Children's Court should be able to add any conditions to parole, whether statutory or discretionary, that it considers reasonable to:

(a) manage the risk to community safety of releasing the person on parole, including (but not limited to) conditions that:

(i) support participation in rehabilitation programs and assist in managing reintegration, or

(ii) give effect to the post-release plan prepared by Juvenile Justice NSW

(b) take account of the effect on any victim of the offender, and on any such victim's family, of the offender being released on parole, or

(c) respond to breaches of parole.[79]

17.83 It is also necessary to allow a Juvenile Justice NSW officer to grant exemptions from complying with place restriction orders and curfew conditions for particular purposes as we propose for adults in Recommendation 9.8.

Recommendation 17.8: Standard conditions and supervision obligations

(1) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that two standard conditions be attached to parole for young offenders:

(a) that they not commit any offence, and

(b) that they submit to supervision by Juvenile Justice NSW.

(2) The obligations under the supervision condition in the juvenile parole system should be the same as those in Recommendation 9.2.

(3) The *Children (Criminal Proceedings) Act 1987* (NSW) should allow the Children's Court to impose any additional conditions it considers reasonable to:

(a) manage the risk to community safety of releasing the offender on parole, including (but not limited to) conditions that:

(i) support participation in rehabilitation programs and assist in managing reintegration, or

(ii) give effect to the offender's post-release plan prepared by Juvenile Justice NSW

79. Recommendation 9.7.

(b) take account of the effect on any victim of the offender, and on any such victim's family, of the offender being released on parole, or

(c) respond to breaches of parole.

(4) The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that an offender does not contravene a place restriction or curfew condition that has been imposed by the Children's Court if the supervising Juvenile Justice NSW officer permits the offender to do so, on the same basis as Recommendation 9.8.

Response to breach and revocation

17.84 At present the Children's Court adopts a flexible approach to revocation. It sometimes revokes and issues a warrant. In such cases, the offender is returned to custody until the review hearing. In other cases it issues a notice to attend with or without revocation. When the Court issues a notice, the young offender only returns to custody if the Court revokes parole at a hearing. The notice procedure works well for the Court, and replaces the s 169 enquiry that can be conducted in adult cases.[80] We think the procedure should be legislated.

17.85 In addition, the options to vary conditions, warn, and note the breach without taking action that we recommend for the adult system should be added to the range of options available to the Court.

17.86 In summary, the Children's Court should have the option to:

- revoke parole and issue a warrant
- revoke parole and issue a notice to attend
- issue a notice to attend without revoking parole
- vary, add or remove one or more conditions of parole
- warn the young offender, or
- note the breach and take no further action.

17.87 As for adults, we recommend the Court should have a broad discretion to respond to any breach of obligations and there should be no statutory criteria limiting decision making. No stakeholders have suggested that criteria should apply.

17.88 The notice procedure requires that the Court have the option of revoking for failure to answer the notice to appear. We would also allow, as at present, the Court to revoke on the offender's request.

80. See para [11.22]-[11.30].

Recommendation 17.9: Options for response to breach and revocation

Bearing in mind Recommendation 17.5, the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that the Children's Court:

(a) may respond to a failure to comply with the obligations of parole by doing one or more of the following:

  (i) revoke parole and issue a warrant

  (ii) revoke parole and issue a notice

  (iii) issue a notice

  (iv) vary the conditions of parole

  (v) warn the offender, or

  (vi) note the breach and take no further action.

(b) may revoke parole if:

  (i) it is satisfied that an offender has breached parole

  (ii) an offender has failed to appear when called upon to do so, or

  (iii) an offender has asked for parole to be revoked.

Accounting for "street time" after revocation

17.89 These options ultimately affect "street time", that is, the time the offender is at large between the day the revocation order takes effect and when the offender returns to custody.

17.90 The Children's Court has advised that, when it deals with a parole breach, it will, wherever possible, issue a notice rather than a warrant. This ensures that a young person does not return to detention unless it is necessary. The Court's view is that parole continues to run even though it has been revoked.[81]

17.91 We have made a number of recommendations in Chapter 11 that deal with situations where SPA revokes parole for adult offenders, and decides, on review, whether or not to rescind the order. Applying the adult regime to the juvenile parole system will have the same effect in cases where the Children's Court has revoked parole and issued a warrant. Likewise, when the Court rescinds a revocation after it has issued a notice, the grant of parole will have effect as if it had not been revoked[82] and this is consistent with current Children's Court practice.

17.92 However, a problem arises in cases where the Court, having revoked parole and issued a notice (to avoid the young offender spending unnecessary time in detention), decides not to rescind a revocation order and the young offender is returned to detention. The young offender will have the time between the date the revocation order takes effect and the return to detention added to his or her sentence in all cases. This is a result that cannot be achieved under the adult parole system because there is no equivalent of issuing a notice. To allow the Children's

81. Information provided by Magistrate Paul Mulroney, Children's Court of NSW (24 July 2014).

82. Recommendation 11.4.

Court flexibility in dealing with breach cases where it did not consider a warrant was desirable, the CCP Act should provide that, when the Court does not rescind a revocation after issuing a notice, the Court can decide that the revocation order takes effect, or is taken to have taken effect, on the date on which the review decision is made or on such earlier date as the Court thinks fit.

Recommendation 17.10: Accounting for street time when Children's Court revokes parole and issues a notice

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that when the Children's Court revokes parole and issues a notice but does not rescind the revocation, it can decide that the revocation order takes effect, or is taken to have taken effect, on the date on which the review decision is made or on such earlier date as the Court thinks fit.

Pre-release revocation of statutory parole

17.93 Currently, the Children's Court can revoke a young offender's court based parole order before the offender is released, in circumstances:

- where the offender requests revocation
- where the Court decides that the offender is unable to adapt to normal lawful community life, or
- where the Court decides that satisfactory post-release accommodation or plans have not been made or cannot be made.[83]

17.94 We have recommended that a new provision be included in the CAS Act that sets out SPA's power to revoke statutory parole before an adult offender is released if:

(a) the Authority is satisfied that the offender's conduct in custody indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(b) the Authority is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(c) the Authority is satisfied that satisfactory accommodation or post-release arrangements have not been made or cannot be made and the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(d) the offender requests that the order be revoked.[84]

17.95 We consider that these provisions should apply equally to the Children's Court when it considers revoking statutory parole before a young offender is released. We

83. *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 222.

84. Recommendation 3.2(2).

note that paragraphs (b) and (c) should ensure that the Court gives proper consideration to the safety of young offenders, particularly vulnerable young people, and their accommodation needs.

Recommendation 17.11: Pre-release revocation of statutory parole

The *Children (Criminal Proceedings) Act 1987* (NSW) should state that the Children's Court may revoke statutory parole before a young offender is released if:

(a) the Court is satisfied that the offender's conduct in detention indicates that the risk that the offender would pose to community safety if released on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(b) the Court is satisfied that, if released on parole, the offender would pose a serious and immediate risk to his or her own safety, or

(c) the Court is satisfied that satisfactory accommodation or post-release arrangements have not been made or cannot be made and the risk to community safety posed by the offender's release on parole outweighs any reduction in risk likely to be achieved through parole supervision of the offender, or

(d) the offender requests that the order be revoked.

Revocation without breach

17.96 For adults we have recommended refining the power to suspend parole in certain emergency situations, and providing a corresponding power to revoke parole. The suspension power is handled by a single judicial member of the SPA without convening a panel. The judicial member may suspend parole only if he or she has reasonable grounds for believing that:

- the offender poses a serious and immediate risk to the safety of the community or of any individual, or
- there is a serious and immediate risk that the offender will leave NSW in contravention of the conditions of the parole order.[85]

17.97 We have also recommended that SPA have the power to revoke parole without a breach when the offender presents the same risks as those above and these risks cannot be mitigated through reasonable directions from the supervising officer or additional or varied parole conditions.[86]

17.98 The power to suspend in emergency situations is unnecessary in the juvenile parole system, since the Children's Court can be constituted by a single Magistrate who could, on short notice, exercise the power to revoke parole without a breach.

17.99 While the situations covered by the power to revoke parole without a breach would be rare for young offenders, we consider that the power should be included in the

85. Recommendation 11.6.
86. Recommendation 10.4.

legislation. It would be activated by Juvenile Justice NSW becoming aware of an issue and making an emergency report to the Children's Court.

Recommendation 17.12: A power to revoke in the absence of breach

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) where there is no breach of parole, the Children's Court may revoke parole if it considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk that the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the supervising officer or by adding or varying parole conditions.

(b) a Juvenile Justice NSW officer may report to the Children's Court in circumstances where there is no breach with a recommendation that the Children's Court revoke parole or add or vary parole conditions if the officer considers that:

  (i) either

    (A) the offender poses a serious and immediate risk to the safety of the community or of any individual, or

    (B) there is a serious and immediate risk the offender will leave NSW, and

  (ii) the risk cannot be mitigated by reasonable directions from the officer.

Hearing flexibility

17.100 The Children's Court operates flexibly and without technicality. While SPA operates under quite formal distinctions between private meeting and review hearings, the Children's Court does not always observe these distinctions strictly.

17.101 Sometimes the rules governing SPA operations that aim to promote fairness can impede good process for the Children's Court. For example, the CAS Act specifies that at least 14 days must elapse between a revocation notice being served on an offender and the automatic review hearing held to reconsider the revocation decision.[87] In the adult parole system, this restriction ensures that there is sufficient time for all parties to prepare for the review hearing, including arranging legal representation for the offender. However, the Children's Court reported that, in the juvenile parole system, the restriction is often an impediment to prompt review of revocation decisions, resulting in young offenders remaining in custody longer than necessary.[88] Most stakeholders favoured removing the 14 day waiting period,[89]

87. *Crimes (Administration of Sentences) Act 1999* (NSW) s 173(2)(b).

88. Children's Court of NSW, *Submission PA43*, 4.

suggesting that an adjournment is a more appropriate tool for the Children's Court to use to delay the review hearing if the circumstances of the case warrant it.[90]

17.102 In our view the Children's Court should be able to convene a hearing at any time to perform its functions. If it has revoked parole, as with the adult system, it should be required to convene a review hearing.

Recommendation 17.13: Flexible hearings for Children's Court

Bearing in mind Recommendation 17.5, the *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) The Children's Court may convene a hearing at any time to decide whether to grant parole or to revoke parole. The offender may make submissions at any such hearing.

(b) When the Children's Court revokes parole without having previously convened a hearing:

(i) The Court must hold a hearing within 28 days of serving the revocation notice on the offender.

(ii) At this hearing, the Court must reconsider the revocation decision and confirm or rescind it.

(iii) The offender may make submissions at the hearing.

(iv) The Court may adjourn the hearing to a later date.

Reapplying for release on parole: the 12 month rule

17.103 If the Children's Court confirms a revocation decision at a review hearing, the young offender must wait 12 months before applying to the Children's Court for re-release on parole and, if refused, may only reapply afterwards at 12 month intervals.[91] The 12 month rule would also apply if the Children's Court decided against parole when making an initial parole determination for a young offender with a sentence imposed by an adult court of more than three years.

17.104 In practice, the Children's Court sometimes avoids the application of the 12 month rule by adjourning revocation review proceedings (rather than confirming a revocation decision) until such a time as it considers it appropriate to rescind the original revocation so that the young offender will be re-released on parole.[92] Most stakeholders supported the abolition of the 12 month rule as it applies to revocation.[93] The Children's Court submitted that the 12 month rule is "arbitrary and

89. NSW Bar Association, *Submission PA31,* 18; Law Society of NSW, *Submission PA46,* 5*;* Shopfront Youth Legal Centre, *Submission PA42*, 4; NSW Department of Family and Community Services, *Submission PA38*, 14; Children's Court of NSW, *Submission PA43*, 4; Legal Aid of NSW, *Submission PA51*, 21; Juvenile Justice, *Submission PA48*, 5.

90. Shopfront Youth Legal Centre, *Submission PA42*, 4; Law Society of NSW, *Submission PA46,* 5.

91. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3, s 137A, s 143A.

92. Children's Court of NSW, *Submission PA43*, 3.

93. Juvenile Justice NSW, *Submission PA48,* 5; NSW Bar Association, *Submission PA31*, 18; NSW Department of Family and Community Services, *Submission PA38*, 14; Law Society of NSW, *Submission PA46,* 5; NSW, State Parole Authority, *Submission PA39*, 4; Shopfront Youth Legal

inappropriate", and in most cases the remainder of the parole period is less than 12 months and the young offender will have no opportunity for parole.[94] Several stakeholders noted that the 12 month rule is in conflict with the importance of flexibility and discretion in decision making for young offenders.[95]

17.105 We have recommended a relaxation of the 12 month rule for adults, proposing that SPA could set a different (earlier or later) date on which an application for parole could be made.[96] For young people, in the context of Children's Court practice, we recommend abolishing the 12 month rule entirely. On refusing to grant parole, or on revoking parole, the Court should be able to make an order about the timing of the next parole consideration. It should also be able to consider an application for parole at any time in a range of circumstances, or refuse to consider such an application if it is patently baseless.

Recommendation 17.14: Reapplying for release on parole

The *Children (Criminal Proceedings) Act 1987* (NSW) should provide that:

(a) when the Children's Court refuses to grant parole or revokes parole (whether before an offender is released or after an offender has been released) the Court must set either:

  (i) a new parole release date, or

  (ii) a date on or after which the offender may apply to the Court to be reconsidered for parole.

(b) when the Children's Court has set a date after which the offender may apply for reconsideration of parole:

  (i) the offender may apply at an earlier date and the Court may consider the application in the following circumstances:

    (A) where new information has come to light or the situation has materially changed

    (B) where parole was revoked because the offender did not have access to suitable accommodation or community health services and such accommodation or services have subsequently become available, or

    (C) where parole was revoked because the offender was charged with an offence but the charge has subsequently been withdrawn or dismissed.

  (ii) the Court may refuse to consider the application if it considers it is frivolous, vexatious or has no prospect of success.

Centre, *Submission PA42*, 5; Children's Court of NSW, *Submission PA43*, 4; Legal Aid of NSW, *Submission PA51*, 21.

94. Children's Court of NSW, *Submission PA43*, 3.

95. NSW Department of Family and Community Services, *Submission PA38*, 14; Legal Aid of NSW, *Submission PA51*, 21; Corrective Services NSW, *Submission PA49*, 3.

96. Recommendation 12.1.

Serious offenders

17.106 The CAS Act sets out different parole decision making processes depending on whether an offender is a "serious offender".[97] The definition of this term does not apply comfortably to young offenders as it includes references to the different classification system and managing agencies of the adult parole system, and to a length of non-parole period that would not apply to a young offender being considered for parole through the juvenile parole system.[98]

17.107 Some stakeholders submitted that the role of the Serious Young Offenders Review Panel (SYORP) should be expanded to mimic that of SORC within the adult system for dealing with serious offenders.[99] The SYORP is an independent body that provides advice and recommendations to the Director General of the NSW Department of Justice on the classification of detainees who are "serious young offenders", and to the Minister for Corrections or Chief Executive of Juvenile Justice NSW on any other matter relating to any detainee.[100] The Minister or Chief Executive may refer an individual or class of detainees to SYORP for this purpose.[101]

17.108 A serious young offender is an offender who was convicted of a serious children's indictable offence.[102] These offences include:

- homicide
- offences with a maximum penalty of 25 years imprisonment or more
- aggravated sexual assault[103] or assault with intent to have sexual intercourse
- a firearms offence punishable by 20 years or more, and
- any offence prescribed by the regulations.[104]

The definition of serious young offender has no operation for the purposes of the CAS Act or the parole jurisdiction of the Children's Court. Young serious offenders can be dealt with at law only by the adult courts.

17.109 SYORP has a different function from that of SORC. In our view, there is no need to extend SYORP's function to parole. There is no need to complicate the system with an additional category that would have very limited utility.

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97. On the two processes in the adult parole system, see para [6.4]-[6.27].
98. *Crimes (Administration of Sentences) Act 1999* (NSW) s 3; *Crimes (Administration of Sentences) Regulation 2014* (NSW) cl 24(3), cl 25(3).
99. NSW, State Parole Authority, *Submission PA39*, 4; NSW Department of Family and Community Services, *Submission PA38*, 15; Justice Action, *Submission PA47*, 6.
100. *Children (Detention Centres) Act 1987* (NSW) s 37P(1)(a)-(b).
101. *Children (Detention Centres) Act 1987* (NSW) s 37P(1)-(2).
102. *Children (Detention Centres) Act 1987* (NSW) s 37N.
103. Except where the only aggravating circumstance is that the victim was under 16 years of age.
104. *Children (Criminal Proceedings) Act 1987* (NSW) s 28. The regulations currently prescribe the inclusion of the offence of sexual assault by forced self-manipulation if the victim was under 10 years of age: *Children (Criminal Proceedings) Regulation 2011* (NSW) cl 32.

Recommendation 17.15: Serious offenders in the juvenile parole system

The juvenile parole system should not distinguish between serious offenders and non-serious offenders.

Parole preparation and management by Juvenile Justice NSW

17.110 In the following paragraphs we examine practical aspects of how Juvenile Justice NSW prepares young offenders for parole and supervises them once they are in the community.

17.111 We do not intend to recommend changes to Juvenile Justice NSW practice in preparing people for parole or supervising them on parole. We describe the system and the few issues raised by stakeholders below.

Assistance with parole readiness

17.112 In-custody case management of young offenders in juvenile justice centres is carried out according to a case plan designed by Juvenile Justice NSW when the offender first enters custody.[105] The plan includes details of:

- the interventions and programs recommended for the young offender
- the offender's health care needs
- if the offender has a disability, strategies to mitigate any disadvantage, particularly disadvantages relating to participation in education or work
- if the offender is Aboriginal or Torres Strait Islander, strategies to meet the offender's cultural needs, and
- the pre-release and post-release assistance that is required by the offender.[106]

17.113 The offender's needs and risk level is assessed through the Youth Level of Service/Case Management Inventory–Australian Adaptation (YLS/CMI-AA) tool, which is an adapted version of the Level of Service Inventory–Revised (LSI-R) tool used by Corrective Services NSW for adults.[107] A Juvenile Justice NSW worker who supervises offenders in the community is involved in the preparation of the custodial case plan to ensure it includes a focus on community reintegration. This worker also maintains regular contact with the young offender while he or she is in custody.[108]

17.114 If the young offender is serving a sentence of more than three years and the Children's Court will consider parole, Juvenile Justice NSW convenes a case conference several months before the end of the non-parole period to generate a

105. *Children (Detention Centres) Regulation 2010* (NSW) cl 21; Juvenile Justice NSW, *Case Management Procedure* (2011).
106. *Children (Detention Centres) Regulation 2010* (NSW) cl 22.
107. Juvenile Justice NSW, *Case Management Procedure* (2011).
108. Juvenile Justice NSW, *Community Supervision and Casework Procedure* (2012).

report for the Court on the offender's suitability for parole. The report includes information and input from the offender's in-custody counsellors, teachers, Justice Health nurse, Youth Officer and other relevant Juvenile Justice NSW staff.[109] Juvenile Justice NSW submitted that family and caregivers may also be involved in the case conference. Conference outcomes include arranging accommodation, re-engagement in education or training, government services to support health issues and non-government services to provide reintegration support.[110]

17.115 Most stakeholders reported that in their experience Juvenile Justice NSW has an appropriate and comprehensive approach,[111] and young offenders are generally better prepared for parole by Juvenile Justice NSW than by Corrective Services NSW.[112] This may be explained in part by the much smaller number of offenders Juvenile Justice NSW manages compared to Corrective Services NSW. This enables Juvenile Justice NSW to provide the more intensive case management required in view of the age and maturity levels of its clients. In addition, Juvenile Justice NSW workers who undertake community supervision of young offenders are involved with a young offender throughout their time in custody. This ongoing relationship could mean that young offenders in the juvenile parole system are better prepared for the expectations of a parole decision maker and for life in the community.

17.116 Stakeholders nominated specific areas of in-custody parole preparation for improvement including preparation of sex offenders and engagement with disability services.[113] The NSW Department of Family and Community Services (FACS) noted the need for collaborative interagency planning for young offenders in correctional facilities involving Corrective Services NSW, Juvenile Justice NSW and FACS,[114] and also involving the family and community of the young offender.[115]

Supervision on parole

17.117 When Juvenile Justice NSW is supervising a young offender, its suite of community based programs and support will be available to the offender. Juvenile Justice NSW facilitates program participation based on the individual needs of parolees.[116] These programs include:

- Sex Offender Program

109. Juvenile Justice NSW, *Parole Procedure* (2011).
110. Juvenile Justice NSW, *Submission PA48*, 4.
111. Shopfront Youth Legal Centre, *Submission PA42*, 3; Children's Court of NSW, *Submission PA43*, 3; Legal Aid NSW, *Submission PA51*, 17; NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 3; Corrective Services NSW, *Submission PA49*, 3.
112. Shopfront Youth Legal Centre, *Submission PA42*, 3; Children's Court of NSW, *Submission PA43*, 3; Legal Aid NSW, *Submission PA51*, 17. Some stakeholders raised issues with the adequacy of in-custody case management provided by Corrective Services NSW and its ability to prepare offenders for the transition to the community: see para [14.25].
113. Legal Aid NSW, *Submission PA51*, 17; NSW Department of Family and Community Services, *Submission PA38*, 11.
114. NSW Department of Family and Community Services, *Submission PA38*, 11.
115. NSW Department of Family and Community Services, *Submission PA38*, 11; Justice Action, *Submission PA47*, 4.
116. Juvenile Justice NSW, *Submission PA48*, 4-5.

- Violent Offender Program
- DthinaYuwali, an alcohol and other drug treatment program for young Aboriginal and Torres Strait Islander offenders
- other alcohol and other drug treatment programs
- Love BiTES, a domestic violence and sexual assault prevention program
- Cognitive Self Change Program, and
- Changing Habits and Reaching Targets (CHART) program.

17.118 Juvenile Justice NSW provides these programs both in juvenile justice centres and in the community.[117]

17.119 The Joint Support Program is a collaborative partnership between Juvenile Justice NSW and non-government agencies to provide community based programs and support to young offenders who are assessed as requiring medium to high levels of intervention. About 95% of parolees fall into this category.[118] The services include:

- casework support
- crisis accommodation
- long term supported accommodation
- employment placement and support, and
- family intervention.[119]

17.120 Under the Joint Support Program, Juvenile Justice NSW also provides an intensive Post Release Support Program to all young offenders transitioning from custody, including parolees, offenders released from remand without a custodial sentence and offenders released from a control order with no parole period. The aim of the program is to reduce reoffending by focusing on the economic, social and welfare needs of young offenders at this important time of transition.[120]

17.121 Juvenile Justice NSW policy is that all parolees must have at least weekly face to face contact with their supervising officer in the first three months of parole, and at least one of these contacts per month must be a home visit. After the first three months, there must be monthly face to face contact alternating between home visits and the parolee reporting to a Juvenile Justice NSW office.[121] Offenders assessed as having high levels of risk and need may be supervised more intensively.[122] This level of contact is significantly higher than most of the supervision levels implemented by Corrective Services NSW for adults.

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117. NSW Department of Attorney General and Justice, *Annual Report 2011-12* (2012) 110-112.
118. Information provided by Juvenile Justice NSW (31 October 2013).
119. Juvenile Justice NSW, "The Joint Support Program" <www.djj.nsw.gov.au/joint_support_program.htm>.
120. C Cuneen, *Evaluation of the Post Release Support Program* (Juvenile Justice NSW, 2005).
121. Juvenile Justice NSW, *Schedule of Standards for Community Supervision (Revised)*.
122. Juvenile Justice NSW, *Community Supervision and Casework Procedure* (2012).

17.122 Most stakeholders were of the view that the support, programs and services provided to parolees by Juvenile Justice NSW is of a good level.[123] In FACS' experience, Juvenile Justice NSW does not always adequately provide for the needs of young offenders with disabilities, and suggested that NSW Health should have responsibility for the young parolees' physical and mental health needs, while FACS could respond to care and protection, housing and disability issues.[124] FACS was also concerned that young parolees with disabilities might be excluded from programs due to an inability to engage without support, especially as Juvenile Justice NSW does not have a dedicated disability unit, and suggested that Juvenile Justice NSW could work with the community sector to develop and provide adapted programs for these parolees in the community.[125]

17.123 The Police portfolio submitted that in some cases young offenders are not provided with adequate support or supervision while on parole and this contributes to reoffending. In the NSW Police Force Bail Compliance Review, the analysis of Computerised Operational Policing System (COPS) data revealed deficiencies in the supervision of high risk young offenders supervised by Juvenile Justice NSW, including parolees. The NSW Police Force is currently working with Juvenile Justice NSW to develop a framework for information sharing about the release of young offenders on parole, which will improve the interagency case management of young offenders.[126]

Table 17.2: Consideration of recommendations for adult parole system

Rec	Recommendation for adult parole system	Potential application for juvenile parole system
	Purpose of parole and design of the parole system	
2.1	Retention of parole	General application to both systems.
2.2	Statement of the primary purpose of parole	Reflected in the proposed additional principle for the juvenile parole system in **Rec 17.3**.
2.3	A mixed parole system	**Covered by Rec 17.6**.
	Statutory parole	
3.1	Introducing a statutory parole model	**Covered by Rec 17.6**.
3.2	Pre-release revocation of statutory parole	**Covered by Rec 17.11**.
3.3	Parole for accumulated sentences	Should apply to juvenile parole system.
	Factors guiding the parole decision	
4.1	Replacing the public interest test	**Covered by Rec 17.7(1)**.

123. NSW Bar Association, *Submission PA31*, 17; Shopfront Youth Legal Centre, *Submission PA42*, 4; Law Society of NSW, *Submission PA46*, 4; Justice Action, *Submission PA47*, 5; Legal Aid NSW, *Submission PA51*, 21; NSW Health (Justice Health and Forensic Mental Health Network), *Submission PA36*, 1.
124. NSW Department of Family and Community Services, *Submission PA38*, 13.
125. NSW Department of Family and Community Services, *Submission PA38*, 14.
126. NSW Police Force and NSW Ministry for Police and Emergency Services, *Submission PA53*, 4.

4.2	Mandatory considerations	**Covered by Rec 17.7(2)**. Consider during drafting whether adjustment is necessary.
4.3	Clarifying the status of SPA's Operating Guidelines	Not relevant. SPA only. Does not apply to Children's Court.
4.4	Content of Community Corrections reports	**Covered by Rec 17.7(2)**. Consider during drafting whether adjustment is necessary.
4.5	SPA's use of risk assessment results	Juvenile Justice NSW reports should include risk assessment results where relevant. Consider providing Children's Court magistrates with background/training to better understand risk assessment results.
4.6	SPA's consideration of security classification	Not relevant.
4.7	SPA's approach to in-custody rehabilitation programs	Not relevant – SPA operating guidelines only.
4.8	SPA's consideration of external leave participation	Not relevant – SPA operating guidelines only.
4.9	Assessing the necessity and suitability of post-release accommodation	Not relevant – SPA operating guidelines only.
4.10	Parole for offenders likely to be deported	Theoretical applications to young offenders. Consider during drafting whether provisions are required in practice.
	Parole decision making for serious offenders	
5.1-5.5	Serious offenders and SORC	Not relevant. See **Rec 17.15**.
5.6	Parole and the *Crimes (High Risk Offenders) Act 2006* (NSW)	*Crimes (High Risk Offenders) Act 2006* (NSW) may have theoretical application, but there is unlikely to be any practical need to include these in CCP Act. Under our proposals for age based cut offs, it is highly unlikely that the Children's Court will ever come to consider a matter that is also subject to High Risk Offender provisions.
	A new parole decision making process	
6.1	Redraft procedural provisions	We recommend that the CCP Act should reflect Children's Court procedure and be drafted in accordance with the design principles set out in **Rec 17.5**.
6.2	A new parole decision making process	We recommend a more flexible procedure for the Children's Court. See **Rec 17.13**.
6.3	SORC's role	Not relevant to management of young offenders. See **Rec 17.15**.
6.4	Victim submissions at hearings	Registered victims should be notified of parole hearings and be able to make written submissions. Consider during drafting whether further involvement is necessary or appropriate in Children's Court matters.
6.5	Commissioner and State submissions	Legislation should continue to allow Juvenile Justice NSW to be represented and heard at hearings.
6.6	Revoking discretionary parole orders pre-release	Unlikely to arise. Consider during drafting whether provisions are required in practice.

6.7	Minimising technical rules	Covered by **Rec 17.13**.
	Other issues in the parole decision making process	
7.1	Victims' access to documents	Consider during drafting what provision is necessary and appropriate in Children's Court context.
7.2	Keeping registered victims informed	Consider during drafting what provision is necessary and appropriate in Children's Court context.
7.3	SPA's power to withhold documents	Consider during drafting what provision is necessary and appropriate in Children's Court context.
7.4	Plain language information for offenders	Children's Court and Juvenile Justice NSW should consider.
7.5	Providing written reasons for SPA's decisions	Consider during drafting what provision is necessary and appropriate in Children's Court context.
7.6	Publishing reasons for SPA's decisions	Consider during drafting what provision is necessary and appropriate in Children's Court context.
7.7	Parole in exceptional circumstances	Very rare occurrence but should apply to juvenile parole system.
	Membership of the State Parole Authority and Serious Offenders Review Council	
8.1-8.7	Membership of SPA and SORC	Not relevant to juvenile parole system: **Rec 17.15**.
	Parole conditions	
9.1	Standard conditions of parole	Covered by **Rec 17.8(1)**.
9.2	Obligations under the supervision condition	Covered by **Rec 17.8(2)**.
9.3	Curfews under the supervision condition	Linked to **Rec 17.8(2)**. Consider during drafting what provision is necessary and appropriate in Juvenile Justice NSW context.
9.4	Purpose of reasonable directions	Consider during drafting what provision is necessary and appropriate in Juvenile Justice NSW context.
9.5	Information about compliance with parole requirements	Consider during drafting what provision is necessary and appropriate in Juvenile Justice NSW context.
9.6	Plain language summary of obligations	Consider what action is necessary and appropriate in Juvenile Justice NSW context.
9.7	Framework for additional conditions	Covered by **Rec 17.8(3)**.
9.8	Exemptions from complying with place restriction or curfew conditions	Covered by **Rec 17.8(4)**.
	Breach and revocation	
10.1	A graduated system of sanctions	No change recommended for juvenile parole system.
10.2	Community Corrections responses to breach	No change recommended for juvenile parole system
10.3	SPA responses to breach	Covered by **Rec 17.9**.

10.4	New powers to revoke parole in the absence of breach	Covered by **Rec 17.12**.
10.5	No offence of breach of parole	Applies generally to adults and young people.
	Breach and revocation: procedural issues	
11.1	Clarifying the street time provision	Should apply to juvenile parole system. See also **Rec 17.10**.
11.2	Reviews automatic unless a s 169 inquiry has been held	Covered by **Rec 17.13**.
11.3	SPA should be able to take into account an offender's behaviour during street time	Should apply to Children's Court.
11.4	Effect of rescinding a revocation order	Should apply to Children's Court.
11.5	SPA's power to vary or add conditions after rescission	Should apply to Children's Court.
11.6	Grounds for emergency suspensions	Emergency suspension is not relevant to the juvenile parole system.
11.7	Reasons for decisions in revocation matters	Consider during drafting what provision is necessary and appropriate in Children's Court context.
11.8	Publishing reasons for decisions in revocation matters	Children's Court and Juvenile Justice NSW should consider.
	Further applications for parole	
12.1	Power to override the 12 month rule	We recommend that the 12 month rule not apply in the Children's Court: **Rec 17.14(a)**.
12.2	Process for "manifest injustice" applications	Covered by **Rec 17.14(b)**.
	Appeals and judicial review of SPA decisions	
13.1	No statutory review by the Supreme Court	Should apply to juvenile parole system.

18. Other issues requiring amendment

In brief

This chapter outlines other issues related to parole that arose during our review. We recommend that the breach and revocation process for intensive correction orders and home detention be amended to ensure consistency with the breach and revocation process for parole. We also recommend repealing the timeframe exception for parole consideration for offenders with revoked compulsory drug treatment orders in light of the revised parole consideration timeframes recommended earlier in this report.

18.1 In this chapter we discuss two areas stakeholders raised as needing reform – the breach and revocation process for home detention orders and intensive correction orders (ICOs) and the parole consideration process for offenders with a compulsory drug treatment order that was revoked by the Drug Court.

Breach and revocation of home detention and intensive correction orders

18.2 Home detention and ICOs are custodial sentences that allow offenders to serve a term of imprisonment in the community. The conditions of these orders can include curfews, community service work, reporting requirements, alcohol abstention, participation in certain programs and other additional conditions selected for individual offenders.[1] Home detention is available for terms of imprisonment of up to 18 months and ICOs for terms of up to two years.[2] Courts can impose a non-parole period for sentences served by way of home detention but not by way of ICOs.[3]

18.3 The current breach and revocation process for home detention and ICOs is managed by the State Parole Authority (SPA) and aligns with the process used for parole. The post-revocation procedure and rights of appeal are the same for all

1. For more information about the conditions of home detention and ICOs, see NSW Law Reform Commission, *Sentencing*, Report 139 (2013) ch 9.
2. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 6, 7.
3. *Crimes (Sentencing Procedure) Act 1999* (NSW) s 7(2).

three orders.[4] Stakeholders have described a number of issues with the breach and revocation process for home detention and ICOs[5] that overlap with problems reported in relation to parole. For these reasons, we consider the breach and revocation process for home detention and ICOs to be relevant to this reference.

18.4 SPA may hold an inquiry into a suspected breach or revoke either order if it is satisfied the offender has failed to comply with his or her obligations under the order.[6] If SPA revokes a home detention order or an ICO, the offender is returned to full time custody.[7]

18.5 SPA must hold a review hearing to reconsider the revocation within 14 to 28 days of the initial decision. If SPA rescinds the revocation, the offender is released to serve the remainder of the home detention period in the community.[8] If the revocation is confirmed, offenders may apply to have home detention reinstated after three months in full time custody or an ICO reinstated after one month in full time custody. Offenders are not entitled to a review hearing if an ICO or home detention order is revoked within 30 days of the date on which an offender's sentence expires.[9]

18.6 In our 2013 report on sentencing, we recommended that home detention and ICOs be combined in a single hybrid community detention order.[10] Alternatively, we made recommendations for the improvement and strengthening of home detention and ICOs as they currently exist, including that:

- courts should be able to set a non-parole period of up to two years for both home detention and ICOs
- home detention and ICOs should have a maximum length of three years, and
- offenders should be allowed to apply for reinstatement of a revoked home detention order or ICO after one month.[11]

18.7 Some stakeholders expressed support for these and other recommendations regarding ICOs and home detention.[12] Others also noted that they supported enabling sentencing courts to set a non-parole period for ICOs.[13]

Problems with the breach and revocation procedure

18.8 A number of the problems reported by stakeholders seem to relate to the old process for dealing with breach and revocation. Previously, Community Corrections

4. *Crimes (Administration of Sentences) Act 1999* (NSW) pt 7 div 4.
5. Para [18.8]-[18.10].
6. *Crimes (Administration of Sentences) Act 1999* (NSW) s 162-163, 166-167.
7. *Crimes (Administration of Sentences) Act 1999* (NSW) s 88-90, s 162-168A.
8. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175.
9. *Crimes (Administration of Sentences) Act 1999* (NSW) s 175A.
10. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 11.1.
11. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) rec 9.3-9.4.
12. NSW Department of Family and Community Services (Ageing, Disability and Home Care) *Submission PA36,* 17; Shopfront Youth Legal Centre, *Submission PA41*, 5.
13. NSW, State Parole Authority, *Submission PA19*, 11; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; Legal Aid NSW, *Submission PA33*, 35

officers referred ICO breaches to the ICO Management Committee, which was established to provide advice and recommendations to the Commissioner about the case management of offenders subject to an ICO.[14] Referring the breach to SPA was one way the ICO Management Committee could deal with a breach.[15] As of 2 December 2013, breaches of ICOs are now referred by Community Corrections staff directly to SPA. SPA and Community Corrections now tell offenders when a breach is referred to SPA and provide offenders with more information about the breach and revocation process.[16] The NSW Department of Justice submitted that changes have been made to the administration of the work component of ICOs to provide greater flexibility for offenders with a reasonable excuse for failing to complete this obligation, which SPA noted is the cause of most ICO revocations.[17]

18.9 These changes may have alleviated stakeholder concerns about the ICO breach and revocation process. Some stakeholder submissions suggested that the old procedures for dealing with breaches of ICOs were overly restrictive and bureaucratic.[18] The NSW Department of Justice noted that the referral of breaches to the ICO Management Committee resulted in delay and a protracted response to breaches".[19] Legal Aid NSW submitted that SPA revoked ICOs without providing adequate notice to the offender and allowing the offender to be heard.[20]

18.10 Most stakeholder submissions were made soon after the changes to the ICO breach and revocation process came into effect. However, stakeholder dissatisfaction about the inability of offenders to make submissions when SPA is first considering a breach remains relevant to the current process for both home detention and ICOs.[21] Like the parole breach and revocation process, SPA's decision to revoke an order is made during a private meeting without input from the offender and the offender will be placed in custody until the review hearing. SPA is not required to call on an offender to appear before it or hold an inquiry before revoking a home detention order or an ICO.[22] The 14 to 28 day delay before the review hearing could significantly disrupt an offender's employment, home life and finances. This could be viewed as unfair in a context where offenders may not have spent any time in custody and have likely committed less serious offences than many parolees.

14. *Crimes (Administration of Sentences) Act 1999* (NSW) s 92; NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 26-7.
15. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 26-7.
16. NSW Department of Justice, *Submission PA54,* 27.
17. NSW Department of Justice, *Submission PA54,* 28; NSW, State Parole Authority, *Submission PA19*, 11.
18. NSW Sentencing Council, *Sentencing Trends and Practices: Annual Report 2011* (2012) 35; Legal Aid NSW, *Submission PSE31*, 12; Probation and Parole Officers Association of NSW, *Submission PSE38*, 7; NSW, State Parole Authority, *Submission PA19*, 11; NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; Legal Aid NSW, *Submission PA33*, 35.
19. NSW Department of Justice, *Submission PA54,* 28.
20. Legal Aid NSW, *Submission PSE31*, 12; Legal Aid NSW, *Submission PA33*, 35.
21. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22; NSW Bar Association, *Submission PA31*, 14; Legal Aid NSW, *Submission PA33*, 35.
22. *Crimes (Administration of Sentences) Act 1999* (NSW) s 163(5), 167(2).

Options for reform

18.11 Several stakeholders suggested improvements to the breach and revocation process for ICOs and home detention. Legal Aid NSW's preference was for the sentencing court to deal with home detention and ICO breaches. However, it submitted that if SPA was to continue dealing with breach and revocation, offenders should be able to make any relevant submissions or explanations when SPA first considers a breach. A formal review hearing should still be held to confirm the revocation decision and, if the revocation is confirmed, the offender should be able to apply for reinstatement in one month.[23] NSW Young Lawyers supported notifying offenders that SPA is considering a breach and offering a right of reply.[24]

18.12 The NSW Bar Association supported a default position of SPA being able to "call up" an offender for breach of an ICO or home detention order without the offender returning to full time custody beforehand. It submitted that SPA should have a wide range of options for dealing with breaches including community service hours, a period of home detention or a short period of full time custody.[25] The NSW Department of Justice submitted that breach and revocation processes could be improved by giving SPA the discretion to revoke an order for a specified period of time before the offender is released, rather than requiring a further review hearing.[26]

Our view

18.13 Our view is that SPA is best placed to manage the risk posed by offenders serving custodial sentences in the community. SPA is able to respond to breaches more quickly than the courts, particularly in urgent matters, and it is experienced in dealing with disputed breaches.[27] We also think that the breach and revocation process for ICOs and home detention should continue to be consistent with that of parole. The revocation of each order involves similar risk management considerations and different processes for each order could be difficult for SPA to administer. Requiring SPA to accept submissions from offenders when it first considers a breach of home detention or an ICO would create a different approach to parole and is arguably unnecessary where there is an automatic review hearing.

18.14 We are not concerned about an offender returning to custody following the revocation of an ICO or home detention order, or the 14 to 28 days that may lapse prior to a review hearing. As the NSW Department of Justice highlighted, returning the offender to custody following revocation underscores that home detention and ICOs are custodial sentences.[28] Offenders are on notice from the outset of their sentence that a failure to comply with the obligations of an ICO or home detention will result in a period of imprisonment.

23. Legal Aid NSW, *Submission PA33*, 35; Legal Aid NSW, *Submission PSE31*, 12.
24. NSW Young Lawyers Criminal Law Committee, *Submission PA21*, 22.
25. NSW Bar Association, *Submission PA31*, 14.
26. NSW Department of Justice, *Submission PA54,* 27.
27. NSW Law Reform Commission, *Sentencing*, Report 139 (2013) [11.16], [11.19]
28. NSW Department of Justice, *Submission PA54,* 28.

18.15 SPA has the power to conduct an inquiry into a suspected breach of home detention in s 162 or an ICO in s 166 of the CAS Act. These provisions are substantially similar to SPA's inquiry power for suspected parole breaches.[29] Inquiries into a suspected breach occur before SPA has revoked an order and offenders may make submissions to SPA.[30] Greater use of this power could avoid unnecessary revocations and reduce the number of cases where an order is reinstated following a review hearing. However, SPA conducting an inquiry does not dispense with the requirement for a review hearing and SPA may be reluctant to use additional resources on an inquiry.

18.16 In Chapter 11, we discuss SPA's inquiry power in the context of parole and recommend that the CAS Act should be amended to provide that where SPA has conducted an inquiry into a suspected breach, review hearings should be held at SPA's discretion.[31] In the interests of consistency and streamlining the breach and revocation process, we recommend amending the CAS Act to provide that review hearings are not required where an inquiry is held under s 162 (ICOs) or s 166 (home detention) of the CAS Act.

Recommendation 18.1: Reviews automatic unless a s 162 or s 166 inquiry has been held

Reviews should continue to be held automatically following revocation of a home detention order or an intensive correction order, unless a s 162 (intensive correction order) or s 166 (home detention) inquiry has been held and the home detention order or intensive correction order has been revoked. The State Parole Authority should have a discretion whether to hold a review hearing.

Parole and revoked compulsory drug treatment orders

18.17 Compulsory drug treatment orders (CDTOs) aim to provide drug dependent offenders with an avenue for rehabilitation and reintegration.[32] CDTOs allow offenders to serve sentences of imprisonment with a non-parole period of at least 18 months and a head sentence of not more than six years at the Compulsory Drug Treatment Correctional Centre (CDTCC) where they undertake the compulsory drug treatment program. The compulsory drug treatment program is conducted in five stages:

(1) closed detention in the CDTCC

(2) a combination of detention in the CDTCC and access to community based programs

(3) residing under supervision in the community

29. *Crimes (Administration of Sentences) Act 1999* (NSW) s 169.
30. *Crimes (Administration of Sentences) Act 1999* (NSW) s 162, 166.
31. Recommendation 11.2.
32. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106B.

(4) parole, and

(5) voluntary community based case management.[33]

To be eligible, offenders must have a long term drug dependency and the circumstances of their offending must indicate that it is related to their drug dependency and associated lifestyle.[34]

18.18 Prescribed sentencing courts must refer eligible convicted offenders to the Drug Court to assess their suitability for a CDTO.[35] The Drug Court may impose a CDTO where it considers a CDTO to be appropriate in all the circumstances.[36] If the Drug Court imposes a CDTO, offenders must serve their sentence of imprisonment by way of the CDTO. A CDTO remains in place until it is revoked, the offender's sentence expires, or the offender is released on parole.[37] If the Drug Court revokes a CDTO, it must commit the offender to a correctional centre to serve the remainder of their sentence in full time custody.[38] In 2013, the Drug Court revoked 25 CDTOs, the sentences of three offenders under CDTOs expired, and seven offenders under CDTOs were paroled. As at 31 December 2013, 44 offenders were serving a sentence of imprisonment by way of a CDTO.[39]

The parole consideration process

18.19 The Drug Court acts as the parole authority for offenders serving a sentence by way of a CDTO.[40] A CDTO has the effect of revoking the court based parole order made by the sentencing court for offenders serving sentences of imprisonment of three years or less.[41] It also suspends the requirement for the parole authority (in this case, the Drug Court) to consider an offender serving a sentence of more than three years imprisonment for release on parole at least 60 days before the end of their non-parole period.[42] This means that offenders serving their sentence by way of a CDTO are considered for release on parole at the discretion of the Drug Court. If an offender is released on parole, SPA is responsible for supervising and, if necessary, revoking the parole order.[43]

18.20 If the Drug Court revokes a CDTO, the power to grant parole reverts to SPA. This includes offenders serving a sentence of three years or less as there is no court

33. Corrective Services NSW, *Review of the Compulsory Drug Treatment Program and the Compulsory Drug Treatment Correctional Centre pursuant to the Crimes (Administration of Sentences) Act 1999* (2013) 7-8.
34. *Drug Court Act 1998* (NSW) s 5A.
35. *Drug Court Act 1998* (NSW) s 5A, 18B. Referring courts are prescribed in the *Drug Court Regulation 2010* (NSW) cl 9.
36. *Drug Court Act 1998* (NSW) s 18D.
37. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106E.
38. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106R, 106S.
39. Drug Court of NSW, *Annual Review 2013* (2014) 8.
40. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T.
41. *Drug Court Act 1998* (NSW) s 18G(b).
42. *Drug Court Act 1998* (NSW) s 18G(d).
43. *Crimes (Administration of Sentences) Act 1999* (NSW) s 106T(2).

based parole order in place.[44] SPA must take into account the circumstances that led to the revocation of the CDTO when considering parole.[45]

18.21 The revocation of a CDTO also has the effect of reinstating the requirement in s 137 of the CAS Act that the parole authority (in this case SPA) consider an offender for release on parole at least 60 days before the end of the non-parole period.[46] In September 2014, s 137(2)(b) was inserted to provide that SPA may consider parole less than 60 days before the end of the non-parole period in cases where the Drug Court has revoked a CDTO.[47] This amendment was recommended by a review of the compulsory drug treatment program and the CDTCC in order to facilitate expedited parole consideration for offenders whose CDTO is revoked within 60 days of the end of their non-parole period or after their non-parole period had expired.[48]

Problems

18.22 We understand that in some matters where a CDTO has been revoked by the Drug Court there have been delays in SPA considering the offender for release on parole. In some of these cases, this delay was caused by the Drug Court not promptly informing SPA of CDTO revocation decisions, although this problem appears to have been resolved recently by improved communication. In others, SPA has adjourned parole consideration for a period of a few months.[49] SPA's reasons for such adjournments are not entirely clear. However, it is possible that where the CDTO was revoked within 60 days of the end of the non-parole period some confusion was created as the legislated timeframes could not apply.

18.23 The timeframes in s 137 of the CAS Act are confusing. It is not clear what happens if SPA considers an offender for release on parole less than 60 days before the end of the non-parole period or what "consider" means in the context of s 137. There do not appear to be any consequences attached to a failure to consider an offender for release on parole within the time limits outlined in the CAS Act. Nor is it clear how the amendment to s 137 allowing SPA to consider an offender with a revoked CDTO within 60 days of the end of the non-parole period actually expedites the decision making process in practice.

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44. *Crimes (Administration of Sentences) Act 1999* (NSW) s 159 provides that where offenders are subject to a sentence of imprisonment of three years or less that includes a non-parole period and there is no parole order in force, *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6 div 2 applies to the making of a parole order.
45. *Crimes (Administration of Sentences) Act 1999* (NSW) s 159(1)(b); s 106Q(2).
46. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(1).
47. *Crimes (Administration of Sentences) Act 1999* (NSW) s 137(2)(b) as amended by *Drug Court Legislation Amendment Bill 2014* (NSW) sch 2[6].
48. Corrective Services NSW, *Review of the Compulsory Drug Treatment Program and the Compulsory Drug Treatment Correctional Centre pursuant to the Crimes (Administration of Sentences) Act 1999* (2013) rec 3.
49. Information provided by Legal Aid NSW (17 July 2014).

Our view

18.24 In Chapter 6 we examine SPA's parole decision making process for offenders serving sentences of imprisonment of more than three years. In that chapter we recommend that s 137 of the CAS Act be amended to provide that SPA must commence considering whether to grant parole at least 21 days before an offender is eligible for parole.[50] We consider that Recommendation 6.7, by providing clearer and more realistic timeframes for parole consideration, may help prevent lengthy deferrals in the context of revoked CDTOs.

18.25 In light of this recommendation, our view is that s 137(2)(b), which allows SPA to consider parole less than 60 days before the end of the non-parole period where an offender's CDTO has been revoked by the Drug Court, is unnecessary and should be repealed.

Recommendation 18.2: Hearings about revoked Compulsory Drug Treatment Orders

The *Crimes (Administration of Sentences) Act 1999* (NSW) should not provide for the State Parole Authority to consider parole less than 60 days before the end of the non-parole period where the Drug Court has revoked an offender's Compulsory Drug Treatment Order.

50. Para [6.106] and Recommendation 6.7(1).

Appendix A
Submissions

Preliminary submissions

PPA1 Noel Beddoe, 9 Jul 2013
PPA2 Aboriginal Legal Service, 26 Jul 2013
PPA3 Chester Porter QC, 31 Jul 2013
PPA4 NSW Bar Association, 19 Aug 2013
PPA5 Ken Marslew, 19 Aug 2013
PPA6 Brianna Chesser and Graham Thomas SC, 23 Aug 2013
PPA7 Police Association of NSW, 23 Aug 2013
PPA8 Public Interest Advocacy Centre, 26 Aug 2013
PPA9 Justice Action, 26 Aug 2013
PPA10 NSW Young Lawyers Criminal Law Committee, 26 Aug 2013
PPA11 Grahame Rogers, 13 Sep 2013

Submissions

PA1 Public Interest Advocacy Centre (QP1-QP3), 28 Oct 2013
PA2 Aboriginal Legal Service (NSW/ACT) Ltd (QP1-QP3), 30 Oct 2013
PA3 Children's Court of NSW, 31 Oct 2013
PA4 Legal Aid NSW (QP1-QP3), 31 Oct 2013
PA5 Law Society of NSW (QP1-QP3), 1 Nov 2013
PA6 Police Association of NSW (QP1-QP3), 1 Nov 2013
PA7 NSW, Office of the Director of Public Prosecutions (QP1-QP3), 1 Nov 2013
PA8 NSW Young Lawyers Criminal Law Committee (QP1-QP3), 1 Nov 2013
PA9 The Hon David Levine AO RFD QC, 4 Nov 2013
PA10 Justice Action (QP1 and QP2), 4 Nov 2013
PA11 NSW Bar Association (QP1-QP3), 5 Nov 2013
PA12 Associate Professor Fleur Johns and David Hertzberg, 7 Nov 2013
PA13 Justice Action (QP3), 7 Nov 2013
PA14 NSW, State Parole Authority (QP1-QP3), 12 Nov 2013
PA15 Ken Marslew (verbal submission), 18 Nov 2013
PA16 NSW Police Force and NSW Ministry for Police and Emergency Services (QP1-QP3), 11 Dec 2013
PA17 NSW, Office of the Director of Public Prosecutions (QP4 and QP5), 18 Dec 2013
PA18 Victims of Crime Assistance League Inc NSW, 18 Dec 2013
PA19 NSW, State Parole Authority (QP4 and QP5), 18 Dec 2013
PA20 Women in Prison Advocacy Network (QP1-QP4), 19 Dec 2013
PA21 NSW Young Lawyers Criminal Law Committee (QP4 and QP5), 19 Dec 2013
PA22 Aboriginal Legal Service (NSW/ACT) Ltd (QP4 and QP5), 19 Dec 2013
PA23 Public Interest Advocacy Centre (QP4 and QP5), 19 Dec 2013
PA24 Australian Justice Reinvestment Project, 20 Dec 2013

PA25 Police Association of NSW (QP4 and QP5), 20 Dec 2013
PA26 Julian Watling and Sandra Narayan (QP4), 20 Dec 2013
PA27 Australian Community Support Organisation (QP4), 20 Dec 2013
PA28 Justice Action (QP4), 20 Dec 2013
PA29 Justice Action (QP5), 20 Dec 2013
PA30 NSW Police Force and NSW Ministry for Police and Emergency Services (QP4 and QP5), 24 Dec 2013
PA31 NSW Bar Association (QP4-QP6), 6 Jan 2014
PA32 NSW Department of Justice (QP1-QP3), 9 Jan 2014
PA33 Legal Aid NSW (QP4 and QP5), 10 Jan 2014
PA34 The Hon David Levine AO RFD QC (QP3-QP6), 13 Jan 2014
PA35 NSW Department of Family and Community Services - Ageing Disability and Home Care (QP4 and QP5), 24 Jan 2014
PA36 NSW Health - Justice Health and Forensic Mental Health Network (QP6) 29 Jan 2014
PA37 Mental Health Coordinating Council (QP4), 29 Jan 2014
PA38 NSW Department of Family and Community Services (QP6), 29 Jan 2014
PA39 NSW, State Parole Authority (QP6), 30 Jan 2014
PA40 Shopfront Youth Legal Centre (QP4), 31 Jan 2014
PA41 Shopfront Youth Legal Centre (QP5), 31 Jan 2014
PA42 Shopfront Youth Legal Centre (QP6), 31 Jan 2014
PA43 Children's Court of NSW (QP6), 31 Jan 2014
PA44 Intellectual Disability Rights Service (QP4), 4 Feb 2014
PA45 Law Society of NSW (QP4 and QP5), 7 Feb 2014
PA46 Law Society of NSW (QP6), 7 Feb 2014
PA47 Justice Action (QP6), 7 Feb 2014
PA48 Juvenile Justice NSW (QP6), 7 Feb 2014
PA49 Corrective Services NSW (QP6), 7 Feb 2014
PA50 Probation and Parole Officers' Association of NSW Inc (QP5), 12 Feb 2014
PA51 Legal Aid NSW (QP6), 17 Feb 2014
PA52 William Kamm, 25 Feb 2014
PA53 NSW Police Force and NSW Ministry for Police and Emergency Services (QP6), 25 Feb 2014
PA54 NSW Department of Justice (QP4 and QP5), 12 Mar 2014
PA55 Probation and Parole Officers' Association of NSW Inc (QP4), 10 Jul 2014
PA56 Mental Health Commission of NSW, 4 Aug 2014

Appendix B
Consultations

Preliminary consultations

NSW, State Parole Authority (PPAC1)

10 July 2013

Ian Pike (Chairperson)

NSW, State Parole Authority (PPAC2)

12 July 2013

Robert Cosman (Director and Secretary)
Amy Manuell (Deputy Director and Assistant Secretary)

Legal Aid NSW and the Aboriginal Legal Service (NSW/ACT) Ltd (PPAC3)

17 July 2013

Bill Grant (Legal Aid NSW)
Paul Hayes (Legal Aid NSW)
Will Hutchins (Legal Aid NSW)
John McKenzie (Aboriginal Legal Service (NSW/ACT))
Bharan Narula (Aboriginal Legal Service (NSW/ACT))

Serious Offenders Review Council (PPAC4)

19 July 2014

David Levine (Chairperson)

Corrective Services NSW (PPAC5)

19 July 2014

Peter Severin (Commissioner)
Rosemary Caruana (Assistant Commissioner Community Corrections)
Luke Grant (Assistant Commissioner Strategic Policy and Planning)
Anne-Marie Martin (Assistant Commissioner Offender Management and Policy)

Juvenile Justice NSW (PPAC6)

18 October 2013

Valda Rusis (Chief Executive)
Kevin Harris (Executive Director, Statewide Operations)
Jenni Byers (A/Executive Director, Court Logistics, Classification and Security Intelligence)
Denise Hanley (Director, Operations Unit)
Mike Wheaton (Senior Project Officer)

Children's Court of NSW (PPAC7)

23 October 2013

Judge Peter Johnstone (President)
Magistrate Paul Mulroney (Senior Children's Magistrate)
Magistrate Joanne Keogh (Senior Children's Magistrate)
Rosemary Davidson (Executive Officer)
Paloma Mackay-Sim (Research Associate to the President)

Consultations

Justice Action and the Women In Prison Advocacy Network (PAC1)

12 December 2013

Kat Armstrong (Director of WIPAN)
Brett Collins (Coordinator of Justice Action)
Michael Knight (Justice Action)
Debbie Akkawi (Justice Action)
Student interns from both Justice Action and WIPAN

Roundtable: advocacy and representative groups (PAC2)

12 December 2013

Bharan Narula (Aboriginal Legal Service (NSW/ACT))
Raymond Brazil (Aboriginal Legal Service (NSW/ACT))
Jessica Roth (Public Interest Advocacy Centre)
Jane Sanders (Shopfront Youth Legal Centre)
Corinne Henderson (Mental Health Coordinating Council)
Tim Chate (Intellectual Disability Rights Service)
Ka Ki Ng (NSW Consumer Advisory Group – Mental Health Inc)
Digby Hughes (Homelessness NSW)
Felicity Reynolds (Mercy Foundation)

Mental Health Commission of NSW (PAC3)

16 December 2013

John Feneley (Commissioner)
Sarah Hanson (Executive Officer)

Roundtable: non-government service providers (PAC4)

17 December 2013

Dea Delaney-Thiele (Aboriginal Medical Service Western Sydney)
Leanne Schuster (Aboriginal Medical Service Western Sydney)
Bron Parker (Catholic Care)
Mindy Sotiri (Community Restorative Centre)
Jonathan Martin (Glebe House)
Tamara Pararajasingham (Mission Australia)
Lynette Marie (Rainbow Lodge)
Richard Feeney (Prison Fellowship Australia (NSW/ACT))
David Parnell (New Horizons)

Dawn de Loas Correctional Centre management team (PAC5)

28 January 2014

Sean Fitzgerald (General Manager)
Andrea Bowen (Manager – Offender Services and Programs)

Dawn de Loas Correctional Centre inmates (PAC6)

28 January 2014

Four inmates at the Dawn de Loas Correctional Centre

Silverwater Parole Unit (PAC7)

28 January 2014

Din Abdmajid
Sarah Gilmour
Tanya Merhi

City Community Corrections Office management team (PAC8)

29 January 2014

Rick Pratley (Manager)
Steven Morris (Unit Leader)
Ilona Koro (Unit Leader)

City Community Corrections Office parolees (PAC9)

29 January 2014

Three parolees at the City Community Corrections Office

NSW Department of Family and Community Services (PAC10)

30 January 2014

Melinda Smith (Ageing Disability and Home Care)
Matt Frize (Ageing Disability and Home Care)
Joe Parsons (Housing NSW)
Galina Laurie (Women NSW)
Rochelle Waterhouse (NDIS taskforce)
Nicole Robinson (NDIS taskforce)

NSW Health (PAC11)

4 February 2014

Karin Lines (Executive Director Clinical Operations – Forensic Health)
Julie Carter (Service Director Adolescent and Community Forensic Mental Health Services)
Amy Lewandowski (Manager Service Development and Quality – Forensic Mental Health)
Trevor Perry (Service Director Forensic Mental Health)
Danielle Maloney (A/Director Mental Health – Children and Young People)

Homicide Victims Support Group (PAC12)

12 March 2014

Robert Taylor (President)
Martha Jabour (Executive Director)
Tim King (Treasurer)
Ron Lockhart (Honorary Treasurer)
Vanya King (Committee member)
Counselling staff
Group members

Roundtable: victims' representatives (PAC13)

19 March 2014

Mahashini Krishna (A/Commissioner of Victims Rights)
Louise Lenard (Victims Services, NSW Department of Justice)
Peter Rolfe (Homicide Survivors Support after Murder)
Howard Brown (Victims of Crime Assistance League)

Ralph Kelly (Thomas Kelly Youth Foundation)
Karen Willis (NSW Rape Crisis Centre)

Wagga Wagga Community Corrections Office (PAC14)

20 March 2014

Paul Bonnett (Manager)
Sue Spry (Unit Leader, Wagga Wagga Community Corrections office)
Lisa Hewitt (Unit Leader, Young Community Corrections office)
Mick Dendy (Unit Leader, Junee Parole Unit)
Paul Willis (Junee Parole Unit)

Roundtable: Wagga Wagga government agencies (PAC15)

20 March 2014

Craig Iskov (Housing NSW)
Scott McKee (Housing NSW)
Stephanie Corrigan (Drug and Alcohol MERIT)
Alison Linder (Ageing Disability and Home Care)
Leanne Smith (Community Services)
Stephanie Connor (Murrumbidgee Local Health District)

Roundtable: Wagga Wagga legal practitioners (PAC16)

20 March 2014

Shaun Mortimer (Aboriginal Legal Service (NSW/ACT))
Kyle Burgess (Aboriginal Legal Service (NSW/ACT))
Anna Nightingale (Legal Aid NSW)

Roundtable: Wagga Wagga non-government service providers and advocacy groups (PAC17)

21 March 2014

John Pocius (Red Cross)
Michelle Ellis (Edel Quinn Crisis Accommodation Shelter)
Candeda Smith (Mission Australia)
Rob Nichol (Mission Australia)
Tyrell Lingren (Mission Australia)
Alison Robb (Mission Australia)

Wagga Wagga Juvenile Justice NSW office (PAC18)

21 March 2014

Michael Whiteside (Area Manager)
Drew Adams (Assistant Manager)

Corrective Services NSW (PAC19)

25 March 2014 – Options workshop

Peter Severin (Commissioner)
Rosemary Caruana (Assistant Commissioner Community Corrections)
Luke Grant (Assistant Commissioner Strategic Policy and Planning)
Anne-Marie Martin (Assistant Commissioner Offender Management and Policy)
Craig Flanagan (Director, Community Corrections)
Jason Ware (Executive Director, Offender Services and Programs)
Mac La'ulu (A/Director Inmate Case Management and Placement)

NSW, State Parole Authority (PAC20)

28 March 2014

Robert Cosman (Director and Secretary)
Lloyd Walker (community member)
Ken Moroney (community member)
Chief Inspector Hamed Baqaie (police member)

Roundtable: legal practitioners (PAC21)

4 April 2014 – Options workshop

John McKenzie (Aboriginal Legal Service (NSW/ACT))
Bharan Narula (Aboriginal Legal Service (NSW/ACT))
Will Hutchins (Legal Aid NSW)
Dara Read (Legal Aid NSW)
Lou Schetzer (Public Interest Advocacy Centre)
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Richard Wilson (NSW Bar Association)
Megan Black (NSW Bar Association)
Johanna Pheils (NSW, Office of the Director of Public Prosecutions)
Thomas Spohr (NSW Young Lawyers)

Shopfront Youth Legal Centre (PAC22)

8 April 2014

Jane Sanders (Principal Solicitor)
Jane Irwin (Solicitor)

Inspector of Custodial Services (PAC23)

4 June 2014

John Paget (Inspector of Custodial Services)
Anita Knudsen (Senior Inspector and Research Officer)

Corrective Services NSW (PAC24)

3 July 2014 – Options workshop

Peter Severin (Commissioner)
Rosemary Caruana (Assistant Commissioner Community Corrections)
Anne-Marie Martin (Assistant Commissioner Offender Management and Policy)
Jason Ware (Executive Director, Offender Services and Programs)
Mac La'ulu (A/Director Inmate Case Management and Placement)
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Children's Court of NSW (PAC25)

9 July 2014

Magistrate Paul Mulroney (Senior Children's Magistrate)
Magistrate John Crawford (A/Children's Magistrate)
Paloma Mackay-Sim (Research Associate)

Juvenile Justice NSW (PAC26)

11 July 2014

Kevin Harris (A/Chief Executive)
Denise Hanley (A/Executive Director Statewide Operations)
Kerrie Bagnall (Director Operations Unit)
Jenni Byers (A/Executive Director Court Logistics Classification Security Intelligence)

State Parole Authority (PAC27)

11 July 2014

The Hon James Wood AO QC (Chairperson)
Robert Cosman (Director and Secretary)
Amy Manuell (Deputy Director and Assistant Secretary)
Lloyd Walker (community member)
Ken Moroney (community member)

Roundtable: legal practitioners (PAC28)

14 July 2014 – Options workshop

John McKenzie (Aboriginal Legal Service (NSW/ACT))
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Will Hutchins (Legal Aid NSW)
Dara Read (Legal Aid NSW)
Paul Hayes (Legal Aid NSW)
Keisha Hopgood (Legal Aid NSW)
Jane Sanders (Shopfront Youth Legal Centre)
Jane Irwin (Shopfront Youth Legal Centre)
Lou Schetzer (Public Interest Advocacy Centre)
Ros Everett (Law Society of NSW)
Veronica Love (Law Society of NSW)
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Thomas Spohr (NSW Young Lawyers)

State Parole Authority (PAC29)

3 October 2014

The Hon James Wood AO QC (Chairperson)
Robert Cosman (Director and Secretary)
Amy Manuell (Deputy Director and Assistant Secretary)

NSW Police Force (PAC30)

21 October 2014

Assistant Commissioner Frank Mennilli
Inspector Michael Moroney

Appendix C
Australian parole systems

	Any sentences ineligible for parole?	Any automatic parole?	Any discretionary safeguard on automatic parole?	Rules about minimum length of possible parole period	Ambit of discretionary parole (decisions of a parole board or similar)
NSW	Yes – sentences 6 months or less; also if court chooses to impose fixed term	Yes – sentences more than 6 months to 3 years	Yes – SPA may revoke court parole order before release	No	Sentences more than 3 years where an NPP has been fixed
Vic	Yes – sentences of 1 year or less; also where the court chooses to impose a fixed term	No	N/A	NPP must be at least 6 months less than the term of the sentence	All sentences of more than 1 year where an NPP has been fixed
Qld	No	Yes – sentences 3 years or less (unless for certain violent or sex offences) court must fix date for release on parole	No	No	Sentences more than 3 years; or sentences 3 years or less but precluded from automatic parole due to offence type
SA	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	Yes – sentences 1 year or more but less than 5 years (unless sentence for certain serious offences) parole board must order release on parole at end of NPP	No	No	Sentences 5 years or more; or sentences 1 year or more but less than 5 years precluded from automatic parole due to offence type
WA	Yes – sentences less than 1 year; also if court chooses for the sentence to not be a parole eligible sentence	No	N/A	Maximum parole period is 2 years. Parole eligible sentences of 4+ years, offenders are eligible to be considered for parole 2 years before end of sentence. Sentences less than 4 years are eligible to be considered for parole at halfway point	Sentences 1 year or more where court has made a parole eligibility order
Tas	Yes – sentences where court has chosen to impose a fixed term	No	N/A	No	All sentences where an NPP has been fixed
NT	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	No	N/A	No	All sentences of more than 1 year where an NPP has been fixed
ACT	Yes – sentences less than 1 year; also if court chooses to impose a fixed term	No	N/A	No	All sentences of more than 1 year where an NPP has been fixed

Cth	Yes – if court chooses not to make a recognizance release order or set a non-parole period	No	N/A	No	All sentences where a recognizance release order has been made, offender must be released in accordance with the order (ie court is discretionary decision maker at time of sentencing) and all sentences where a non-parole period has been fixed (Attorney General the discretionary decision maker at end of non-parole period)

NPP = non-parole period. Life sentences and the different types of indefinite or indeterminate sentences that exist in some jurisdictions are not included.

- **NSW**: *Crimes (Administration of Sentences) Act 1999* (NSW) pt 6-7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 44-46
- **Victoria**: *Corrections Act 1986* (Vic) pt 8 div 5; *Sentencing Act 1991* (Vic) pt 3 div 2
- **Queensland**: *Penalties and Sentences Act 1992* (Qld) pt 9 div 3; *Corrective Services Act 2006* (Qld) ch 5 pt 1
- **SA**: *Criminal Law (Sentencing) Act 1988* (SA) pt 3 div 2; *Correctional Services Act 1982* (SA) pt 6
- **WA**: *Sentence Administration Act 2003* (WA) pt 3; *Sentencing Act 1995* (WA) pt 13 div 3
- **Tasmania**: *Sentencing Act 1997* (Tas) pt 3; *Corrections Act 1997* (Tas) pt 8
- **NT**: *Sentencing Act* (NT) pt 3 div 5; *Parole Act* (NT) pt 3
- **ACT**: *Crimes (Sentence Administration) Act 2005* (ACT) ch 7; *Crimes (Sentencing) Act 2005* (ACT) pt 5.2
- **Commonwealth**: *Crimes Act 1914* (Cth) pt IB

Appendix D
Parole refusals case sample

d.1 In Chapter 6 we describe the factors guiding State Parole Authority (SPA) parole decision making for offenders with a head sentence of more than three years. Stakeholder submissions reported a number of problems that impeded offenders' progress to parole, including a lack of program participation and post-release accommodation.

d.2 In order to get a stronger sense of the common reasons SPA refuses to grant parole we reviewed a three month sample of parole refusals. The material we reviewed consisted of SPA's decision to refuse parole letter to the offender (or intention to refuse parole letter in the case of serious offenders) and Community Corrections' pre-release reports, including anniversary or supplementary reports where relevant. We undertook the analysis to identify any problems with preparing offenders for release that could be addressed to reduce the number of offenders being refused parole.

d.3 The three month sample ranged from 6 March 2014 to 10 June 2014 and comprised 97 cases. Of these, 80 cases (82.5%) concerned non-serious offenders and 17 (17.5%) concerned serious offenders. Most offenders (82.5%) were being considered for parole for the first time. The remainder had previously been refused parole (12.4%) or were being reconsidered for parole after their parole order was revoked (5.2%).

d.4 Our method involved attempting to identify the key reasons why SPA refused to grant parole in each case. We chose three reasons in accordance with their apparent importance from the following list:

- poor attitude/uncooperative/previous poor response to supervision (eg previous parole revocation)
- no post-release accommodation
- no post-release plan (for example, needs to undertake a residential rehabilitation program)
- needs to complete program - offender problem (for example, refused to participate, failed or suspended from the program, became ineligible due to security classification regression)
- needs to complete program - administrative problem (for example, program waiting list, lack of program availability, confusion regarding referrals and assessments)
- needs to complete external leave
- poor behaviour in custody/institutional offences/drug use in custody
- risk of reoffending remains too high despite programs/interventions
- outstanding charges.

- needs to stabilise on medication/risk of self harm/further assessment required

d.5 In cases concerning serious offenders, the Serious Offenders Review Council (SORC) provides a recommendation to SPA regarding whether an offender should be released on parole. SORC recommended against parole for each serious offender in our sample. This recommendation against parole was recorded as the primary reason for SPA's refusal to grant parole in those cases.

d.6 The process of identifying these reasons involved one staff member reviewing the materials and recording the three most significant reasons in a spreadsheet. Another staff member then reviewed the material and the reasons collated in the spreadsheet, taking note of those cases where there was disagreement. The two reviewers then discussed the queried cases and agreed on the three key reasons parole was refused. We focused on the critical issues and conclusion to SPA's letter to get a sense of which reasons were the most significant in its decision.

d.7 The notification letters from SPA do not rank the reasons for its decision to refuse parole. In some cases, there was a clear reason SPA refused to grant parole and the other concerns it cited appeared largely incidental. In others, there were a few compelling reasons for SPA to refuse parole. Grading reasons in these cases was a difficult, and perhaps meaningless, process. The ranking of each reason involved an exercise of judgement based on the issues that SPA and Community Corrections appeared to focus on in the materials.

d.8 The varying level of detail across cases in the materials we reviewed sometimes made it difficult to distinguish between the grading categories. This was particularly so where SPA refused parole because an offender needed to complete a program addressing their offending behaviour. It was not always apparent why the program had not been completed in time, for example if the offender's participation had been delayed by their poor behaviour in custody, a long waiting list or an oversight in case planning.

d.9 For these reasons we were not able to compile an exact numerical analysis of reasons parole was refused in our case sample. However, the review still provided a useful insight into SPA's decision making process as well as the issues that commonly arise to prevent offenders being released on parole.

Appendix E
Juvenile parole systems in Australian jurisdictions

	Is there a juvenile parole system separate to adult parole system?	Who is dealt with by juvenile parole system?	Who makes juvenile parole orders?	Are the criteria for making juvenile parole orders different to those for adult parole orders?	Do any offenders under 18 come within the adult parole system?
NSW	Yes.	Children and young people who are detained in detention centres at the time of parole eligibility.	The sentencing court for sentences of three years or less. The Children's Court may release juveniles serving custodial sentences of over 3 years in detention centres on parole after the non-parole period expires, as SPA does with adults. The Children's Court can also revoke the court based parole orders of detainees serving three years or less before release.	**No.** A sentencing court that imposes a custodial sentence of up to 3 years on a juvenile must make a parole order. When the Children's Court deals with a juvenile's application for parole, it must consider the criteria applicable to releasing adults on parole in CAS Act s 135.	**Yes.** A person detained in a correctional centre, including Kariong juvenile correctional centre, comes under SPA's jurisdiction.
Vic	Yes.	Children aged 10-14 who are sentenced to Youth Residential Orders. Children and young people aged 15-20 who are sentenced to Youth Justice Orders, or transferred to a Youth Justice Centre from a prison.	Youth Residential Board may release children aged 10-14 on parole who are detained in Youth Residential Centres at any time. Youth Parole Board may release people aged 15-20 on parole who are detained in Youth Justice Centres at any time.	**No.** The Adult Parole Board, the Youth Residential Board and Youth Parole Board are not required to consider any criteria when releasing an offender on parole.	**Yes.** A person detained in an adult prison, including a juvenile transferred from a Youth Justice Centre, comes under the Adult Parole Board's jurisdiction.
SA	Yes.	Children and young people who, at the time of eligibility for release, are: ▪ serving sentences of detention in training centres ▪ serving prison sentences in training centres.	Training Centre Review Board (known as the Youth Parole Board when dealing with "recidivist young offenders") may: ▪ release a person serving a sentence of detention in a training centre after he or she has served two thirds of the sentence ▪ release a recidivist young offender serving a sentence of detention in a training centre after he or she serves four fifths of the sentence ▪ release a person serving a prison sentence in a training centre on parole.	**It depends.** The criteria in *Young Offenders Act 1993* (SA) s 41A(2) apply to release of most juveniles. The criteria in *Young Offenders Act 1993* (SA) s 41A(3) apply to release of "recidivist young offenders". The criteria in *Correctional Services Act 1982* (SA) s 67 apply to release on parole of people serving prison sentences of more than 5 years in training centres. People serving prison sentences of 5 years or less are automatically paroled under *Correctional Services Act 1982* (SA) s 66.	**Yes.** A person detained in an adult prison, including any person transferred from a training centre, comes under the Parole Board's jurisdiction.

	Is there a juvenile parole system separate to adult parole system?	Who is dealt with by juvenile parole system?	Who makes juvenile parole orders?	Are the criteria for making juvenile parole orders different to those for adult parole orders?	Do any offenders under 18 come within the adult parole system?
WA	Yes.	Children and young people who, at the time of eligibility for release, are serving sentences of detention in a detention centre or a prison.	The Supervised Release Review Board may: ▪ release a child or young person serving up to 12 months detention on a supervised release order after 50% of the sentence has expired ▪ release a child or young person serving over 12 months detention on a supervised release order after the minimum term set by the sentencing court has expired, and ▪ release a child or young person subject to a "special order" on a supervised release order after 12 months of the special order has expired.	The criteria in *Young Offenders Act 1994* (WA) s 133(1) apply to the release of a child or young person on a supervised release order.	**Yes.** A person serving a prison sentence comes under the Prisoners Review Board's jurisdiction.
Qld	Yes.	A child or young person sentenced to detention. Children and young people up to 16 may only be sentenced to detention. People aged 17 who committed an offence when under 17 may also be sentenced to detention in certain circumstances.	Children and young people are automatically released after serving the minimum term in detention. 70% of the sentence must expire before automatic release, unless a court varies the minimum term to between 50-70% of the sentence.	No discretionary parole. Automatic release after serving minimum term.	**Yes.** People over 16 who receive prison sentences come under the Parole Board's jurisdiction.
Tas	Yes.	Children and young people serving sentences of detention in detention centres or prisons.	Children and young people are automatically released after serving 50% or 3 months of a sentence of detention (whichever is longer).	No discretionary parole. Automatic release after serving minimum term.	**Yes.** A person serving a prison sentence comes under the Parole Board's jurisdiction.
NT	No separate juvenile parole system.	No separate parole system.	NT Parole Board.	**No.** NT Parole Board has full discretion to release all offenders on parole.	**Yes.** Juvenile and adult offenders all come under the Parole Board's jurisdiction.

	Is there a juvenile parole system separate to adult parole system?	Who is dealt with by juvenile parole system?	Who makes juvenile parole orders?	Are the criteria for making juvenile parole orders different to those for adult parole orders?	Do any offenders under 18 come within the adult parole system?
ACT	No separate juvenile parole system.	No separate parole system for children and young people.	ACT Parole Board.	**Yes.** *Crimes (Sentence Administration) Act 2005* (ACT) s 120(2) and the youth justice principles in *Children and Young People Act 2008* (ACT) s 94 apply to consideration of children and young people for release on parole.	**Yes.** Juvenile and adult offenders all come under the Parole Board's jurisdiction.

Appendix F
Young offenders in NSW custody

Pathways from the sentencing court into adult or juvenile custody

Jurisdiction of the Children's Court and decisions on jurisdiction

f.1 The Children's Court has jurisdiction to sentence young offenders for summary and indictable offences, excluding traffic offences and serious children's indictable offences.[1] All offences in the Children's Court are dealt with summarily,[2] including indictable offences. However, the Children's Court may decide at any time that it is not appropriate for an indictable matter to be dealt with summarily and instead commit the young offender to trial or sentencing as an adult in the District or Supreme Courts.[3] A young offender may make a similar election.[4]

f.2 The Children's Court cannot impose a term of imprisonment but may impose a control order for a period of up to two years.[5] This means the young offender will enter custody as a detainee in a detention centre under the management of Juvenile Justice NSW.[6] However, if the offender is over 21 when the control order is imposed, it will convert to a term of imprisonment and the offender will go to a correctional centre under the management of Corrective Services NSW.[7]

Powers of the District and Supreme Courts

f.3 A young offender who has been charged with a serious children's indictable offence must be dealt with at law and sentenced as an adult in the District or Supreme

1. *Children (Criminal proceedings) Act 1987* (NSW) s 28. On serious children's indictable offences, see para [17.108].
2. *Children (Criminal Proceedings) Act 1987* (NSW) s 31(1).
3. *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2)-(5).
4. An election may only be made for indictable offences that can be prosecuted summarily without the consent of the accused: *Children (Criminal Proceedings) Act 1987* (NSW) s 31(2).
5. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(4), 33(1)(g).
6. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(g)(i).
7. *Children (Criminal Proceedings) Act 1987* (NSW) s 33(1)(g)(ii).

Courts.[8] The court may impose a sentence of imprisonment, which the young offender will generally serve as an inmate in a correctional centre under the management of Corrective Services NSW.

f.4 In sentencing a young offender who has been found guilty of an indictable offence (other than a serious children's indictable offence), the District or Supreme Courts may choose between:

- sentencing the young offender under the *Children (Criminal Proceedings) Act 1987* (NSW) (CCP Act) as if the court was the Children's Court, or
- sentencing the young offender as an adult.[9]

f.5 In deciding which approach to take, the court must have regard to:

- the seriousness of the indictable offence
- the nature of the indictable offence
- the age and maturity of the young offender at the time of the offence and at the time of sentencing
- the seriousness, nature and number of any prior offences, and
- other matters the court considers relevant.[10]

If a young offender is charged with or found guilty of a serious children's indictable offence, the young offender must be dealt with in the District or Supreme Courts according to law.[11]

Placement after serious children's indictable offences

f.6 **Under 18 at sentencing:** If the District or Supreme Court sentences a young offender who is under 18 to a term of imprisonment for a serious children's indictable offence, the court may direct that the young offender serve part or all of the sentence as a detainee in a detention centre.[12]

f.7 **Over 18 but under 21 at sentencing:** If a young offender (who was under 18 at the time of the offence and under 21 at the time of being charged before the court) is sentenced to imprisonment for a serious children's indictable offence when the young offender is over 18 but still under 21, the court may only direct that part or all of the term be served in juvenile detention if:

- there are special circumstances, or

8. *Children (Criminal Proceedings) Act 1987* (NSW) s 16-17.
9. *Children (Criminal Proceedings) Act 1987* (NSW) s 18.
10. *Children (Criminal Proceedings) Act 1987* (NSW) s 18(1A).
11. *Children (Criminal Proceedings) Act 1987* (NSW) s 17.
12. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(3).

- the non-parole period or the head sentence will expire within 6 months of the offender turning 18.[13]

f.8 "Special circumstances" include:

- the young offender is vulnerable due to illness or disability
- there is need for and availability of certain programs in detention centres, or
- imprisonment in a correctional centre poses an unacceptable risk of harm to the young offender.[14]

f.9 If the young offender has previously served a period of imprisonment in a correctional centre, the court can only order that part or all of the sentence be served in juvenile detention if there are special circumstances.[15]

f.10 **Over 21 at sentencing:** If a young offender (who was under 18 at the time of the offence and under 21 at the time of being charged before the court) is sentenced to imprisonment for a serious children's indictable offence when over 21, the court may only direct that part or all of the term be served in juvenile detention if:

- there are special circumstances (as defined at paragraph f.8), and
- either the non-parole period or the head sentence will expire within six months of the offender turning 21.[16]

Placement after other indictable offences

f.11 **Under 18 at sentencing:** If the District or Supreme Courts sentence a young offender to imprisonment for an indictable offence (that is not a serious children's indictable offence), the court may direct that the sentence or part of the sentence be served as a detainee in a detention centre.[17]

f.12 **Over 18 but under 21 at sentencing:** If the District or Supreme Courts sentence a young offender to imprisonment for an indictable offence (that is not a serious children's indictable offence), the court may direct that the sentence or part of the sentence be served as a detainee in a detention centre unless the young offender has previously served a period of imprisonment in a correctional centre (this would include Kariong juvenile correctional centre). If the young offender has previously served a period of imprisonment in a correctional centre, the court can only direct that they serve part or all of the period of imprisonment in a detention centre if there are special circumstances (as defined at paragraph f.8).[18]

f.13 **Over 21 at sentencing:** If the District or Supreme Courts sentence a young offender to imprisonment for an indictable offence (that is not a serious children's indictable offence) when the offender is over 21 at time of sentencing, the court may

13. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(3)(a)-(c).
14. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(4).
15. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(1A).
16. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(2)-(3).
17. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(1).
18. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(1A), (4).

only direct that the sentence or part of the sentence be served as a detainee in a detention centre if the non-parole period or the head sentence will expire within six months of the offender turning 21.[19] If the young offender has previously served a period of imprisonment in a correctional centre, there must also be special circumstances before the court can direct that the offender serve the sentence or part of the sentence as a detainee.[20]

Transfers

f.14 A young offender may be transferred between a detention centre (managed by Juvenile Justice NSW) and a correctional centre (managed by Corrective Services NSW), or between a juvenile correctional centre and an adult correctional centre (both types are managed by Corrective Services).

Transfer from a correctional centre to a detention centre

f.15 The Attorney General may order the transfer of any offender under 21 years old from a correctional centre to a detention centre.[21]

f.16 The Commissioner of Corrective Services may, with the consent of the Director General of the Department of Attorney General and Justice (the Director General), order the transfer of an offender under 21 years old from a juvenile correctional centre to a detention centre.[22] However, this may only be done if the offender had previously been transferred to a juvenile correctional centre from a detention centre.[23]

f.17 If a young offender is transferred to a detention centre, the offender's term of imprisonment is converted into a control order of the same term.[24]

Transfer from a detention centre to a correctional centre

f.18 The Director General may order the transfer of a young offender aged 16 or over to a correctional centre, with the consent of the Commissioner of Corrective Services.[25] There is no provision in the legislation authorising the transfer of young offenders aged under 16 from a detention centre to a correctional centre.

f.19 If the young offender is over 16 and under 18, such a transfer can only be made if

19. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(2).
20. *Children (Criminal Proceedings) Act 1987* (NSW) s 19(1A).
21. *Children (Detention Centres) Act 1987* (NSW) s 10(1). The legislation specifies that the Minister administering the *Crimes (Administration of Sentences) Act 1999* (NSW) may order the transfer, but only with the consent of the Minister responsible for the *Children (Detention Centres) Act 1987* (NSW). Currently, the Acts are administered by the same person – the Attorney General.
22. *Children (Detention Centres) Act 1987* (NSW) s 10(2).
23. *Children (Detention Centres) Act 1987* (NSW) s 10(3).
24. *Children (Detention Centres) Act 1987* (NSW) s 10(4).
25. *Children (Detention Centres) Act 1987* (NSW) s 28(1).

- the offender had previously been transferred to the detention centre from a correctional centre
- the offender was in a detention centre after being ordered to serve part or all of the sentence there by the District or Supreme Court, or
- The Director General is satisfied that the offender's behaviour warrants the transfer.[26]

The only exception is if the offender had previously been transferred to a correctional centre from a detention centre in the same period of detention.[27] Offenders who are transferred to a correctional centre when they are under 18 may only be transferred to a juvenile correctional centre. [28]

f.20 For offenders aged between 18 and 21, such transfer orders can only be made if:

- the Children's Court has authorised such an order
- the offender has been in a detention centre for at least 6 months and the Director General assesses that it would be "preferable" for the offender to be in a correctional centre
- the offender has been in an adult correctional centre for a period totalling more than 4 weeks
- the offender has applied to be transferred
- the offender has been previously transferred from a correctional centre to a detention centre
- the offender was sentenced by the District or Supreme Court and was directed to spend part or all of the sentence in a detention centre, or
- the Director General is satisfied that the offender's behaviour warrants the transfer.[29]

These limitations do not apply if the offender had previously been transferred to a correctional centre from a detention centre in the same period of detention or in any previous period of detention.[30]

f.21 There are no restrictions on the Director General's power (with the consent of the Commissioner of Corrective Services) to transfer an offender who is over 21 from a detention centre to a correctional centre. [31]

f.22 If a young offender is transferred to a correctional centre, the offender's control order is converted into a term of imprisonment of the same duration.[32]

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26. *Children (Detention Centres) Act 1987* (NSW) s 28(2).
27. *Children (Detention Centres) Act 1987* (NSW) s 28(2C).
28. *Children (Detention Centres) Act 1987* (NSW) s 28(2B).
29. *Children (Detention Centres) Act 1987* (NSW) s 28(2A).
30. *Children (Detention Centres) Act 1987* (NSW) s 28(2D).
31. *Children (Detention Centres) Act 1987* (NSW) s 3, s 28(1).
32. *Children (Detention Centres) Act 1987* (NSW) s 28(3).

Transfer between juvenile and adult correctional centres

f.23 The Commissioner may order the transfer of any inmate under 21 from an adult correctional centre to a juvenile correctional centre for any reason.[33] As juvenile and adult correctional centres are all managed by Corrective Services NSW, the State Parole Authority will remain the parole authority after any transfer.

f.24 The Minister may order the transfer of an inmate from a juvenile correctional centre to an adult correctional centre.[34] For an inmate 18 or above, the Commissioner must recommend the transfer.[35] For an inmate under 18, the Serious Offenders Review Council (SORC) must recommend the transfer.[36] To recommend the transfer, the Commissioner or SORC must be satisfied that:

- the inmate wants to transfer
- the inmate's behaviour warrants the transfer
- the transfer is in the inmate's best interest, or
- the association of the inmate with other inmates at the juvenile correctional centre constitutes a threat to another person's personal safety, the security of the centre, or good order and discipline within the centre.[37]

f.25 In addition, SORC must conduct an inquiry and decide whether or not to recommend the transfer.[38] SORC may conduct a hearing as part of the inquiry, in which case notice must be given to the Commissioner and the inmate.[39] The inmate may choose to be present at the hearing, and may choose to be heard.[40] The Commissioner and the inmate may choose to be represented by a legal practitioner or other person during the inquiry,[41] and SORC must co-opt either a Children's Magistrate or experienced children's advocate as an extra member for the inquiry.[42]

33. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41C(1).
34. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41C(2).
35. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41C(2)(a).
36. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41C(2)(b).
37. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41C(3).
38. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41D(1).
39. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41D(3).
40. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41D(4).
41. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41D(5)-(6).
42. *Crimes (Administration of Sentences) Act 1999* (NSW) s 41D(7)-(8).

Bibliography

ADMINISTRATIVE REVIEW COUNCIL, *Decision Making: Evidence, Facts and Findings*, Best Practice Guide 3 (2007)

ADMINISTRATIVE REVIEW COUNCIL, *Review of Administrative Decisions (Judicial Review) Act: Statements of Reasons for Decisions*, Report No 33 (1991)

ANDREWS, D, and BONTA, J, *The Psychology of Criminal Conduct* (LexisNexis, 4th ed, 2006)

ANDREWS, D, and others, "Does Correctional Treatment Work? A Clinically Relevant and Psychologically Informed Meta-analysis" (1990) 8 *Criminology* 369

AOS, S, MILLER, M and DRAKE, E, *Evidence-Based Adult Corrections Programs: What Works and What Does Not* (Washington State Institute for Public Policy, 2006)

AOS, S, MILLER, M, and DRAKE, E, *Evidence-Based Public Policy Options to Reduce Future Prison Construction, Criminal Justice Costs and Crime Rates* (Washington State Institute for Public Policy, 2006)

APTED, V, HEW, R and SINHA, T , *Barriers to Parole for Aboriginal and Torres Strait Islander People in Australia* (University of Queensland, 2013)

AUDITOR-GENERAL OF NEW SOUTH WALES, *NSW Auditor-General's Report: Financial Audit Volume Six Focusing on Law, Order and Emergency Services* (Audit Office of NSW, 2013)

AUSTIN, J, "How Much Risk Can We Take? The Misuse of Risk Assessment in Corrections" (2006) 70(2) *Federal Probation* 58

AUSTIN, J, and others, *Reliability and Validity Study of the LSI-R Risk Assessment Instrument* (Institute on Crime, Justice and Corrections, 2003)

AUSTRALIA, *Report on Government Services 2014* (Productivity Commission, 2014)

AUSTRALIA, *The Road Home: A National Approach to Reducing Homelessness,* White Paper (2008)

AUSTRALIAN LAW REFORM COMMISSION, *For your Information: Australian Privacy Law and Practice,* Report 108 (2008)

AVIRAM, H, KRAML, V, and SCHMIDT, N, "Dangerousness, Risk and Release" (2010) 7 *Hastings Race and Poverty Law Journal* 175

BAIRD, C, *A Question of Evidence: A Critique of Risk Assessment Models Used in the Justice System* (National Council on Crime and Delinquency, 2009)

BALDRY, E, "Homelessness and the Criminal Justice System" (2011) 14(10) *Parity* 5

BALDRY, E, "Recidivism and the Role of Social Factors Post Release" (2007) 81 *Precedent* 4

BALDRY, E, and others, "Ex-prisoners, Homelessness and the State" (2006) 39 *Australian and New Zealand Journal of Criminology* 20

BALDRY, E, and others, *Ex-Prisoners, and Accommodation: What Bearing Do Different Forms of Housing Have on Social Reintegration?* Final Report No 46 (Australian Housing and Urban Research Institute, 2003)

BARTELS, L, "Parole and Parole Authorities in Australia: A System in Crisis?" (2013) 37 *Criminal Law Journal* 357

BORZYCKI, M and BALDRY, E, *Promoting Integration: The Provision of Prisoner Post-release Services* Trends and Issues in Crime and Criminal Justice No 263 (Australian Institute of Criminology, 2003)

BORZYCKI, M, *Interventions for Prisoners Returning to the Community* (Australian Institute of Criminology, 2005)

BOYLE, D, and others, "An evaluation of Day Reporting Centers for parolees: outcomes of a randomized trial" (2013) 12 *Criminology and Public Policy* 119

BROADHURST, R, "Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?" (Paper presented at Keeping People Out of Prison, Hobart, 27 March 1990)

BROWN, M, "Serious Offending and the Management of Public Risk in New Zealand" (1996) 36 *British Journal of Criminology* 18

BRUNTON-SMITH, I, and HOPKINS, K, *The Factors Associated with Proven Re-offending Following Release from Prison: Findings from Waves 1 to 3 of SPCR* (UK Ministry of Justice, 2013)

BYRNE, J M, and PATTAVINA, A, "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

CALLINAN, I, *Review of the Parole System in Victoria* (2013)

COMMUNITY RESTORATIVE CENTRE, *Getting Out: Your Guide to Surviving on the Outside* (2007)

COOKE, D J, and MICHIE, C, "Violence Risk Assessment: Challenging the Illusion of Certainty" in B McSherry and P Keyzer (ed) *Dangerous People: Policy, Prediction and Practice* (Routledge, 2011)

CORRECTIVE SERVICES NSW, *Review of the Compulsory Drug Treatment Program and the Compulsory Drug Treatment Correctional Centre pursuant to the Crimes (Administration of Sentences) Act 1999* (2013)

CULLEN, F T, and GENDREAU, P, "Assessing Correctional Rehabilitation: Policy, Practice and Prospects" (2000) 3 *Criminal Justice 2000* 109

CULLEN, F T, and others, "Nothing Works Revisited: Deconstructing Farabee's 'Rethinking Rehabilitation'" (2009) 4 *Victims and Offenders* 101

CULLEN, F T, JONSON, C L, and NAGIN, D S, "Prisons Do Not Reduce Recidivism: The High Cost of Ignoring Science" (2011) 91 *Prison Journal Supplement* 48S

CUNEEN, C, *Evaluation of the Post Release Support Program* (Juvenile Justice NSW, 2005)

DARJEE, R and RUSSELL, K, "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)

DAWSON, P and others, *An Evaluation of the Diamond Initiative: Year Two Findings* (London Criminal Justice Partnership, 2011)

DENNISON, S M, "Developmental and Life-Course Criminology-Theories, Research and Policy Implications" in A Stewart, T Allard, S Dennison (ed), *Evidence Based Policy and Practice in Youth Justice* (Federation Press, 2011)

DHARMAPALA, D, GAROUPA, N, and SHEPHERD, J M, "Legislatures, Judges and Parole Boards: The Allocation of Discretion under Determinate Sentencing" (2010) 62 *Florida Law Review* 1037

DOWDEN, C, and ANDREWS, D, "What Works for Female Offenders: A Meta-Analysis" (1999) 45 *Crime and Delinquency* 438

DOWDEN, C, and ANDREWS, D, "What Works in Young Offender Treatment: A Meta-analysis" (1999) 11 *Forum on Corrections Research* 21

DRAKE, E, *Chemical Dependency Treatment for Offenders: A Review of the Evidence and Benefit-Cost Findings,* Document No 12-12-0201 (Washington State Institute for Public Policy, 2012)

DRAKE, E, *Inventory of Evidence-Based and Research-Based Programs for Adult Corrections* (Washington State Institute for Public Policy, 2013)

DURLAUF, S N and NAGIN, D S, "Imprisonment and Crime: Can Both be Reduced?" (2011) 10 *Criminology and Public Policy* 13

DURLAUF, S N and NAGIN, D S, "The Deterrent Effect of Imprisonment" in P J Cook and others (ed) *Controlling Crime: Strategies and Tradeoffs* (UCP, 2011)

ELLIS, T and MARSHALL, P, "Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners" (2000) 33 *Australian and New Zealand Journal of Criminology* 300

FETSCO, D M, "Early Release from Prison in Wyoming: An Overview of Parole in Wyoming and Elsewhere and an Examination of Current and Future Trends" (2011) 11 *Wyoming Law Review* 99

FETSCO, D M, "Parole Revocation in Wyoming" (2012) 1(10) *Association of Paroling Authorities International* 2

GELB, K, FISHER, G, and HUDSON, N, *Reoffending Following Sentencing in the Magistrates' Court of Victoria* (Victorian Sentencing Advisory Council, 2013)

GOTTFREDSON, S D and MORIARTY, L J, "Clinical Versus Actuarial Judgments in Criminal Justice Decisions: Should One Replace the Other?" (2006) 70(2) *Federal Probation* 15

GRANT, B, and GAL, M, *Case Management Preparation for Release and Day Parole Outcome*, (Correctional Service of Canada, 1998)

GREWCOCK, M, "Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners Under Section 501 *Migration Act 1958*" (2011) 44.*Australian and New Zealand Journal of Criminology* 56

GROVE, W M and others, "Clinical Versus Mechanical Prediction: A Meta-Analysis" (2000) 12 *Psychological Assessment* 19

GRUNSEIT, A, FORELL, S and McCARRON, E, *Taking Justice Into Custody: The Legal Needs of Prisoners* (Law and Justice Foundation of NSW, 2008)

HANN, R G and HARMAN, W G, *Release Risk Prediction: A Test of the Nuffield Scoring System* (Ministry of the Solicitor General, 1989)

HANN, R G, HARMAN, W G and PEASE, K, "Does Parole Reduce the Risk of Reconviction?" (1991) 30 *Howard Journal of Criminal Justice* 66

HARRIS, P M, "What Community Supervision Officers Need to Know About Actuarial Risk Assessment and Clinical Judgment" (2006) 70(2) *Federal Probation* 8

HEGGIE, K, *Review of the NSW Home Detention Scheme*, Research Publication No 41 (NSW Department of Corrective Services, 1999)

HELLAND, E, and TABARROK, A, "Does Three Strikes Deter? A Nonparametic Estimation" (2007) 42 *Journal of Human Resources* 309

HENDERSON, M, *Benchmarking Study of Home Detention Programs in Australia and New Zealand* (National Corrections Advisory Group, 2006)

HOOD, R and SHUTE, S, *The Parole System At Work: A Study of Risk Based Decision-Making*, Research Study 202 (Home Office, 2000)

HOOD, R and others, "Sex Offenders Emerging from Long-Term Imprisonment" (2002) 42 *British Journal of Criminology* 371

HOWELLS, K and DAY, A, *The Rehabilitation of Offenders: International Perspectives Applied to Australian Correctional Systems*, Trends and Issues in Crime and Criminal Justice No 112 (Australian Institute of Criminology, 1999)

HSU, C, CAPUTI, P, and BYRNE, M K, "The Level of Service Inventory-Revised (LSI-R): A Useful Risk Assessment Measure for Australian Offenders?" (2009) 36 *Criminal Justice and Behavior* 728

HSU, C, CAPUTI, P, and BYRNE, M K, "The Level of Service Inventory-Revised (LSI-R) and Australian Offenders: Factor Structure, Sensitivity and Specificity" (2011) 38 *Criminal Justice and Behavior* 600

HUEBNER, B, and others, "The Effect and Implications of Sex Offender Residence Restrictions: Evidence from a Two State Evaluation" (2014) 13 *Criminology and Public Policy* 139

HUTCHINS, W and WATERS, K, "Parole, 'Normal Lawful Community Life', and Other Mysteries" (paper presented at Aboriginal Legal Service (NSW/ACT) Ltd Western Zone Conference, 2013)

INDIG, D, and others, *2009 Young People in Custody Health Survey: Full Report* (Justice Health and Juvenile Justice NSW, 2011)

JONES, C, and others, *Risk Of Reoffending Among Parolees*, Crime and Justice Bulletin No 91 (NSW Bureau of Crime Statistics and Research, 2006)

KARMER, J, and others, *Evaluation of the Pennsylvania Board of Probation and Parole's Violation Sanction Grid,* Final Report (2008)

KEVIN, M, *Corrections Treatment Outcome Study (CTOS) on offenders in drug treatment: Results from the Drug Summit demand reduction residential programs*, Research Bulletin 31 (Corrective Services NSW, 2011)

KILLIAS, M, VILLETTAZ, P, and ZODER, I, *The Effects of Custodial vs. Non-Custodial Sentences on Re-Offending: A Systematic Review of the State of Knowledge* Campbell Systematic Reviews, 2006:13 (2006)

KLEIMAN, M and HAWKEN, A "Fixing the Parole System: a System Relying on Swiftness and Certainty of Punishment Rather than on Severity Would Result in Less Crime and Fewer People in Prison" (2008) 24(4) *Issues in Science and Technology* 45

KLEIMAN, M and HAWKEN, A, *Managing Drug Involved Probationers with Swift and Certain Sanctions: Evaluating Hawaii's HOPE* (US Department of Justice, 2009)

KUZIEMKO, I, "How Should Inmates Be Released From Prison? An Assessment of Parole Versus Fixed-Sentence Regimes" (2013) 128 *Quarterly Journal of Economics* 371

La VIGNE, N and others, The Justice Reinvestment Initiative: Experiences from the States (Urban Institute, 2013)

LARKIN, P J, "Clemency, Parole, Good-Time Credits and Crowded Prisons: Reconsidering Early Release" (2013) 11 *Georgetown Journal of Law and Public Policy* 1

LATESSA, E J, and LOWENKAMP, C, "What are Criminogenic Needs and Why are they Important?" [2005] *For the Record* (4th Quarter, 2005) 15

LIPSEY, M W, LANDENBERGER, N A and WILSON, S J, *Effects of Cognitive-Behavioral Programs for Criminal Offenders,* Campbell Systematic Reviews 2007:6 (2007)

LIPSEY, M, LANDENBERGER, N and WILSON, S, "Effects of Cognitive-Behavioral Programs for Criminal Offenders" (2007) 3(6) *Campbell Systematic Reviews*

LITTLE, H, and FARROW, S, *Review of the Victorian Adult Parole System* (Victorian Sentencing Advisory Council, 2012)

LOWENKAMP, C, and LATESSA, E, *Evaluation of Ohio's Halfway House and Community Based Correctional Facilities* (University of Cincinnati, 2002)

LOWENKAMP, C, and LATESSA, E, *Understanding the Risk Principle: How and Why Correctional Interventions Can Harm Low-risk Offenders*, Topics in Community Corrections (National Institute of Corrections, 2004)

LULHAM, R, WEATHERBURN, D and BARTELS, L, *The Recidivism of Offenders Given Suspended Sentences: A Comparison With Full-time Imprisonment*, Crime and Justice Bulletin No 136 (NSW Bureau of Crime Statistics and Research, 2009)

MARTIN, B, and VAN DINE, S, *Examining the Impact of Ohio's Progressive Sanction Grid: Final Report* (National Criminal Justice Reference Service, 2008)

MARTINOVIC, M and SCHLUTER, P, "A Researcher's Experience of Wearing a GPS-EM Device" (2012) 23 *Current Issues in Criminal Justice* 413

MARVELL, T B and MOODY, C E, "Specification Problems, Police Levels, and Crime" (1996) 34 *Criminology* 609

McCAUSLAND, R and others, *People with Mental Health Disorders and Cognitive Impairment in the Criminal Justice System: Cost-Benefit Analysis of Early Support and Diversion* (Australian Human Rights Commission, 2013)

MELBOURNE CENTRE FOR CRIMINOLOGICAL RESEARCH AND EVALUATION, *Home Detention in Victoria - Final Evaluation Report*, Report prepared for Corrections Victoria (2006)

MILLER, M and NGUGI, I, *Impacts of Housing Supports: Persons with Mental Illness and Ex-Offenders* (Washington State Institute for Public Policy, 2009)

MOSS, I, *Statutory Review of the Crimes (Administration of Sentences) Act 1999* (2005)

NAGLE, J F, *Report of the Royal Commission into NSW Prisons* (Parliament of NSW, 1978)

NEW SOUTH WALES GOVERNMENT, *A Way Home: Reducing Homelessness in NSW: NSW Homelessness Action Plan 2009-2014* (2009)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing*, Discussion Paper 33 (1996)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing*, Report 139 (2013)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing*, Report 79 (1996)

NEW SOUTH WALES LAW REFORM COMMISSION, *Sentencing: Patterns and Statistics*, Report 139-A (2013)

NEW SOUTH WALES LAW REFORM COMMISSION, *Young Offenders*, Report 104 (2005)

NEW SOUTH WALES SENTENCING COUNCIL, *High Risk Violent Offenders: Sentencing and Post-Custody Management Options* (2012)

NEW SOUTH WALES SENTENCING COUNCIL, *Sentencing Trends and Practices: Annual Report 2011* (2012)

NEW SOUTH WALES, Auditor-General, *Home Detention: Corrective Services NSW*, Auditor-General's Report, Performance Audit (2010)

NEW SOUTH WALES, Legislative Council Standing Committee on Law and Justice, *Back-end home detention* (2005)

NEW SOUTH WALES, Legislative Council Standing Committee on Law and Justice, *Community Based Sentencing Options for Rural and Remote Areas and Disadvantaged Populations* (2006)

NEW ZEALAND, Law Commission, *Sentencing Guidelines and Parole Reform*, Report 94 (2006)

NORTH CAROLINA, Post-Release Supervision and Parole Commission, *Report on the Status of the Mutual Agreement Parole Program* (2013)

NUTTALL, C P, and others, *Parole in England and Wales*, Home Office Research Study No 38 (1977)

O'LEARY, C, "The Role of Stable Accommodation in Reducing Recidivism: What Does the Evidence Tell Us?" (2013) 12 *Safer Communities* 5

OGLOFF, J R P, and DAVIS, M R, "Assessing Risk for Violence in the Australian Context" in D Chappell and P R Wilson (ed) *Issues in Australian Crime and Criminal Justice* (LexisNexis, 2005)

OGLOFF, J, *Review of Parolee Reoffending By Way of Murder* (2011)

OSTERMANN, M, "Active Supervision and Its Impact Upon Parolee Recidivism Rates" (2013) 59 *Crime and Delinquency* 487

PALK, G R, FREEMAN, J E, and DAVEY, J D, "Australian Forensic Psychologists' Perspectives on the Utility of Actuarial Versus Clinical Assessment for Predicting Recidivism Among Sex Offenders" (paper presented at 18th Conference of the European Association of Psychology and Law, Maastricht, 2008)

PETERSILIA, J, "Parole and Prisoner Reentry in the United States" (1999) 26 *Crime and Justice* 479

PETERSILIA, J, "What Works in Prisoner Reentry? Reviewing and Questioning the Evidence" (2004) 68(2) *Federal Probation* 4

PETERSILIA, J, *When Prisoners Come Home: Parole and Prisoner Reentry* (Oxford University Press, 2003)

POTTEIGER, M C, *Pennsylvania's Reentry System: Toward Safer Communities* (Pennsylvania Board of Probation and Parole, 2013)

RATANSI, S and COX, S M, *Assessment and Validation of Connecticut's Salient Factor Score* (Connecticut Statistical Analysis Center, 2007)

RICHARDS, K, *What Makes Juvenile Offenders Different From Adult Offenders?* Trends and Issues in Crime and Criminal Justice No 409 (Australian Institute of Criminology, 2011)

ROBINSON-OOST, A, "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

ROEGER, L, "Recidivism and parole" (Paper presented at 2nd Australian and New Zealand Society of Criminology Research Conference, 1987)

SACKS, H R, and LOGAN, C H, *Does parole make a difference?* (University of Connecticut School of Law Press,1979)

SACKS, H R, and LOGAN, C H, *Parole: Crime Prevention or Crime Postponement* (University of Connecticut School of Law Press,1980)

SCHETZER, L, and STREETCARE, *Beyond the Prison Gates: The Experiences of People Recently Released from Prison into Homelessness and Housing Crisis* (Public Interest Advocacy Centre, 2013)

SCHLAGER, M and ROBBINS, K, "Does Parole Work? – Revisited: Reframing the Discussion of the Impact of Postprison Supervision on Offender Outcome" (2008) 88 *Prison Journal* 234

SHANE-DuBOW, S, BROWN, A P and OLSEN, E, *Sentencing Reform in the United States: History, Content and Effect* (US Department of Justice, 1985)

SHUTE, S, "Does Parole Work? The Empirical Evidence from England and Wales" (2004) 2 *Ohio State Journal of Criminal Law* 315

SHUTE, S, "Parole and Risk Assessment" in N Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan Publishing, 2007)

SIMPSON, R, *Parole: An Overview*, Briefing Paper No 20/99 (NSW Parliamentary Library Research Service, 1999)

SMITH, N and JONES, C, *Monitoring Trends In Reoffending Among Offenders Released From Prison*, Crime and Justice Bulletin No 117 (NSW Bureau of Crime Statistics and Research, 2008)

SMITH, P, GOGGIN, C and GENDREAU, P, *The Effects of Prison Sentences and Intermediate Sanctions on Recidivism: General Effects and Individual Differences* (Public Works and Government Services Canada, 2002)

SOCIA, K M, "Residence Restrictions are Ineffective, Inefficient and Inadequate: So Now What?" (2014) 13 *Criminology and Public Policy* 179

SOLICITOR GENERAL CANADA, *Study of Conditional Release, Report of the Working Group* (1998)

SOLOMON, A, KACHNOWSKI, V and BHATI, A, *Does Parole Work? Analysing the Impact of Postprison Supervision on Rearrest Outcomes* (Urban Institute, 2005)

STEWART, A, ALLARD, T and DENNISON, S (ed), *Evidence Based Policy and Practice in Youth Justice* (Federation Press, 2011)

THOMAS, S, "Housing Issues for Ex-Prisoners" (2010) 81 *Around the House* 13

THOMPSON, B, "The recidivism of early release, parole and mandatory release prisoners in NSW 1982-85" (Paper presented at 5th Annual Conference of the ANZ Society of Criminology, Sydney University, 1989)

TRAVIS J, and LAWRENCE, S, *Beyond the Prison Gates: The State of Parole in America* (Urban Institute, 2002)

UNITED KINGDOM, HM Prison Service, *Comprehensive Review of Parole and Lifer Processes* (2001)

UNITED KINGDOM, Home Office, *The Parole System in England and Wales: Report of the Review Committee*, Cm 532 (1988)

VICTORIA, Parliamentary Library Research Service, *Sentencing Legislation Amendment (Abolition of Home Detention) Bill 2011*, Research Brief No 8 (2011)

VODANOVICH, I, "Has Parole a Future?" in I Potas (ed) *Sentencing in Australia,* Seminar Proceedings No 13 (Australian Institute of Criminology/Australian Law Reform Commission, 1987)

WAN, W and others, *Parole Supervision and Reoffending*, Trends and Issues in Crime and Criminal Justice No 485 (Australian Institute of Criminology, 2014)

WAN, W and others, *Parole Supervision and Re-offending: A Propensity Score Matching Analysis*, Report to the Criminology Research Advisory Council, Grant CRG 23/12-13 (Australian Institute of Criminology, 2014)

WARD, T and BROWN, M, "The Good Lives Model and Conceptual Issues in Offender Rehabilitation" (2004) 10(3) *Psychology* 243

WARD, T, YATES, P and WILLIS, G, "The Good Lives Model and the Risk Need Responsivity Model: A Critical Response to Andrews, Bonta and Wormith" (2012) 39 *Criminal Justice and Behaviour* 95

WARWICK, K, DODD, H, and NEUSTETER, S R, *Case Management Strategies for Successful Jail Reentry* (National Institute of Corrections, 2012)

WATKINS, I, *The Utility of Level of Service Inventory – Revised (LSI-R) Assessments within NSW Correctional Environments*, Research Bulletin No 29 (Corrective Services NSW, 2011)

WEATHERBURN, D, and RINGLAND, C, *Re-offending on parole*, Crime and Justice Bulletin No 178 (NSW Bureau of Crime Statistics and Research, 2014)

WEATHERBURN, D, and others, *The NSW Drug Court: A Re-evaluation of its Effectiveness,* Crime and Justice Bulletin No 121 (NSW Bureau of Crime Statistics and Research, 2008)

WEATHERBURN, D, FROYLAND, G, MOFFATT, S, and CORBEN, S, *Prison populations and correctional outlays: The effect of reducing re-imprisonment*, Crime and Justice Bulletin No 138 (NSW Bureau of Crime Statistics and Research, 2009)

WEATHERBURN, D, *The Effect of Prison on Adult Re-offending*, Crime and Justice Bulletin No 143 (NSW Bureau of Crime Statistics and Research, 2010)

WEATHERBURN, D, *What Causes Crime?* Crime and Justice Bulletin No 54 (NSW Bureau of Crime, Statistics and Research, 2001)

WILKIE, M and SIDOTI, C, *Sentencing Juvenile Offenders*, Human Rights Brief No 2 (Australian Human Rights Commission, 1999)

WILLIS, M, *Ex-Prisoners, SAAP, Housing and Homelessness in Australia: Final Report of the National SAAP Coordination and Development Committee* (Australian Institute of Criminology, 2004)

WILSON, D B, GALLAGHER, C A, and MACKENZIE, D L, "A Meta-Analysis of Corrections Based-Education, Vocation and Work Programs for Adult Offenders" (2000) 37 *Journal of Research in Crime and Delinquency* 347

WILSON, J, and DAVIS, R, "Good Intentions Meet Hard Realities: An Evaluation of the Project Greenlight Reentry Program" (2006) 5(2) *Criminology and Public Policy* 303

WODAHL, E J, and others, "Offender Perceptions of Graduated Sanctions" (2013) 59 *Crime and Delinquency* 1185

WOMEN IN PRISON ADVOCACY NETWORK, *No Exit into Homelessness: Still a Dream? The Housing Needs of Women Leaving Prison*, Discussion Paper (2011)

WOODROW, A, and BRIGHT, D "Effectiveness of a Sex Offender Treatment Programme: A Risk Band Analysis" (2011) 55 *International Journal of Offender Therapy and Comparative Criminology* 43

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