

## **Parole; Frequently Asked Questions**

The purpose of this document is to provide junior practitioners with a brief practical understanding of procedure in the NSW State Parole Authority ('the SPA') and how they intersect with other areas of the criminal justice system, including sentencing and bail.<sup>1</sup>

### **A. Sentencing**

#### **[1] If my client is serving a balance of parole and receives a further sentence of imprisonment, when should that sentence start from?**

The court has a broad discretion in this regard, and the following is useful per Simpson J (James and Hall JJ agreeing) in *R v Callaghan* [2006] NSWCCA 58 at [21]-[22]:

*[21] That the matter is discretionary appears to be the prevailing view of members of this Court. Even in Andrews and Kelly, the court accepted that a judge might backdate a sentence where parole had been revoked by reason of the offence for which the offender is then to be sentenced.*

*[22] I maintain the view that a discretion exists. There is no clear rule which will govern all cases. The circumstances that bring an offender before a court for sentence after parole has been revoked are far too varied to permit a single absolute rule.*

This view was affirmed by Hoeben CJ at CL (Johnson and Bellew JJ agreeing) in the more recent decision of *Ith v R* [2013] NSWCCA 280 at [48]:

*[48]...Where parole is revoked as a consequence of the commission of a subsequent offence, whether the sentence for the subsequent offence should be backdated to the time the offender was taken into custody for the subsequent offence is a matter for the exercise of the sentencing judge's discretion.*

Usually, if the client's parole was revoked only by reason of the new offence, there is a good argument that the sentence should be wholly concurrent with the balance of parole.<sup>2</sup> If the balance of parole is still being served at the time of sentence, the court cannot start the sentence from a date after the sentencing date because the court cannot assume the SPA will confirm the revocation of parole.<sup>3</sup> Care must also be taken at sentence so as to not to double count having regard to s. 21A(2)(j) of the Crimes (Sentencing Procedure) Act 1999.

The most reliable way of knowing which condition/s of parole have been breached is to contact the Secretary of the SPA<sup>4</sup> and seek a certificate pursuant to cl. 21 of the Crimes (Administration of Sentences) Act 1999 (NSW) ('the Act'). This certificate is admissible in any legal proceeding (including sentence).

#### **[2] I am appearing for a client in the local court who has breached parole. What outcome should I seek on sentence to maximise the chances of getting parole?**

Any outcome that avoids a sentence of full-time custody (including fixed terms). This includes a fine, a conviction with no other penalty pursuant to s. 10A, or a s. 9 bond.<sup>5</sup>

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<sup>1</sup> This document does not discuss the procedure in the Children's Court as applicable to young persons in juvenile detention centres. However, Parts 6 and 7 of the Crimes (Administration of Sentences) Act 1999 continue to apply in the same way to an adult inmate as a juvenile detainee: see s29 Children's (Detention Centres) Act 1987. Also note if an 'older detainee' (juvenile above 16) is moved to an adult correctional facility, they will come within the jurisdiction of the NSW State Parole Authority. See s 28(3)(a) of the *Children's (Detention Centres) Act 1987*.

<sup>2</sup> See also *R v DW* [2012] NSWCCA 66 at [35] and [79].

<sup>3</sup> See s. 47(5) and s. 55(4) of the Crimes (Sentencing Procedure) Act 1999 (NSW).

<sup>4</sup> Email: [secretary.paroleboard@dcs.nsw.gov.au](mailto:secretary.paroleboard@dcs.nsw.gov.au)

<sup>5</sup> Note that a suspended sentence is not available by virtue of s. 12(2) of the Crimes (Sentencing Procedure) Act 1999 (NSW).

This is because the SPA is of the view that rescission is generally inappropriate for an inmate who committed an offence on parole that has resulted in the imposition of a full-time sentence of imprisonment (even if the fixed term expires well before the remaining balance of parole). It is not insignificant to note at sentence that notwithstanding there being a breach of conditional liberty, the court must still have regard to the principle of proportionality.<sup>6</sup>

If the SPA does not rescind the revocation, the offender is not eligible for release to parole again until they have served the lesser of 12 months or the balance of parole left. It should be noted that a fresh sentence cannot be accumulated on the balance of parole that is still active at the time of sentencing (see [1] and footnote (3)).

**[3] What advice should I give a client who has just been sentenced to a term of imprisonment?**

If the sentence is less than 3 years, inform the client that there is a possibility that it can be revoked prior to release (see [10]). To avoid this they should:

- a. Not conduct themselves in a manner that draws adverse attention whilst in custody and comply with all reasonable directions of correctional staff;
- b. Proactively undertake any courses available to them;
- c. Ensure they have appropriate, suitable post-release accommodation if parole is supervised.

If the sentence is more than 3 years, inform the client that the SPA will determine whether release is in the public interest at the conclusion of the non-parole period, and release is not inevitable. To maximise chances of being released, they should proactively seek to enrol themselves into programs, especially VOTP or CUBIT, as soon as they are sentenced to ensure they have adequate time to enter and complete programs prior to consideration. They should also ensure they comply with [3](a)-(c).

**B. Bail**

**[4] Can bail be granted if my client has been arrested on a parole revocation warrant?**

Bail can be granted on fresh charges but not on the revocation of parole warrant. Only the SPA may determine whether or not to rescind the revocation which allows the client to be released (provided they have bail on the fresh charges). A hearing in SPA usually takes 4-6 weeks from the date of arrest. See s. 181 of the Act.

**[5] My client has bail on his/her fresh charges - will the SPA rescind the revocation and allow the client to be released on parole?**

The SPA will rarely consider rescission where charges alleged to have been committed during the parole period are outstanding, especially if there is a possibility of a further sentence of imprisonment. The test that the SPA usually applies is that the offender has failed to "adapt to normal lawful community life" on the balance of probabilities. There is an exception to this rule, and is discussed at [6]-[7].

**[6] My client has been given bail to attend a full-time rehabilitation centre pursuant to s. 11 of the C (SP) Act 1999; will the SPA facilitate this by rescinding the revocation of parole?**

Usually, the SPA will rescind the revocation to allow the inmate to enter full-time rehabilitation to facilitate the intention of the Magistrate or Judge. There are exceptions to this and it may depend on the particular factual scenario of the matter (such as other serious breaches of parole or behavioural issues).

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<sup>6</sup> A man must be given the sentence appropriate to his crime and no more: *Veen v R (No 2)* [1988] HCA 14 per Wilson J at [7] quoting Jacobs J from *Veen v R (No 1)* [1979] HCA 7 at 478.

**[7] My client has been referred to the Drug Court, will the SPA rescind the revocation as required to facilitate this program?**

The SPA has a Memorandum of Understanding with the NSW Drug Court, and will usually rescind the revocation so that the Drug Court is not fettered in exercising its jurisdiction.

**C. State Parole Authority Process**

**[8] Does the Evidence Act 1995 (NSW) apply in SPA?**

Despite s. 4 of the Evidence Act being non-exhaustive, stating inter alia, that this Act applies to all proceedings in a NSW court (which includes “any person or body (other than a court) that, in exercising a function under the law of the State, is required to apply the laws of evidence.”<sup>7</sup>); Schedule 1 of the Act is unequivocal:

***11 General procedure***

*(3) The Parole Authority is not bound by the rules of evidence, but may inform itself of any matter in such manner as it thinks appropriate.*

However, admissibility does not cure unreliability. Persuasive submissions and cross examination can often be undertaken on the basis of unreliable evidence, diminishing the weight that can be placed upon such evidence.

Further, it is suggested that simply because the rules of evidence do not apply does not necessarily mean that the rationale underlying the rules can be completely ignored.

**[9] What types of matters does the SPA determine?**

SPA is established by Part 8 of the Act, and has two main functions:

1. To determine matters with respect to granting parole and the conditions on which parole is granted (governed by Part 6);
2. To determine matters with respect to the revocation of intensive corrective orders, home detention orders, or parole orders (governed by Part 7).

If a sentence of imprisonment is 3 years or less, then the sentencing court orders parole.<sup>8</sup> If however the sentence is greater than 3 years, the SPA decides whether or not parole is in the public interest.<sup>9</sup> SPA has jurisdiction if parole has been revoked on a sentence of 3 years or less and the offender becomes eligible after 12 months have been served.

**[10] If Parole is court ordered (i.e. 3 years or less), can the SPA revoke parole before releasing an inmate?**

Yes. The SPA can revoke an inmate prior to being released in certain circumstances pursuant to s130 of the Act:

***130 Revocation of parole order before release***

*(1) The Parole Authority 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.*

*(2) Division 4 of Part 7 applies to the revocation of a parole order under this section in the same way as it applies to the revocation of a parole order under Division 3 of that Part.*

<sup>7</sup> See Dictionary of Evidence Act 1995 (NSW).

<sup>8</sup> See s. 50 of the Crimes (Sentencing Procedure) Act 1999 (NSW)

<sup>9</sup> See s. 134 of the Act

The principle provision in the Regulations is contained in Reg. 232, and sets out four circumstances in which such a revocation prior to release can be made:

- (a) *If the offender requests that the order be revoked;*
- (b) *If the Authority decides before releasing the offender that the offender is unable to adapt to normal lawful community life;*
- (c) *If the Authority decides that satisfactory accommodation arrangements or post-release plans have not been made or are not able to be made;*
- (d) *Circumstances where the Attorney-General, the DPP or a direction is given by a court for the Authority to consider whether the order should be revoked, and the Authority so decides.*

Examples where the SPA has revoked prior to release include unsuitable accommodation (Reg. 232(1)(c)), adverse behaviour in custody prior to release (Reg. 232(1)(b)), or unavailability of full-time rehabilitation where the sentencing Magistrate or Judge has ordered such a condition on parole.

### **[11]How is the SPA constituted?**

Any individual meeting of the SPA usually consists of five persons, including a judicial member, two official members (a police officer and a community corrections officer) and two community members.

At the time of the writing of this paper, the four judicial members that may preside in any particular meeting of the SPA are Justice Wood (Chairperson), Judge Freeman, Magistrate Moore and Magistrate Cloran.

### **[12]How are matters processed and determined in the SPA?**

Inmates appear via AVL, and must do so unless such facilities cannot be made available or the Authority orders otherwise in the interests of justice.<sup>10</sup> The Community Corrections Officer ('CCO') also appears via telephone (and rarely in person) to give evidence on an application for parole or rescission of revocation.

The SPA compiles a bundle of documents that detail the reasons for the decision to revoke or refuse parole, including any reports from CCOs. These documents can be obtained from SPA in advance. In revocation matters, inmates either admit or deny the breaches that are alleged by Community Corrections, and the hearing takes place where the inmate gives evidence, followed by cross examination of the CCO.

Similar to criminal courts, proceedings in the SPA are open to the public unless the Authority determines proceedings should be conducted in otherwise.<sup>11</sup>

When an issue is raised that is a question of law, or mixed law and fact, the presiding member, being the judicial member, must decide that question alone.<sup>12</sup> This is especially important when questions of statutory interpretation or legal principle are raised.

### **[13]Should I call my client to give evidence about unresolved outstanding matters?**

Practitioners should be very careful when adducing evidence from inmates that have been revoked due to outstanding charges that are still unresolved (or where there is a possibility of new charges being laid). The reason is that the inmate may make public admissions before the SPA that may be used against them in the outstanding criminal proceedings.

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<sup>10</sup> See cl. 11A of Schedule 1 of the Act

<sup>11</sup> See cl. 11A(4) of Schedule 1 of the Act

<sup>12</sup> See cl. 22A of Schedule 1 of the Act

#### **[14]What is Street Time?**

S. 171(3) of the Act states:

*(3) If an offender is not taken into custody until after the day on which the revocation order takes effect, the term of the offender's sentence is, by this subsection, extended by the number of days the person was at large after the order took effect.*

This means that any time spent in the community after the revocation date is not included in the sentence. This time is added to the balance of parole.<sup>13</sup>

#### **[15]Can a parole decision be appealed?**

There is no automatic appeal from a decision of the SPA on merits. There are two avenues of appeal:

1. If the SPA has made a decision based on false, misleading or irrelevant information, an inmate can apply to the Supreme Court for a direction to be given to the SPA. See s. 155 and s. 176 of the Act.
2. Prerogative relief pursuant to s. 69 of the Supreme Court Act if the SPA has made an error of law. See for example *Esho v Parole Board Authority of NSW* [2006] NSWSC 304 per Rothman J.

#### **[16]Can my client be released before their non-parole period expires?**

Yes. There are two ways in which this application can be made:

1. Applying under s. 160 of the Act if the client is dying or there are other exceptional extenuating circumstances; or
2. Applying to the Executive for a prerogative of mercy.

These applications, especially the latter, are extremely difficult to successfully argue. In the Author's experience, the SPA interpret 'dying' as the client having days or weeks left to live.

#### **[17]What about a breach of a Commonwealth Parole Order?**

The SPA has no jurisdiction over such orders, and there is no Federal Parole Authority similar to the NSW SPA. In such circumstances there is a specific procedure investing a Magistrate at the Local Court with the powers of the Executive. If you encounter such a matter, it is apposite to contact the Federal Offenders Unit on (02) 6141 6666.

If you have any specific questions please feel free to contact the Author at the ALS or by email [bharan.narula@alsnswact.org.au](mailto:bharan.narula@alsnswact.org.au).

An additional invaluable and very thorough resource about parole is a paper authored by Will Hutchins and Keppie Waters titled "Parole, 'Normal Lawful Community Life' and other mysteries". This can be accessed at:

[http://criminalcle.net.au/attachments/Parole Normal Community Life and Other Mysteries.pdf](http://criminalcle.net.au/attachments/Parole%20Normal%20Community%20Life%20and%20Other%20Mysteries.pdf)

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<sup>13</sup> The SPA cannot give parole for a period of street time. If the revocation is rescinded, the balance of parole reverts back to the original period. If however the revocation is confirmed, the offender must serve the street time in custody.