Parole, 'Normal Lawful Community Life' and other mysteries

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Overview

This paper intends to provide an outline of the current parole system in NSW and examine parole issues relevant for advocates regularly appearing in the Local and District Courts.

Solicitors appearing in the criminal jurisdiction should have an understanding of parole provisions and the procedures of the State Parole Authority (the Authority) in order to adequately advise their clients, particularly at sentencing as to the propsects of obtaining parole, and upon a client's return to custody on fresh matters where a parole revocation warrant has also been issued by the Authority.

A lack of knowledge by practitioners and judges of parole provisions and procedures, combined with a view that it is the poor cousin of sentencing, leads to inadequate advice to our clients, and can often result in our clients' release on parole being unnecessarily delayed.

There were significant legislative amendments made effective from 10 October 2005 which were the most drastic and harsh changes to parole in the last few decades. The relevant legislation is:

- *Crimes (Administration of Sentences) Act 1999,* Part 6 (ss 125-161), Part 7 (ss 162-182) and Part 8 (ss 183-194); and,
- *Crimes (Administration of Sentences) Regulation 2008*, Chapter 7 (cls 224-241A) and Chapter 8 (cls 242-249).

All legislative references are to this Act or Regulation unless otherwise stated. The law is stated as at 1 March 2013.

Changes effective 10/10/2005

The *Crimes (Administration of Sentences) Amendment (Parole) Act* 2004 commenced on 10/10/2005 and substantially amended the principal legislation.

The 'Parole Board' ceased to exist and was reconstituted as the State Parole Authority: s 183.

There were significant changes to the criteria and procedure relating to parole consideration. Briefly, the major changes were:

- Section 128(2A) was added, whereby, a parole order must include conditions giving effect to a post-release plan prepared by the Probation and Parole Service;
- Section 135A was added whereby the report prepared by the Probation and Parole Service must address, the likelihood of the offender being able to adapt to normal lawful community life, risk of re-offending and the measures to be

taken to reduce that risk, the offender's attitude to the offence, the victim and willingness to participate in rehabilitation programs;

- By the insertion of ss 137A and 143A, a date for parole consideration following a refusal of parole (for example, in three or six months) is no longer possible. Now *following refusal of parole there is a mandatory deferral of 12 months for further consideration.*

- By ss 139(1) and 146(1), a public review hearing is no longer available in all cases. The *Authority can refuse to have a hearing if not satisfied that a hearing is warranted* and there is no appeal from a refusal to hold a hearing;

- Prior to the amendments, if parole was revoked a date could be fixed for consideration of re-parole (for example, in three or six months time was common). This is no longer possible for revocations made after 1 October 2010 and, **following revocation of parole there is a mandatory deferral of 12 months for parole consideration**. As a result, many offenders serve the balance of their parole because they have less than 12 months left. The pre-amendment rules continue to apply for parolees who are arrested on a revocation warrant issued prior to these changes the warrant ;

- The insertion of s 141A permits the Commissioner of Corrective Services ('the Commissioner') to make submissions concerning the release on parole of an offender.

- Section 172A allows the Commissioner to apply to a judicial member of the Authority for an order suspending a parole order and issue a warrant; and

- By s 193A, the Minister is entitled to access to all documents held by the Authority and, the victim of a serious offender is entitled to access to all documents except medical, psychiatric or psychological reports.

A further amendment in 2008 saw the insertion of s 2A, which defines the objects of the *Act*. These include, the conflicting, "(a) to ensure that those offenders who are required to be held in custody are removed from the general community", "(d) to provide for the rehabilitation of offenders with a view to their reintegration into the general community" and, "In pursuit of these objects, due regard must be had to the interests of victims of the offences".

Parole

Who grants parole - the sentencing court or the Parole Authority?

The length of the sentence is the determining factor. Importantly, if there are accumulated sentences, it is the length of the individual sentences which is the determining factor, not the aggregate of the sentences. This is fundamental but surprisingly is not as well known as you would expect.

In 2011 5,447 inmates were released to parole. The Authority ordered parole in 1,036 cases which represents approximately 19% of all offenders released to parole that year. The remaining 4,411 offenders were subject to automatic court based orders.

Sentences of 3 years or less

For sentences of three years or less that have a non-parole period, the sentencing court must make an order directing release on parole at the end of the non-parole period (ss 50 and 51, *Crimes (Sentencing Procedure) Act*). Accordingly, parole for sentences imposed in the Local Court is usually automatic, but not always.

Of note, by virtue of s 51(1AA), *Crimes (Sentencing Procedure) Act*, the parole order is taken to include a condition that the offender is subject to supervision unless the court expressly states otherwise. This provision was inserted in 2003, and prior to then, most court based parole orders did not include supervision.

Notwithstanding s 50, *Crimes (Sentencing Procedure) Act*, clients should be advised that the Authority has the power to revoke such a parole order before release by virtue of s 130 and cl 232. The Authority can do this if it is of the view that, if released to parole,

(i) The offender would not be able to adapt to normal lawful community life; and / or
(ii) Satisfactory post-release plans or accommodation are not in place.

An inability to adapt can be considered due to bad behaviour in custody, positive urinalysis or a failure to complete appropriate offence related courses. A lack of appropriate post-release plans often arises, for example, in circumstances where a placement in a residential rehabilitation centre has been included as a condition of parole by the sentencing Judge or Magistrate, and there has been insufficient time between sentencing and the expiry of the non-parole period for these plans to be put in place.

While this is not the most common reason inmates appear before the Authority, it is in my experience that a comparatively larger number of Indigenous inmates do compared to their non-Indigenous counterparts. Moreover, it also commonly affects inmates who suffer from a mental illness or intellectual disability as well as those who are ordinarily homeless or transient.

If you are appearing on behalf of a client in this situation, you should consider s 51(1AA), *Crimes (Sentencing Procedure) Act* and whether it would be appropriate the sentencing court to expressly state the parolee will not be subject to parole supervision on release. The parolee will then not be required to report to the Probation and Parole Service or live at a particular address. The parolee will be subject only to the condition to be of good behaviour.

Any sentencing submissions regarding entry into a residential rehabilitation programme should be made cautiously. Any client seeking release to a residential programme needs to be advised that, in the event the sentencing court agrees, they:

- will need to follow through upon release;
- if 'time served' is likely then, they should have already contacted residential programmes for at least an assessment; and
- if they aren't genuine, then any finding of special circumstances and an otherwise early release date following a submission for post-release rehabilitation is unlikely to eventuate in early release and may result in being held in custody longer than if they were given a conventional sentence.

This should also be considered when dealing with sentences greater than three years given the Authority takes guidance from the court's sentencing remarks and any judicial recommendation for residential rehabilitation is unlikely to be abandoned lightly.

When clients have been sentenced to three years or less, they should be advised of the following:

- Their parole is court ordered which means it is likely their release should be automatic;
- There is a possibility that the Authority could revoke their parole order before release; and
- To avoid this, they should:
    - comply with correctional centre routine;
    - not draw adverse attention to themselves;
    - undertake any courses made available to them, particularly those relevant to their index offence but also including educational and vocational programmes; and
    - if they are to be supervised by the Community Probation Service, to obtain suitable post-release accommodation before their release date as it will be visited and assessed by the Community Probation Service before release.

Procedurally, the Community Probation Service notifies the Authority by way of a report seeking revocation before release. The report and any order revoking parole prior to release is made at a private meeting of the Authority and will be the subject of review at a public hearing of the Authority. An inmate may appear at the review by Audio Visual Link (AVL) or not, and be legally represented or not. Inmates are provided with a form to indicate their choices which will be returned to the Authority's secretariat.

Sentences of greater than 3 years

For sentences of more than three years for which a non-parole period has been set, a parole order must be made by the Parole Authority, not the sentencing Court: s 134.

A situation which often arises is where a sentence exceeding three years is imposed with a non-parole period expiring on the date of sentence. Understandably, the offender (and often their legal representatives and the Judge) expect immediate release to parole. However, because the sentence is more than three years, the matter must be referred to the Authority for a parole determination. Notwithstanding there might have been good reasons for the non-parole period to expire at sentencing, there is no guarantee that the Authority will grant parole.

The Authority automatically considers an inmate's parole when they first become eligible for parole. The process of parole consideration takes at least six weeks because, in accordance with ss 135 and 135A, the Probation and Parole Service submit a pre-release report including a recommendation for or against parole. If the inmate is a "serious offender", a report is also prepared for the Authority by the Serious Offenders Review Council (SORC).[ii]

Section 135 sets out the matters the Authority must consider before parole is granted. The Authority 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*. The public interest is not defined but s 135(2) lists matters (a) to (k) which the Authority must have regard to in determining what is appropriate in the public interest. The matters listed in s 135(2) are a useful checklist of what to address when making written or oral submissions to the Authority. Section 135A prescribes the matters which the Probation and Parole Service must address in any pre-release report.

By virtue of s 135(3), the Authority must not make a parole order for a serious offender unless the SORC advises that it is appropriate for the offender to be considered for release on parole. What constitutes exceptional circumstances is not prescribed.

The question of parole is first considered at a private meeting of the Authority. This means the inmate, members of their family, a legal representative and Probation and Parole Officer cannot be present.

For a serious offender, if the Authority has determined at a private meeting that the release of a serious offender is appropriate, a notice of an intention to grant parole will be issued, together with the reasons for the decision and the proposed parole conditions. This will be further considered at a public review hearing.

If parole is not granted, the Authority will issue a notice of a decision to refuse parole (for non-serious offenders) or of an intention to refuse parole (for serious offenders). The notice will set out the reasons for refusal which can include any combination of the following:

- Need to address offending behaviour;
- Need for further alcohol and other drug counselling;
- Unsuitable, unconfirmed or no post release plans / accommodation;
- Risk of re-offending;

- Need for psychological assessment re risk;
- Need for psychiatric assessment re diagnosis and treatment;
- Poor prison performance;
- Past failures on conditional liberty;
- Need to complete programs (and nominate the program);
- Unlikely to adapt to normal lawful community life;
- Outstanding criminal charges;
- Need to reduce classification;
- Need for all reports; and
- Not supported by SORC (for serious offenders).

As per the 2005 amendments, the Authority has discretion as to whether a public review of the decision to refuse parole will be held.

Where a review will be held only following a written application from an inmate for such a review. The onus is upon the inmate to persuade a review is appropriate by completing an Authority-issued form addressing the following:

1. The information given to the Authority with which they do not agree;
2. How their post-release plans are different from the pre-release report;
3. If they have completed a program since the pre-release report;
4. If they intend to undertake a program(s) in the community; and
5. Anything else they would like the Authority to consider.

To place this onus in context it is necessary to examine the disadvantages faced by inmates. In 2001, the NSW Legislative Council Select Committee on the Increase in Prisoner Population reported the following:

- sixty percent of inmates are not functionally literate;
- thirteen percent of inmates have an intellectual disability; and
- sixty percent of inmates did not complete the School Certificate.[iii]

In 2003, the then NSW Corrections Health Service produced a study which showed that seventy-four percent of inmates had suffered 'any psychiatric disorder' in the previous twelve months.[iv] This was contrasted to a figure of twenty-two percent for the general population.[v]

Before this application process was introduced, the Minister responsible provided assurances that the Department of Corrective Services will provide inmates with “proper assistance” and “will develop appropriate user-friendly application forms”. Notwithstanding these reassurances, the assistance provided by Service and Programs staff and Probation and Parole Officers is often limited, and as a result many inmates struggle to address these issues effectively.

The time frame for making applications is short and from experience, it appears assistance is being sought from fellow inmates and on occasion solicitors from Prisoners' Legal Service are being called upon to assist inmates with these applications. Not every application for a review hearing is successful, and significantly, there is no appeal from a refusal to grant a review hearing.

If a review is considered appropriate at the outset or following an application, a hearing will be held approximately six weeks after the private meeting. The inmate may appear by AVL or not, and be legally represented or not. The inmate's nominated solicitors are provided with papers a week before the hearing, in just enough time to obtain instructions. These papers include copies of Pre-Release and Pre-Sentence Reports prepared by the Community Probation Service, remarks on sentence for the index offence, the inmate’s movement and classification Records, the inmate’s Criminal History, Correctional Centre Reports, and any available psychological and / or psychiatric reports.

At the public review hearing, the Authority will reconsider parole. The inmate and the author of the pre-release report will give evidence. If relevant, family members or others who support the inmate's parole can also give evidence. Section 141A also allows the Commissioner to make submissions concerning any inmate's release on parole.

For a serious offender with an intention to grant or refuse parole, any registered victims are given notice of the hearing, and an opportunity to attend and make representations at the public hearing: ss 144-150. Section 153 allows the State to make submissions to the Authority concerning the release of a serious offender on parole. If no submissions are made following an intention to grant, the intention will simply be confirmed at the public hearing.

At the end of the hearing, the Authority retires briefly and returns with a decision that parole is refused or granted: ss 141 and 149.

If parole is granted, the Authority can, before an inmate is released, revoke a parole order it has made: s 130. This must be for proper reasons, not simply because the Authority changes its mind. The decision in *Lim v State Parole Authority* [2010] NSWSC 93 dealt with circumstances where, following intense media pressure, the Authority vacated the parole order it had made for this serious offender, and permitted the State to appear and oppose parole when the State had earlier advised the Authority it did not oppose the offender's release.

If parole is refused, an inmate can only be considered for parole after serving a further twelve months. The inmate must make an application to be considered for parole at the anniversary of their eligibility date; it is not automatically considered.

The only safeguard against the 12 months rule is found in ss 137B and 143B:

> The Parole Authority may consider an offender’s case at any time after the offender’s parole eligibility date, and without the need for an application, in such circumstances as may be prescribed by the regulations as constituting *manifest injustice*.

Clause 233 prescribes eight matters which amount to manifest injustice. These include, for example, where due to circumstances beyond the inmate's control, they

had not previously completed a program or a psychiatric report was not available, but do not include a general subjective / compassionate situation.

In all cases where parole is to be determined by the Authority, clients should be advised that parole is far from automatic and will only be granted if "release of the offender is appropriate in the public interest".

Put simply the Authority requires more than good behaviour. Guideline 2.3 of the Authority's 'Operating Guidelines' is a useful starting point as to what an inmate will be required to achieve before being granted for parole. These include:

> (i) A recommendation for release by the Probation and Parole Service;
> (ii) 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;
> (iii) Satisfactory completion of programs and courses aimed at reducing their offending behaviour;
> (iv) Suitable post release plans which relate to their assessed requirements on parole, including family or other support, employment, suitable accommodation and access to necessary programs in the community;
> (v) A willingness and demonstrated ability and / or a realistic prospect of compliance with the conditions of parole;
> (vi) Be assessed as a low risk of committing serious offences on parole, particularly sexual or violent offences, and have good prospects of successfully completing the parole supervision period; and
> (vii) In the case of serious offenders and other long term inmates, participation in external leave programs and a recommendation for release by the Review Council.

Achieving some or all of the above is often difficult for inmates who receive a favourable finding of special circumstances or 'time served' because, for example, they will not have had access to appropriate programs while on remand.

When clients have been sentenced to more than three years, they should be advised of the following:

- Their parole is not automatic and their release can only be ordered by the Authority;
- They should be proactive and work towards obtaining their parole;
- Given the Authority's insistence upon program completion, they should undertake therapeutic programs relating to drugs and alcohol, anger management, violence and / or sexual offending;
    - For inmates with violent index offences, completion of the Violent Offenders Therapeutic Program (VOTP) will be necessary. This program takes approximately 12 months to complete, and does not include custodial maintenance;
    - For inmates with sexual index offences, completion of the Custody Based Intensive Treatment (CUBIT) program will be required, which takes approximately 10 months – or the shorter CUBIT Outreach or CORE Moderate course;
    - For inmates who deny their offending, the 'catch 22' with these programs is to be considered eligible for them an inmate must admit

guilt for the relevant offences. As a result there is a very real risk that those wrongfully convicted could serve their entire sentence without parole;

- They should comply with correctional centre routine, not draw adverse attention to themselves and avoid, not only criminal charges in custody, but also prison discipline offences; and
- They should work to progress through the classification system and aim to participate in external leave which requires the minimum security classification – C3 for men and Category 1 for women. The definitions of classification for men, women and escapees are set out in cl 22 to 24, *Crimes (Administration of Sentences) Regulation* 2008. Reductions in classification are dependent on good custodial behaviour and work reports and program completion. In the same way, misbehaviour, refusing to work or participate in programs will result in an inmate's classification being regressed. For long term inmates, if it is possible they can reach the stage in the last 12 months of their non-parole period where they are on works release and weekend leave, which amounts to spending only Monday to Thursday evenings in gaol to sleep.

For a list of programs offered within the custodial system, refer to the *Compendium of Correctional Programs in New South Wales* available through the Department of Corrective Services' website. This document is a useful tool when preparing sentencing submissions for Local and District Court matters, as you will be able use it to give advice to your client, and in many cases inform the presiding judicial officer about these custodial programs.

Revocations

The Authority has exclusive jurisdiction to revoke not only parole orders, but also home detention, intensive correction orders (ICO) and any remaining periodic detention sentences.

Following the execution of such a warrant, bail cannot be granted because other courts do not have jurisdiction in relation to any of these warrants.

Revocations of Parole

Parole orders may be revoked in circumstances where a parolee has:

- Breached any condition of their parole order; and / or
- Has been charged with, but not yet convicted of, further offences which are alleged to have occurred while they were on parole.

Typically the conditions which are breached are reporting to a supervising Probation and Parole Officer as directed, living at an approved address, and following all reasonable directions of supervising Probation and Parole Officer. Other conditions of parole which are often breached include conditions to be abstinent from alcohol,

attending for urinalysis as directed, or attendance and completion of a residential rehabilitation centre program.

A parolee's supervising Probation and Parole Officer will notify the Authority of the alleged breaches by way of a breach report. In considering whether to revoke parole, the Authority will examine this report and where new charges are relevant, the Authority will have at least a copy of the Police Facts Sheet.

Decisions by the Parole Authority to revoke occur in the absence of the parolee and without an opportunity to be heard. Any revocation warrant issued by the Authority is an order to return a parolee to prison to serve the balance of their sentence. Even when the parole order has finished, the Authority is empowered by s 182 of the *Act* to revoke an order if a breach has occurred during the term of the sentence.

Guideline 6 of the Authority's Operating Guidelines deals with revocations of parole. Guideline 6.2 states, 'the Authority should exercise discretion for or against revocation on the individual merits of each case'. The matters to be considered in determining whether or not to revoke are set out in Guideline 6.3. Significantly, Guideline 6.4 states:

> Bail refusal or grant of bail should not be an overriding factor. Such status is liable to change at every court attendance. It should be noted that the Parole Authority generally has more information available to it as to the current status and conduct of the offender than does the court.

It is now commonplace for the Authority to revoke parole solely due to "outstanding charges". In 2010, the Authority made 531 revocations for outstanding charges and in 2011, it was 451. The Authority does not decide that the parolee has committed the offence/s. Instead the Authority determines there has been a breach of the standard condition of parole that the parolee must "adapt to normal lawful community life". This is considered on the balance of probabilities by considering the Police Facts Sheet or brief of evidence. In the experience of Prisoners Legal Service' solicitors appearing before the Authority, revocation is ordered regardless of whether bail has been granted on the fresh charges. In rare circumstances the Authority will monitor the progress of minor charges rather than revoke at the first instance.

The date of revocation, which is the date the Authority makes the revocation order, is not necessarily the 'effective date' of revocation. The revoked order stops running from this date and the balance of parole required to be served is calculated from this date. Where a parolee has their parole revoked but they remain "on the run", the time they spend in the community after the effective date until arrest will be deemed to be "street time". This will not be counted as time served towards their parole order and the sentence is extended by the number of days the person is at large after the effective date: s 171(3), *Crimes (Administration of Sentences) Act*.

If the Authority has monitored court results without revoking parole and there is a subsequent conviction with a sentence of imprisonment, the Authority will still backdate the breach to the date of the offence. The parolee will not get any 'credit'

for the time in the community during which they continue to report to their Probation and Parole Officer and are on bail.

If you need to confirm the balance of parole, you can forward a written information request to the Authority. Alternatively you can phone the Sentence Administration branch of the Department of Corrective Services for this information.

The revocation can only be reconsidered at a public review hearing of the Authority. These usually take place between six to eight weeks after a parolee has been returned to custody. As with decisions to refuse matters, an inmate may appear by AVL or not, and be legally represented or not. In accordance with s 175, *Crimes (Administration of Sentences) Act*, the Authority will hear whether the inmate disputes or admits the breach and will determine whether the revocation should be rescinded or confirmed, and the effective date varied or confirmed. A rescission order restores the original parole order as if it had not been revoked and the inmate is released.

If the parolee wishes to dispute some or all of the breach(es) the Authority will adjourn the review hearing for the Probation and Parole Officer who prepared the breach report to give evidence at the review hearing by telephone. At the subsequent review hearing, the breaches are canvassed in a manner similar to a defended hearing. At the review hearing the Authority will,

- hear evidence from the inmate and any additional witnesses to be called on their behalf;
- hear evidence from the author of the breach report;
- retire to deliberate and consider the evidence; and
- then determine whether or not,
    - the breaches have been established;
    - the revocation should be rescinded or confirmed;
    - a warning should be issued to the inmate; and
    - the effective date should be varied or confirmed.

Rescission may still be sought even when the Authority has found breaches to have been proven.

As recently as February 2013, the Authority has introduced new procedures for dealing with rescission applications. These procedures apply regardless of whether the breaches are admitted or disputed. In an overwhelming majority of revocations, a client provides instructions to apply for rescission, even when they are advised their application has little, if any merit. This is understandable when the alternative for the parolee is serving another 12 months in custody or, if shorter, the balance of their parole.

The procedures are such that now:

- A rescission will no longer be considered by the Authority at the initial review hearing, however an application for the effective date to be varied may be made;

- The initial review hearing will be limited to an opportunity to persuade the Authority there is some merit in the rescission application. This has involved, at the least, indicating rescission is being sought and at the most, having the client give evidence and then making submissions as if the application is being heard in full;
- If the parolee has fresh charges, with or without conditional breaches of parole, the Authority will not entertain any application for rescission until the new charges are finalised, regardless of the status of bail. The Authority will administratively monitor the progress of the court proceedings, without the inmate and their representative appearing;
- In circumstances where the Authority considers on the material before it that there is no merit in the rescission application, the Authority will then confirm the revocation, which results in the inmate serving 12 months in custody, or the balance of their parole;
- In circumstances where the Authority considers there is some merit in an application for rescission, the review hearing will be adjourned for the Probation and Parole Officer who prepared the breach report or another officer familiar with the case to attend via telephone and if necessary, give evidence and be cross-examined by the inmate or their representative;
- If, after hearing the evidence, the Authority determines rescission is not appropriate, the revocation will be confirmed;
- If, after hearing the evidence, the Authority decides there is still merit in the application, the hearing is adjourned again for a written reinstatement report to be prepared by the Probation and Parole Service. This can take approximately four weeks as the report covers an inmate's proposed post-release plan including accommodation and provides a recommendation as to the inmate's suitability for parole;
- The Authority's direction for a reinstatement report should not be taken as a guarantee that rescission will be ordered;
- If the Authority has adjourned the review hearing for the results of new charges and the charges have been dismissed or any new sentence has been quashed on appeal, post-release accommodation will need to be confirmed before rescission will be ordered. If a parolee has spent more than a couple of months it is likely that another accommodation assessment will be ordered by the Authority and undertaken by the Community Probation Service. This can take between two to four weeks; and
- Rescission is not guaranteed in circumstances where new charges are dismissed, if at a defended hearing no evidence was offered by the prosecution, particularly in matters involving allegations of domestic violence.

What is clearly apparent is that a successful rescission application is now likely to take a minimum of three months to be finalised. This process will only be prolonged where any new charges must be resolved.

A client who is on bail for a new offence alleged to have been committed while on parole should first be advised that a guilty plea will ordinarily result in the revocation of their parole. If their instructions are to enter a guilty plea or there is a strong

prospect of a conviction, consideration should be given to pleading guilty at an early opportunity while they are on bail, because if the charge is defended and they are found guilty months later, the effective date will be taken as the date of the offence, not the sentencing date. As noted above, this could result in a lengthy period of street time awaiting a defended hearing could be lost when the balance of parole is calculated.

For clients in the cells with fresh charges as well as an Authority warrant the same considerations are relevant. While bail on the parole matter is not an option, the best approach, if a person is likely to enter a guilty plea, is to enter the plea early so that any new custodial sentence commences as soon as possible and is therefore concurrent with any revoked balance of parole. If the anticipated plea is delayed, the parole review process will correspondingly be delayed. If a later plea or finding of guilt is entered, the client faces the risk of not having their new sentence backdated because they have effectively been in custody serving another sentence.

As noted above the Authority will not reconsider the revocation until the fresh charges have been finalised. The Local Court will often want the Authority to determine first whether or not the revocation will be rescinded. The Authority will not do this. The Authority will want to know if the person has pleaded or been found guilty, and if they have received a sentence of imprisonment. The Authority will not rescind the revocation if the sentence of imprisonment is greater than one month. A backdated sentence which has expired by the time of the Authority's hearing will not shift the Authority in this regard.

This is something many Magistrates and Judges are not familiar with. For one Aboriginal Legal Service solicitor with parole experience, she has described Magistrates scratching their heads regarding this approach declaring, "No, that can't be". For example, she recalled that at sentencing a presiding Magistrate was sceptical of her submissions regarding the Authority's approach such that the backdated short fixed term sentence she intended to impose would result in revocation of a fairly lengthy balance of parole. The Magistrate stood the matter down, contacted the Authority to confirm their approach and then imposed a good behaviour bond when the matter was recalled.

Whilst success in persuading a District Court Judge of this at a severity appeal is valuable, a client may have spent several months in custody waiting on the appeal, unable to get bail because of parole revocation and as a result lost their accommodation and other community supports. It is for this reason that all advocates appearing in the Local Court need to be equipped to make these submissions.

The CCA decision in *Morrison v Regina* [2009] NSWCCA 211 is also relevant when appearing for clients in this situation. The Court held that an offence committed after parole had been revoked (and before the warrant was executed) was not committed while on conditional liberty and therefore not an aggravating factor on sentence. The breach of parole is likely to be relevant to, for example, an assessment

of a parolee's prospects of rehabilitation. Refer to paragraphs 34 to 46 of the judgment.

Notwithstanding this interaction between new sentences and balances of parole, it is important to note that a sentencing court cannot accumulate a new sentence onto a balance of parole. By virtue of ss 47(1) and (2) of the *Crimes (Sentencing Procedure) Act*, a sentence must commence on the day it is imposed unless the court direct that it commence before or after. Most relevant for clients with revoked balances of parole, the effect of ss 47(5) and 55(4) is such that any accumulation must be onto the non-parole period of another sentence, and cannot be imposed in circumstances where the non-parole period of the other sentence has expired.

Firstly, if a parolee has been released and had their parole subsequently revoked, logically the non-parole period of their sentence has expired. Secondly, their return to custody to serve a balance of parole does not remove the restrictions contained in ss 47(5) and 55(4).

Revocations of home detention

A home detention order is ordinarily revoked because of a positive urinalysis or breath analysis, frequent unauthorised absences, or the alleged commission of further offences.

A detainee, who has had their home detention sentence revoked and has been returned to custody, appears before the Authority for a review of the revocation. Unlike parole consideration, there is an automatic entitlement to a public review hearing.

As with revocations of parole, a detainee may admit or dispute the breach(es). Where some or all breaches are disputed, the Authority will follow the same hearing process as with parole revocations. This is discussed above.

Section 168A *Crimes (Administration of Sentences) Act* sets out the options for a detainee who has had their home detention sentence revoked. A detainee can apply for reinstatement of their home detention after serving three months custody full-time. If the now revoked home detention was ordered following the revocation of an intensive correction order, then reinstatement of the original intensive correction order may also be sought. The detainee may also serve the remaining balance of their home detention sentence in custody.

If an application for reinstatement is made, the Authority will adjourn the review hearing for a suitability assessment report to be prepared by the Probation and Parole Service. The original sentence will only be reinstated if there is a positive assessment for suitability.

In 2009 the Authority revoked 58 home detention orders, in 2010 it revoked 37, and in 2011 it revoked 20.

In my experience, it is not common for these detainees to be Indigenous because:

1. a small number of Indigenous offenders are assessed as suitable for and undertake home detention;
2. home detention is available in a limited geographical area; and
3. home detention orders involve intensive supervision by Probation and Parole which often leads to most home detainees successfully completing their home detention order.

Revocations of periodic detention

Notwithstanding the abolition of periodic detention as a sentencing option from 1 October 2010, there are still a number of detainees completing their periodic detention sentences which were imposed prior to the abolition. Since the abolition, sentences of periodic detention are served by way of community service which was formerly known as Stage Two of periodic detention. There are also a number of outstanding revocation warrants yet to be executed.

A detainee, who has had their periodic detention sentence revoked and has been returned to custody, appears before the Authority for a review of the revocation. Unlike parole consideration, there is an automatic entitlement to a public review hearing.

A detainee may admit or dispute the breach(es). As with parole revocations, the Authority will follow the same hearing process where some or all breaches are disputed. This is discussed above.

A detainee can apply for reinstatement of their periodic detention after serving three months custody full-time. If an application for reinstatement is made, the Authority will adjourn the review hearing for a suitability assessment report to be prepared by the Probation and Parole Service. The original sentence will only be reinstated if there is a positive assessment for suitability.

A detainee may also apply to serve the balance of their sentence by way of home detention. If an application for home detention is made, the Authority will adjourn the review hearing for an initial assessment of the proposed addressed, co-residents and likely suitability. If this is positive, the Authority will grant a Temporary Release Order releasing the detainee and further adjourn for a period of six weeks for a detailed suitability assessment. A detailed suitability assessment report is prepared by the Probation and Parole Service.

For a detainee to obtain home detention the balance of their sentence must not be greater than 18 months and they must satisfy the eligibility criteria for home detention set out in Part 6 Division 2 of the *Crimes (Sentencing Procedure) Act*. A positive assessment for suitability is necessary before the Authority will order home detention.

Revocations of ICOs

Periodic detention was replaced with the community based Intensive Correction Orders (ICO). Section 163 of the *Act* enables the Authority to revoke an ICO.

An inmate, who has had their ICO revoked and has been returned to custody, appears before the Authority for a review of the revocation. Unlike parole consideration, there is an automatic entitlement to a public review hearing.

A detainee may admit or dispute the breach(es). As with parole revocations, the Authority will follow the same hearing process where some or all breaches are disputed. This is discussed above.

Section 168A *Crimes (Administration of Sentences) Act* sets out the options for a detainee who has had their home detention sentence revoked. A detainee can apply for reinstatement of their home detention after serving three months custody full-time. If the now revoked home detention was ordered following the revocation of an intensive correction order, then reinstatement of the original intensive correction order may also be sought. The detainee may also serve the remaining balance of their home detention sentence in custody.

Section 165 enables an inmate to seek reinstatement of the ICO after serving one month imprisonment and after telling the Authority what they have done or are doing to ensure a further breach will not occur if the ICO is reinstated. As with all reinstatement applications, the Authority will adjourn the review hearing for a suitability assessment report to be prepared by the Probation and Parole Service. The original sentence will only be reinstated if there is a positive assessment for suitability.

Section 165A allows the inmate to apply to serve the balance of their sentence by way of home detention. The assessment process is the same as that outlined in relation to revocations of periodic detention.

As at 30 June 2012 there were 886 ICOs current. At the end of 2011, 67 ICOs had been revoked by the Authority.

The Parole Authority

Location and Contact Details

Since 1 April 2008, the hearings of the Parole Authority are at Parramatta in Court 7 on Level 4 of the Sydney West Trial Courts complex. The office of the Parole Authority is in the Parramatta Justice Precinct Offices. The contact numbers for the Authority are ph. 8688 3629 and fax 8688 3699.

Structure

The Authority is constituted by s 183 of the *Act*. The pool of members must consist of at least four judicial members, one from Police, one from the Probation and Parole

Service, and 10 community members "who reflect as closely as possible the composition of the community at large". At least one of the community members must be a person who has an appreciation or understanding of the interests of victims of crime.

The Chairperson of the Authority is a judicial member of the Authority. The current sitting judicial members of the Authority are Mr Ian Pike AM, Judge Terrence Christie QC, Judge Paul Cloran and former Local Court Magistrate Mr Alan Moore.

At present the total pool of Authority members includes Police members, Probation and Parole Service representatives and community members. Members with which you may be familiar include Lloyd Walker, former Police Detective Superintendent Mr Bob Inkster OAM APM and former Commissioner of Corrective Services Mr Ron Woodham.

Section 184 prescribes that a Division of the Authority is convened at any one time is to consist of one judicial member, at least one community member, and one or more official members. For most hearings, the Authority sits as a tribunal of five to seven members. A decision supported by a majority of votes is the decision of the Authority, and in the case of an equality of votes, the judicial member has the casting vote: cl 17 Schedule 1. Any questions of fact or law, or of mixed law and fact, it is to be decided by the presiding judicial member alone: cl 22A Schedule 1.

Procedural Matters

Evidence

The threshold for the Authority to make a parole order is the balance of probabilities as set out in s 135(1). The Authority is, "*not bound by the rules of evidence by may inform itself of any matter in such manner as it thinks appropriate*" and "*proceedings are not be conducted in an adversarial manner*": cl 11 Schedule 1.

This low threshold is illustrated in *Holschier v State Parole Authority* [2009] NSWSC 916. Notwithstanding good evidence to the contrary, this decision upheld a revocation of parole based on voice identification evidence which placed the parolee in a location where he should not have been. Refer to paragraphs 34 to 35 and 37 to 38 for discussion of this threshold and voice identification.

Review Hearings

From 2003 onwards the option to appear before the Authority in person was removed. The introduction and subsequent expansion of AVL means inmates now only appear before the Authority by AVL. Probation and Parole Officers, psychologists and other Department of Corrective Services staff who are required to give evidence do so via telephone.

Unlike previous years where the availability of AVL was not so widespread, many inmates now choose to appear before the Authority. If you are approached by an inmate for advice about an upcoming review hearing, please advise inmates that their chances of being granted parole (in decision to refuse hearings) or rescission (in

revocation hearings) are improved if they appear before the Authority. From the perspective of the solicitor appearing at the Authority, it is much easier to cancel an inmate's AVL appearance where it is not necessary than to arrange their appearance where they have initially elected not to appear.

Section 194

The Authority's Secretariat compiles the paperwork which is considered by the Authority members in making their initial determination. Ordinarily copies of this material are provided to an inmate and their legal representative.

By virtue of s 194, the Authority can refuse to provide a copy of a document if a judicial member is of the option that to do so would,

> (a) adversely affect the security, discipline or good order of a correctional centre, or
> (b) endanger the person or any other person, or
> (c) jeopardise the conduct of any lawful investigation, or
> (d) prejudice the public interest, or
> (e) adversely affect the supervision of any offender who has been released on parole, or
> (f) disclose the contents of any offender's medical, psychiatric or psychological report.

The Authority often does this in relation to letters received from victims and their families.

Unfortunately, the Authority takes the view that if it invokes s 194, it does not have to be mentioned. Guideline 7 of the Authority's 'Operating Guidelines' outlines this approach. This means the Authority can take into account prejudicial material of which the inmate and their representative have no knowledge and therefore, no opportunity to respond.

The Authority's approach is contrary to the Supreme Court decision in *Dib v Parole Authority of NSW* [2009] NSWSC 575 which held that this was a denial of procedural fairness where the Authority made no mention of the existence and nature of material withheld under s 194. His Honour Acting Justice Patten noted:

> It is difficult to conceive that the public interest required the Authority to say absolutely nothing about the nature or quality of the material it proposed to rely on, but, in any event, the Plaintiff was entitled to some reasons for the approach the Authority took.

The Court endorsed an approach whereby an offender should be told that a copy of the material has not been provided, and given an outline of the content or substance of the material so they have an opportunity to respond.

Client Participation

While some inmates choose not to appear before the Authority, it is our experience that generally most inmates are more enthusiastic in their preparation and participation when it comes to their parole matters than is sometimes (unfortunately) the case with their other legal matters. They are often keen to be involved, provide relevant information and discuss their matters at length.

Harnessing this enthusiasm is significant for two reasons:

1) The likelihood of an inmate being released from custody sooner is increased; and
2) Participating in a parole hearing, irrespective of an outcome, gives inmates an opportunity to demonstrate the progress they have made while in custody and often gives inmates confidence and self-esteem which will ultimately assist them if they are released to parole.

Accordingly, please encourage inmates to, where possible:

- Prepare a letter to the Authority explaining why they should be released to parole or why they breached their parole and should be considered for release again in the future; and
- Read through and make comment on the reports of their Probation and Parole Officer.

Other Matters

Appeals

A rehearing on the merits, that is an appeal, is not available from the Authority's refusal of parole or revocation. There is however a limited right of review whereby an inmate can apply to a judge of the Supreme Court for a direction to be given to the Authority that the Authority's decision was made on the basis of false, misleading or irrelevant information: s 155 re parole and s 176 re revocations.

The process is relatively useless as it is difficult to prove and it does not mean an inmate will be released. If an application is successful, it only results in the matter being referred back to the Authority with a direction to reconsider the matter because their original decision was based on information which was false, misleading or irrelevant.

Supreme Court challenges

Notwithstanding s 193C(4) provides that a decision of the Authority is final, it is accepted that the Supreme Court has jurisdiction under s 69 of the *Supreme Court Act* to consider an application for prerogative relief. This is not a rehearing of the merits but is based upon establishing the Authority made an error of law. It is complex, expensive and difficult to win but creates case law regarding the Authority. Two examples are discussed below.

In *Esho v Parole Board* [2006] NSWSC 304, the Supreme Court quashed a refusal of parole because the Authority took into account irrelevant considerations, failed to take into account relevant considerations and made errors of law such that it made a decision for which there was no basis in evidence or material. In custody, Mr Esho was referred to the VOTP but was assessed as ineligible because he did not have the necessary English skills to qualify. He had, otherwise, undertaken every program available to him.

At para 55, his Honour Justice Rothman stated:

> …the function of the Parole Authority in determining the question before it under s 135 is not to determine what would be the most optimum basis upon which the claimant could be released into the community. It is to consider, the likelihood of the offending being able to adapt to normal lawful community life.

His Honour went on to note at para 56:

> The expert reports…recommended release on parole subject to the condition of one to one treatment which was unavailable in prison. In those circumstances there is no basis, on the evidence, upon which the Parole Authority could possibly have found the claimant was not able to adapt to normal lawful community life.

In *Jonathan Davison v Commissioner for Corrective Service & Ors* [2011] NSWSC 699, Mr Davison was found unsuitable for a custodial sex offender treatment program because he denied there was a sexual aspect to his index offence of murder. He was found suitable for the Deniers Program but it would not commence for at least nine months.

The Supreme Court set aside the decision of the Commissioner refusing to reduce his classification and the decision of the SORC advising the Authority that it was not appropriate for Mr Davison to be considered for parole. The Court held:

(i) The Commissioner was not bound to accept the SORC's recommendation to reduce the C1 classification to a C2 but he was bound to consider it, there was no evidence that this was done and no reasons were given to not accept the SORC's recommendation; and
(ii) The SORC gave inadequate reasons as to why it was essential for Mr Davison to do the Deniers program when the delay in starting would result in him spending at least another 12 months in custody in order to complete it.

Early parole

An application for early release on parole can be made to the Authority under s 160 or to the Executive for a prerogative of mercy.

Where an inmate is dying or release is necessary because of exceptional extenuating circumstances, the Authority may make an early parole order. Life sentences are excluded. The written application is forwarded to the Authority along with supporting medical material, for it to be considered at a private meeting of the Authority. Depending upon the circumstances the application may be considered within a matter of days.

While s 270 preserves the prerogative of mercy, these applications are comparatively rare, cumbersome and very slow.

Juvenile Parole

The Children's Court exercises the functions of the Authority pursuant to s 29 of the *Children (Detention Centres) Act* 1987, and by virtue of the fact that the client is a detainee.

Parole for young offenders is mostly 'automatic' because their sentence will not be greater than three years. If the sentence is greater than three years and the young person has served the non-parole period in a juvenile detention centre, then the parole jurisdiction will be exercised by the Children's Court because of the young person is a detainee. If the sentence is greater than three years and the young person is sentenced to serve their sentence in a correctional centre, the jurisdiction will be exercised by the Authority. This also applies if the detainee is transferred to a correctional centre before release on parole is considered. Section 28(3) of the *Children (Detention Centres) Act* 1987 provides that once a detainee is transferred to a correctional centre, they cease to be a detainee and become an inmate. Please note that Kariong Juvenile Correctional Centre is a correctional centre, not a juvenile detention centre.

For revocations of parole, the position as to jurisdiction and review is not so clear. If parole was granted by the Authority then the jurisdiction to revoke also lies with the Authority. Note s 9A(f) which provides that following the execution of an Authority warrant, a person aged 18 years or over, cannot be detained in juvenile detention. The effect is the Authority retains its jurisdiction with respect to the revocation. The policy for a person under 18 is that they be taken to Kariong.

The Authority will also have jurisdiction to revoke and review parole if a young person' parole was ordered by the sentencing court, that is 'automatic' parole and the person was released from a correctional centre (including Kariong). This is because at the time of their release they were an inmate, not a detainee.

The Children's Court will however have jurisdiction to revoke and review parole if parole was ordered by the sentencing court and the person was released from a juvenile detention centre. By virtue of s 29(2), if the Children's Court revokes parole, it retains jurisdiction to review the revocation notwithstanding a subsequent transfer of the parolee to a correctional centre. If the parolee goes directly into a correctional centre following the execution of the revocation warrant issued by the Children's Court, the practice is that the Children's Court will continue to retain the jurisdiction to review the revocation, presumably because the parolee was a detainee at the time they were released.

Prisoners Legal Service

Legal Aid NSW’s, Prisoners Legal Service (PLS) provides a duty in-house solicitor service at hearings before the Authority. PLS is also located in the Parramatta Justice Precinct Offices. The contact numbers for PLS are ph. 8688 3888 and fax 8688 3895.

In addition to Authority hearing, PLS provides the following:

- Representation in:
    - (ii) Prison discipline offences before a Visiting Magistrate;
    - (iii) Reviews of segregation directions;
- General legal advice and minor assistance regarding criminal, family and civil matters to prisoners by way of:
    - (i) A visiting advice service to most gaols; and
    - (ii) Responding to letters and telephone calls from or on behalf of prisoners.

Conclusions

At present inmates seeking parole in NSW face a number of hurdles in participating in the parole process and ultimately being released to parole. For Indigenous inmates these hurdles are greater than their non-Indigenous counterparts, often due to the entrenched socio-economic disadvantage they, their families and their communities face, their lengthier offending histories, as well as the limited culturally-appropriate services available both pre- and post-release.

In circumstances where inmates and their representatives are equipped with information gleaned from the inmate's family as well relevant community based services, there is a stronger prospect of parole.

For that reason, the NSW Aboriginal Legal Service's network and connections to communities, and the strong relationship it has with Legal Aid NSW presents a valuable opportunity for Indigenous inmates who are drawn into the NSW parole system to be well-informed about the parole process and successfully utilise their limited opportunities for parole.

If you have any questions about Parole Authority procedure or specific matters involving your clients, please contact Prisoners Legal Service on ph. 8688 3888. Will can be contacted directly on ph. 8688 3963 or email william.hutchins@legalaid.nsw.gov.au. Keppie can be contacted directly on ph. 8688 3888 or email keppie.waters@legalaid.nsw.gov.au.

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[i] Will Hutchins is the solicitor in charge and Keppie Waters is a solicitor at the Prisoners Legal Service, Legal Aid NSW.

[ii] A 'serious offender' is defined by s 3 an offender who is serving a life sentence, at least 12 years before eligible for release or a sentence for murder.

[iii] Citing the Department of Corrective Services, Submission 63: 35-36 in NSW Legislative Council Select Committee on the Increase in Prisoner Population, *Final Report*, Parliamentary Paper 924, NSW Parliament, 2001: 20.

[iv] Butler, T & S Allnutt, *Mental illness among New South Wales' prisoners*, NSW Corrections Health Service, Sydney, 2003, cited in Law and Justice Foundation, "The Needs of Prisoners and People Recently Released from Prison – Background Paper", *Access to Justice and Legal Needs Program: Disadvantaged Groups,* 2005.

[v] Ibid.