VACRO
Submission to the Sentencing Advisory Council

Parole: The rehabilitative sentence

September 2011
Introduction

VACRO welcomes the opportunity to provide comments addressing the legislative and administrative framework governing the release and management of sentenced prisoners on parole in Victoria. Parole is an important but at times mysterious part of the operation of the criminal justice system and has a significant role to play in ensuring that the system is not only safe but also fair.

Whilst acknowledging the complexity of the issues that emerge when considering Parole, this submission focuses on responding to the following two questions:

- When making its decisions, the Adult Parole Board assesses people on various criteria. What criteria do you think the Board should apply when making decisions about parole?
- The assessment criteria used by the Board are not currently formalised in legislation. What do you see as the advantages and disadvantages of formally stating the Board’s criteria in legislation?

Criteria required to guide decision making about parole must clearly correspond to the purposes of parole. Three key purposes are considered in this submission: parole’s relationship to community safety, as an incentive for prisoners and as a means of managing the costs of imprisonment.

In considering the list of factors that are relevant in deciding questions of parole, VACRO supports the Board’s flexible and active approach to engaged case management throughout a custodial sentence. Current criteria reflect the Board’s commitment to monitoring progress and ensuring adequate release preparation and planning has occurred. The emphasis of decision making at this point is clearly on rehabilitation and safe reintegration and VACRO considers the current criteria are sufficiently broad to permit balanced decisions to be made. A list of recommendations follows this introduction.

The second part of the submission briefly addresses the overall advantages and some of the practical challenges associated with adopting a legislative framework, formally stating the Board’s criteria and providing guidelines for decision making.
LIST OF RECOMMENDATIONS

Parole and community safety

- Any decisions about changes to the administration of parole in Victoria should consider evidence on whether paroled prisoners have higher or lower recidivism rates than those who serve a full sentence and are released with no correctional supervision.
- Any decisions about changes to the administration of parole in Victoria should consider evidence about the ways in which recidivism can be further reduced with robust release preparation and planning, and high quality, well resourced community correctional supervision and support.
- The granting of parole to comparatively high numbers of eligible prisoners by the Victorian Board is supported by VACRO as a constructive approach to sentence management, permitting a flexible but informed approach to deciding individual release dates and tailoring orders to provide appropriate conditions of release and levels of supervision in the community.

Parole as incentive

- Parole is one of few incentives for constructive, pro-social behaviour in a custodial setting and must continue to offer both motivation for change and hope for the future.

Cost

- Parole is an effective tool for managing the risk of excessive cost to the public in maintaining growing prison populations with increasingly complex needs.

Criminal history

- Where parole is granted for those with a history of offences against the person, it must then be managed with highly skilled supervision of compliance, with carefully planned Order conditions.

Risk, assessment and recommendations

- Detailed and sensitive assessments of risk of reoffending and of harm to self and others need to be available to the Board.
- Parallel assessments of needs and strengths are not only helpful in decision making but are key sources of information to inform the detail of any order conditions and the setting of appropriate levels of supervision and support.
- A comparison between the risks associated with supervised conditional reintegation during parole should be contrasted with the future risks associated with unsupervised, unconditional release.
Conduct in custody

- Where participation in programs and learning opportunities or progress on managing health conditions has the potential to impact on a decision of the Board, this should be communicated to the offender.
- The Board requires some flexibility to consider access and barriers to programs and services, including health care.

Preparation and planning for release

- VACRO supports careful consideration of release plans by the Board, acknowledging that resources are required to ensure proper planning and preparation for release.
- The Board requires a flexible approach to considering the order in which various preparatory steps must occur to support adequate preparation and planning.
- VACRO supports the Board having the flexibility to indicate that they will approve parole subject to certain preparatory steps being completed.
- Where completion of such steps is beyond the control of the individual offender, and creates a barrier to the granting of parole that restricts the alternatives available to the Board, it would be helpful if the Board could require those responsible to ensure that the necessary action is taken.

Submissions or representation from a range of interested parties

- VACRO supports the entitlement of victims or persons related to victims to make representation or submissions to the Board that may influence order conditions.
- The Board must retain mechanisms to protect any such information considered sensitive.
- It is useful for the Board to accept informally presented recommendations or submissions (letters, notes), since this provides an opportunity to engage those who may provide ongoing support for the offender.
- The Board must retain mechanisms to protect any such information considered sensitive.
- As a result of offenders having limited access to information before the Board, reliable processes are needed to quickly correct technical inaccuracies that may change the outcome of a decision.
- The Board has an obligation to communicate with those affected by its decisions in a timely and respectful fashion.
- Provision of reasons for refusal of parole assists offenders and support workers to address specific areas of need and to focus release planning in the direction that is most likely to be supported by the Board.
VACRO

VACRO is a non-denominational, community-based agency that provides information, counselling and support for those charged with an offence in Victoria, for offenders and for their families.

Our long history as supportive client advocates, offering practical, confidential and effective services has established our credibility with service users. Our open and accountable partnerships with prisons and Community Corrections Officers, enables us to work efficiently and constructively with Government. As a result, VACRO is uniquely placed to provide a comprehensive service for individuals accused of a criminal offence, defendants going through court, prisoners, offenders and those individuals in transition from custody to the community.

VACRO is one of the oldest non-denominational welfare organisations in Victoria and has provided support to offenders and their families since the organisation was founded in 1872 in response to a Royal Commission into the Penal system. As the Discharged Prisoners’ Aid Society, VACRO’s original focus was on addressing the material and practical needs of prisoners and their families. VACRO has retained its commitment to meeting the needs of this particularly vulnerable and often excluded client group while developing new, professional approaches to service delivery. In recent years, significant work has been directed towards innovation and the development of new evidence-based programs and services. This work has occurred in parallel with VACRO’s commitment to contributing to local research and active engagement in policy development in areas that impact on our client group.

Our focus is on three key areas of work:

1. Community
2. Justice System Services
3. Family and Children’s Services

In each area, VACRO provides information, practical resources, personal support and specialist referral. Consistent with our throughcare approach, we aim to reduce recidivism and build safer communities. This is achieved by working with individuals and families at the time of arrest, through the Court process and in the prison system, placing a special emphasis on transition and reintegration.

NOTE: This submission includes comments from VACRO Support Workers based on their experience working directly with people exiting prison. Real names and other identifying features have been changed.
Purposes of Parole

• When making its decisions, the Adult Parole Board assesses people on various criteria. What criteria do you think the Board should apply when making decisions about parole?

Any review of the function of parole necessarily begins with an exploration of its purposes. This submission does not aim to provide a comprehensive coverage and instead focuses on three central factors: parole and community safety, parole as an incentive for prisoners and parole as a means of managing the costs of imprisonment.

Parole and community safety
VACRO’s role and mission support strong efforts towards rehabilitation and reintegration of offenders at the earliest point, while ensuring that correctional processes are both safe and fair.

While a focus on improving community safety is proper, it is critical that questions of safety and risk be viewed very broadly and must not be permitted to narrow and distort complex, individual decisions about parole. In Fergus Mc Neill’s words, we need to consider ‘what works’ without losing sight of ‘what’s just’ (2009:21).

A sole focus on protection of the public from potential or predicted harm can have a perverse or counter productive effect insofar as punishment, deterrence and incapacitation do not necessarily prepare a prisoner for reintegration into the community at the point of release. A disproportionate emphasis on these functions risks ignoring other, equally important correctional purposes such as rehabilitation, reinforcing positive behaviour and minimising negative behaviour through case managed planning, access to treatment, programs, learning opportunities, release preparation, supervision and support. Corrections Victoria summarises their approach to ‘offender management’ during a custodial sentence as follows:

The aim of the offender management system is to motivate offenders to engage in and continue with programs and services, identify offenders’ issues, coordinate and prioritise their access to appropriate programs, services and activities and to promote well-being (which includes personal safety and health) with the aim to reduce re-offending.  

Where a prisoner is eligible to be considered for parole according to the original sentence, parole can be considered an opportunity to ‘calibrate release to maximise the benefit of imprisonment’ (Broadhurst, 1990: 30) by permitting flexibility and an individualised approach to deciding the date and conditions of release. It is important to contrast this intention to maximise benefit with the alternative of remaining in custody for the full term of the original sentence, ending with an unconditional or straight release. At the end point of a custodial sentence, straight release carries with it no obligation to comply with the conditions of an order and no correctional supervision or reporting requirements. While release preparation and planning can clearly occur for straight

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1 Corrections Victoria Offender Management Framework, 2010:3.
2 The title of this submission, ‘Parole: the rehabilitative sentence’ is taken from a reference in Broadhurst 1990:25.
3 With some notable exceptions, including those on Extended Supervision or Detention Orders or listed on the Sex Offender Register.

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release, there is no capacity to manage, monitor or support the planning process through transition in the critical post release phase. While serving a full sentence may appear to be more severe as a form of punishment, deterrence, denunciation of criminal conduct and incapacitation of the offender, it may well prove to be less safe at the point of release and thus be much less effective in fulfilling other important expectations of sentencing and sentence management: rehabilitation and the related question of protecting the community in future.

Recommendations:

- Any decisions about changes to the administration of parole in Victoria should consider evidence on whether paroled prisoners have higher or lower recidivism rates than those who serve a full sentence and are released with no correctional supervision.
- Any decisions about changes to the administration of parole in Victoria should consider evidence about the ways in which recidivism can be further reduced with robust release preparation and planning, and high quality, well resourced community correctional supervision and support.
- The granting of parole to comparatively high numbers of eligible prisoners by the Victorian Board is supported by VACRO as a constructive approach to sentence management, permitting a flexible but informed approach to deciding individual release dates and tailoring orders to provide appropriate conditions of release and levels of supervision in the community.

Parole as incentive

Parole should be considered as a flexible part of the complex sequence that follows from sentencing. In the course of serving a custodial sentence, punishment for past behaviour should gradually give way to a focus on current behaviour and learning ‘desistance’ (McNeill, 2009). Constructive steps towards change must be considered possible within the prison environment and rewards must be available and achievable. Programs and opportunities for learning or practical work are all vital in offering a setting that permits prisoners to make changes and plan for a future that does not involve reoffending.

In this context, parole is a clear and powerful motivation for change.

I think in general prisoners understand what parole means - that it is a privilege and not a right - and that they will need to do anything asked by the Parole Board in order to be considered for their EED (earliest eligibility date). They are also very wary that any incidents such as fights or drug use may affect their chances of getting parole. (VACRO Transitional Support Worker 1)

Parole is an incentive for good behaviour, providing a focus for achieving personal goals or taking constructive action by participating in prison based programs or activities that will improve the chances of release at the EED. Where deprivation of liberty is the punishment for past (criminal) behaviour, parole is contingent upon present good behaviour and is a form of reward, providing both day to day motivation and hope for the future.⁴

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⁴ On this, see McNeill (2009:28).
Recommendations:

- Parole is one of few incentives for constructive, pro-social behaviour in a custodial setting and must continue to offer both motivation for change and hope for the future.

Cost

Although it is difficult to include questions of cost in any consideration of community safety and justice, the day to day functioning of the criminal justice system must nevertheless be planned and managed within budgetary constraints and so broader questions of policy and planning must take cost into consideration. Prisoner numbers are increasing rapidly in Australia and Victoria. This is a result of a myriad of factors, including changing patterns of offending and policing, as well as changes in the reporting of crime. Changes to ‘front end’ sentencing options (such as the abolition of suspended sentences or consideration of minimum mandatory sentences) will also impact on future prisoner numbers, as will changes to ‘back end’ options (such as the abolition of home detention).

All factors that result in an increase in prisoner numbers bring with them the significant and growing costs of health care for an ageing prisoner population with complex needs including high levels of chronic and communicable disease, mental health issues, acquired brain injury, intellectual disability and addiction to alcohol and other drugs. Prisoners also require access to legal services and provision of quality clinical and educational programs in professionally managed and staffed secure environments that must keep pace with this growth.

In this context, parole should be considered a practical mechanism that is an important part of managing the numbers of prisoners across the system, avoiding overcrowding and excessive cost to the public. This can be done in a way that is safe, efficient and responsible (Levin and Reddy, 2011).

Recommendation:

- Parole is an effective tool for managing the risk of excessive cost to the public in maintaining growing prison populations with increasingly complex needs.

Criteria

When deciding whether to release an offender on parole or home detention, the Board considers the interests of the community, the rights of the victim, the intentions of the sentencing authority and the needs of the offender. This summary statement reflects a long list of factors to be considered by the APB in reaching a decision. Some factors relate to the period prior to the current custodial sentence and focus on offending history. Others relate to the current period of incarceration and others to future

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5 Australian Institute of Health and Welfare, 2010
7 Factors addressed in this submission are taken from two sources: ‘Factors that influence the Board’s Decision’ (APB Annual Report 2009-2010: 18) and the website of the Adult Parole Board of Victoria (Department of Justice, see footnote 5).
possibilities and predictions of future behaviour. The following section makes comment on factors taken into consideration by the Board: history of offending; risk and recommendations; conduct in custody; preparation and planning for release; and, submissions or representation from a range of interested parties.

**Criminal history**

- the nature and circumstances of the offence(s);
- comments made by the judge when imposing the sentence;
- the offender’s criminal history;
- previous history of supervision in the community.

All of the above have clear relevance in any decision about parole and should be considered by the Board but are not, on their own, sufficient to determine a decision about parole.

It is evident that the non-violent offender who is eligible for parole requires a very different level of consideration to an offender with a history of offences against the person and serious past breaches of order conditions. In cases where a serious offence has been committed or where the offender has a significant criminal history or a track record of failing to comply with supervision requirements in the community, decisions to refuse parole may rest on the assessment of risk (see below). However, in such circumstances, it is in the best interests of both the community and the individual offender that an extensive, structured release plan is nevertheless prepared well in advance to manage the risk. Those who have been convicted of serious offences are also those most likely to have served long sentences and are thus more likely to be affected by institutionalisation. As a result, they may be less able to adjust and cope with a sudden change to unsupervised and unfamiliar freedom on straight release.

Graduated and planned steps to freedom are essential for any person who will eventually be released if community safety is the key consideration. VACRO notes that the use of Extended Supervision and Detention Orders create different post sentence pathways for some offenders assessed as posing an unacceptable risk. This section focuses on those who are eligible for parole and are likely to be released at the end of their sentence. As part of a long period of preparation and ‘step down’ from prison, structured permits also provide a useful preparation for parole. Permits are managed and monitored through the Ministerial Community Advisory Committee under the auspices of Corrections Victoria.

Occasional high profile failures of parole that result in the commission of further serious offences are tragic. These may reflect failures at any number of points in the criminal justice system – poor release preparation, poor provision of post release support, poor monitoring or coordination of supervision in the community, poor responses to breaches of order conditions - and do not only reflect poor decisions about granting parole.
Recommendation:
  - Where parole is granted for those with a history of offences against the person, it must then be managed with highly skilled supervision of compliance, with carefully planned Order conditions.  

Risk, assessment and recommendations

- potential risk to the community and/or the individual offender;
- reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychiatrists, psychologists, custodial staff and/or Community Corrections Officers.

VACRO accepts the need for careful assessment of the risk of future reoffending and supports the current approach of the Board in seeking to inform itself by accessing information from multiple sources, including medical professionals and Corrections Officers. The complexity of risk assessment and prediction means that it is an inexact science and requires constant updating with new and more sensitive approaches that improve accuracy in the identification and assessment of static and dynamic risk factors relating to specific offender sub-populations (such as women or Indigenous offenders) or offence types (such as sex offences or family violence). Where risks are identified, some can be mitigated and managed through a carefully planned release, involving a period of correctional supervision in the community.

Recent evidence of high levels of post release mortality also point to the importance of paying careful attention to the risks posed to the offender on release. Available means of protection against risk of harm to the offender should also be considered and form part of a release plan (see below).

In parallel with a detailed risk assessment, it is necessary to pay attention to the needs of the offender for services and support on release. Where needs are not met, risk of reoffending or harm to self or others is likely to increase. Again, this can be addressed through the provision of adequate referral and access to appropriate supports in the pre-release preparation period. The very high proportion of people in prison who were homeless or in unstable housing at the point of arrest or who had an untreated mental health condition or an undiagnosed acquired brain injury indicate a relationship between unmet need (as a result of poor access to services), offending and subsequent incarceration.

A focus on risk that ignores a parallel assessment of strengths ignores a series of factors that can serve a protective function in the period post-release. Factors such as a supportive family, secure housing or new employment opportunities can reduce the risk of reoffending and these should all be taken into consideration in assessments used to inform the Board.

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8 A vast body of evidence is available about the most effective approaches to the supervision of offenders in the community and this is an important consideration in looking at the way parole is administered. In other words, many outcomes of parole do not depend solely on the decision or the risk assessment, but rather on the quality and consistency of supervision, monitoring and ensuring compliance with order conditions, managing information and responding to breaches appropriately.

9 Kinner et al., 2011.
A detailed assessment of risk (to self and others) that also includes identification of needs and strengths is not only helpful in decision making but is a key source of information to inform the detail of any order conditions and the setting of appropriate levels of supervision.

Order conditions tailored in this way can serve many purposes, addressing significant risks (proscribing some contacts or behaviours that exacerbate risks of harm to self or others) while ensuring that needs are met (through access and referral to support programs, health services or learning opportunities) and strengths are reinforced (contact with children and family or work commitments are taken into account in order conditions and release planning).

In relation to the discussion above (see pg. 4, concerning the purposes of parole, community safety and reintegration) the Board should also consider a comparable assessment of risk/needs/strengths relating to likely conduct on unconditional release after the current sentence is completed. In the event that parole is not then approved, this is ideally because the completion of further time in custody will, on balance, reduce the risk posed at the future point of unconditional release to a greater extent than can be achieved through a period of supervised, conditional reintegration while under sentence.

The appropriate balance between these two forms of risk – risk now or risk in future - is articulated in the Canadian legislation, which states as a guiding principle that, ‘parole boards make the least restrictive determination consistent with the protection of society’.\(^{10}\) Attaching value to the principle of the least restrictive determination encourages a planned approach to managing risk and discourages a ‘risk averse’ approach. A ‘containment’ approach, by contrast, uses custody as a form of incapacitation without adequate planning for future release – simply holding a person in custody until such time as they must be released with no supervision. Such an approach would not be supported by a guiding principle that makes reference to balancing the least restrictive alternative with protection of society.

Recommendations:

- Detailed and sensitive assessments of risk of reoffending and of harm to self and others need to be available to the Board.
- Parallel assessments of needs and strengths are not only helpful in decision making but are key sources of information to inform the detail of any order conditions and the setting of appropriate levels of supervision and support.
- A comparison between the risks associated with supervised conditional reintegration during parole should be contrasted with the future risks associated with unsupervised, unconditional release.

\(^{10}\) Corrections and Conditional Release Act, SC 1992, Canada, as cited in Naylor and Schmidt 2010:443.
Conduct in custody

- The conduct of the offender while in custody and whether any positive drug tests have been recorded;
- Willingness to participate in relevant programs and courses while in custody.

VACRO believes that conduct while in custody is a relevant consideration for the APB and this is well understood by prisoners (see above), for whom it acts as an incentive to comply with prison requirements and plan for the future. VACRO supports a very broad consideration of conduct and participation, to include involvement in a whole range of other constructive activities such as participation in the peer listener program or taking on responsibilities as a billet. This broadens the focus from treatment and learning directed at the individual to include pro-social aspects of learning and participation in group activities or making a contribution to shared responsibilities.

Where participation in programs and learning opportunities have the potential to impact on a decision of the Board, then access and barriers to such programs and services must also be taken into account.

> Generally, I have found with my clients that there is a long waitlist for many programs. Sometimes when people get to the top of the list, there is insufficient time left of their sentence to complete a program. (VACRO Transitional Support Worker 2)

VACRO notes that the Board criteria is broad enough to consider ‘willingness to participate’ as well as looking at actual completion of courses and programs. Retaining flexibility in the criteria allows the Board to consider this issue in context for each individual, taking into account any barriers to accessing programs.

> I think that the APB seem to have been more understanding of this in recent times and are now more aware of the limitations that may affect a person’s opportunity to do programs. They acknowledge that this is a huge source of frustration for prisoners – putting their names down and then suddenly being moved at short notice, and finding that not all prisons run all the different programs. So they are inclined to be more flexible and take this into account if a person has been unable to complete a particular program. (VACRO Transitional Support Worker 3)

As a result of the increasingly complex health needs of the offender population, it is worth considering whether ‘willingness’ to access health and medical assessments, treatment and healthcare programs while in custody should also be relevant considerations, reflecting a willingness to tackle issues that may have contributed to past offending.

The Board’s active case management approach means that access to healthcare assessments or treatments may be as significant in their decision making as program participation. If this is the case,

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11 These considerations are consistent with the Good Lives Model. On this, see Ward and Maruna, 2007.
12 See Annual Report 2009 -2010 for a description of the active role that the Board plays throughout a sentence. This includes meeting with offenders, ensuring that they undertake programs, interviewing offenders and monitoring progress in order, ‘to be satisfied that such offenders are well equipped to be reintegrated into the community on release’ (Annual Report 2009 -2010:3).
An example of this is a client of mine, Ivan. Ivan’s parole application was declined and he was required to serve a further 3 months. This decision was made only days before his EED and no reason was given. When I emailed to ask why this decision was made (so that I could explain to the client, and address anything the Board were concerned about), the reply stated: “It’s the policy of the Board not to give reasons for their decisions”. In Ivan’s case, it turned out he was required to serve the three months to address his mental health issues and stabilise his medication. This information would have been useful for both Ivan and myself, so that we could start putting appropriate services in place, and so that Ivan could make some sense of the decision. A further frustration was that Ivan had by this time spent a number of years in custody so his mental health needs could really have been addressed much earlier. (VACRO Transitional Support Worker 1)

As with programs, it is legitimate for the Board to take into account access and barriers to health services.

Similar issues arise around access to healthcare where waiting times can be significant. Prisoners are also very concerned about the potential loss of a particular cell or bed that may have taken them a long time to get. The moves involved in accessing a health service can mean you lose your spot and they have to decide if it’s worth it, not knowing if it will help with parole. (VACRO Transitional Support Worker 3)

Recommendations:

- Where participation in programs and learning opportunities or progress on managing health conditions has the potential to impact on a decision of the Board, this should be communicated to the offender.
- The Board requires some flexibility to consider access and barriers to programs and services, including health care.

Preparation and planning for release

- release plans.

VACRO believes that release plans and the related issue of proper preparation for release are critical factors that require consideration by the Board. All aspects of release planning are relevant and should begin as early in the sentence as possible. A series of challenging issues need to be addressed in release planning and these cannot always be finalised with the resources available within a custodial setting: proper identification, bank account details, suitable accommodation, registration for income support and employment services, enrolment in education, reestablishment of significant relationships with family and community, and referral to legal and health services. Many members of the broader community would struggle to organise a major move such as release

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13 On this, see Victorian Ombudsman, 2011.
from custody with no internet access, minimal budget and limited access to a telephone, bearing in mind that this must frequently be organised without a definite date to plan from.

All Victorian prisoners have access to the Transitional Assistance Program (TAP) and access to a range of services, including Centrelink staff and housing support workers. A smaller number of eligible prisoners have access to case managed transitional support programs (such as LinkOut, WISP and Konnect). Even with support, it is not always possible to plan adequately to finalise all of these important details. Some simply remain beyond the control of the individual and it is unfortunate if such issues impact on parole decisions.

By way of example, the Board Chairperson has acknowledged, ‘the very considerable difficulties experienced in finding appropriate housing for parolees and the affect that that can have in inhibiting the grant of parole’ (Annual Report 2009 – 2010:9). While finding suitable and affordable housing continues to be a challenge, a parallel difficulty exists, where the granting of parole can also inhibit confirmation of appropriate housing:

Because accommodation is so important to a person’s stability after release, I would love to see a parole decision along the lines of: ‘Parole approved subject to suitable accommodation being confirmed’. Because we can’t set up accommodation, not knowing when or if parole will go ahead. This way, we could book accommodation, if that’s the only reason for refusal. Then as soon as the accommodation is finalised, we can seek final APB approval. Otherwise, we are caught up having to say that we may need accommodation at some time in the future when parole may be approved, and so you can’t confirm it and then the parole can’t be approved. (VACRO Transitional Support Worker 2)

If the Board is able to identify certain ‘hurdle requirements’ for the granting of parole, then support workers can proceed with a degree of certainty to meet these requirements.

Following on from the acknowledgment that not all programs or health assessments and treatments can be completed in custody for reasons beyond the offender’s control, VACRO supports the Board having the capacity to grant parole with release plans to include the completion of programs in community settings. For some offenders, completion of programs in a community setting can be considered preferable to completion of programs in custody.

Where people can’t complete a program while they are inside, it would be really good for motivation if there was the flexibility to be able to complete the programs in the community, as part of an Order. For example, where prisoners are doing cognitive skills training to learn to make better choices, it may be even more beneficial to do this sort of learning in a community setting, where they are confronted with actually having to make choices that matter. They can practise their skills, they can learn by doing. Particularly for those with an ABI or ID, who need to learn outside the prison environment. (VACRO Transitional Support Worker 3)

Such benefits may apply equally to health assessments (such as a neuropsychologists assessment of acquired brain injury) or treatments (pharmacotherapy) that can be completed in the community.
This has the added advantage of using the period of correctional management and supervision to engage the offender in access to follow up services and linkage with supports within their local area.

Recommendations:

- VACRO supports careful consideration of release plans by the Board, acknowledging that resources are required to ensure proper planning and preparation for release.
- The Board requires a flexible approach to considering the order in which various preparatory steps must occur to support adequate preparation and planning.
- VACRO supports the Board having the flexibility to indicate that they will approve parole subject to certain preparatory steps being completed.
- Where completion of such steps is beyond the control of the individual offender, and creates a barrier to the granting of parole that restricts the alternatives available to the Board, it would be helpful if the Board could require those responsible to ensure that the necessary action is taken.

Submissions or representation from a range of interested parties

- representations made by the victim or by persons related to the victim

Victims and relatives of victims have a clear interest in any decision regarding parole and are entitled to make a submission to the Board, consistent with the entitlement to make a victim impact statement before the sentencing court. Such information is clearly sensitive and the Board must retain mechanisms to ensure that such information is protected. Submissions by victims and relatives can inform the setting of relevant order conditions, such as exclusion from particular geographic areas where inadvertent contact may occur.

Recommendations:

- VACRO supports the entitlement of victims or persons related to victims to make representation or submissions to the Board that may influence order conditions.
- The Board must retain mechanisms to protect any such information considered sensitive.

- submissions made by the offender, the offender's family, friends and potential employers or any other relevant individuals;
- representations made by the offender or others with an interest in the case.

The Board is able to review submissions made by a wide range of interested parties. This is significant, since support from family, friends or potential employers are all relevant to a consideration of the risks of reoffending. Being able to make a submission or representation to the Board in an informal manner is a valuable opportunity to engage those who may provide ongoing financial, emotional or social support for the offender on release. Strong and supportive social networks (family, friends), practical support and legitimate income sources (potential employment)
or learning opportunities (potential education or training) offer protection against the risks of reoffending, as noted above. Involving others in the parole process allows them to become engaged in the reintegration process and this makes a powerful contribution to release planning.

As with material provided to the Board by victims or relatives of victims, some material provided by family, friends or potential employers may be considered sensitive and the Board must retain mechanisms to ensure that such information can be protected.

The limited sharing of information with offenders, while justifiable in the instances described above, can create difficulties where information may be inaccurate or may be contestable. Although some offenders have significant contact with the Board, not all offenders have sufficient opportunity to meet with the Board and follow the detail of determinations. Since the Board is not required to provide reasons, some of the decisions of the Board appear to be mysterious or inconsistent and this can create high levels of anxiety amongst the prison population.

_I have a particular client I have worked with for several months. He’s still incarcerated, despite his EED being (during June 2011). They told him to do a program, which he did, and to get support, which he did, through VACRO, and he would be released. He is still in prison and they are not sitting on him until (during September 2011). The client has an appointment for a naltrexone implant booked for the following day (in September) and a release plan in place which we hoped would provide strong evidence of his support. It seems, from the client’s perspective, that the Board have given him one set of instructions and despite adhering to these instructions, have failed to parole him or give him an explanation as to why this is the case. He doesn’t want to appeal or anything, he just wants to know why._ (VACRO Transitional Support Worker 2)

_They sometimes indicate their distrust for the APB, usually after being given an indication of how it’s supposed to work and then finding that it is not being followed through. They see discrepancies between individual cases, with one person being granted parole under one set of circumstances and what seems like an identical case being knocked back. This causes anxiety and lack of faith, when they can’t see the reason._ (VACRO Transitional Support Worker 3)

Processes that provide an avenue for correcting technical inaccuracies are also extremely important.

_I recently had a case where the parole plan was written without consultation with the client: he wasn’t seen in person or contacted via telephone which was really unusual. As a result, the plan did not indicate that he had housing on release, which he had. The client’s parole was declined, despite having appropriate housing and the client did not know how to get this amended. Because this particular guy had access to a support worker, I was able to advocate for an urgent amendment to be made, and the decision was quickly changed. If he hadn’t had access to that sort of support, he may still be in prison._ (VACRO Transitional Support Worker 2)

The speed of Board processes is valued highly by prisoners and support workers who see any delay in decision making as a serious disadvantage that leaves them in a form of limbo, unable to proceed with release plans and unsure of appropriate steps towards rehabilitation and participation in programs.
VACRO transitional support workers report that the Board currently communicates with offenders in a timely and respectful fashion by letter. This ensures that regular updates are provided on the status of decisions. While this communication is valued by prisoners, the content of the communication tends to be limited to procedural updates or outcomes rather than providing access to the detail of material considered or reasons for particular outcomes.

Recommendations:

- It is useful for the Board to accept informally presented recommendations or submissions (letters, notes), since this provides an opportunity to engage those who may provide ongoing support for the offender.
- The Board must retain mechanisms to protect any such information considered sensitive.
- As a result of offenders having limited access to information before the Board, reliable processes are needed to quickly correct technical inaccuracies that may change the outcome of a decision.
- The Board has an obligation to communicate with those affected by its decisions in a timely and respectful fashion.
- Provision of reasons for refusal of parole assists offenders and support workers to address specific areas of need and to focus release planning in the direction that is most likely to be supported by the Board.
Advantages and disadvantages of legislation

- The assessment criteria used by the Board are not currently formalised in legislation. What do you see as the advantages and disadvantages of formally stating the Board’s criteria in legislation?

On this question, the Board’s Annual Report makes the following statement:

_The Board aims to ensure that its proceedings are conducted properly and fairly for all parties involved. In making decisions to grant, deny, defer or cancel parole, the Board considers each case on its merits, while using flexible guidelines developed over many years to streamline the decision-making process_ (2009-2010:18).

Advantages

The overwhelming argument in favour of formalising the assessment criteria used by the Board in legislation is that it would make the purposes of the Board transparent and the processes of the Board fair. While the Board currently, ‘aims to ensure that its proceedings are conducted properly and fairly for all parties involved’ (2009-2010:18), the extent to which they are successful cannot be challenged or tested under the current system. There is no formal entitlement to appeal decisions of the Board, to appear before the Board, to seek reasons for a decision or to challenge material presented before the Board, although a review may be requested by an offender or person acting on their behalf. A prisoner whose release date is determined as a result of such a process might reasonably describe it as unfair. More accurately, they may not be able to determine if it was fair or not, as they simply do not have sufficient information available.

In principle, VACRO agrees with the compelling arguments considered by Naylor and Schmidt in their paper, ‘Do Prisoners have a Right to Fairness before the Parole Board?’ (2010). Naylor and Schmidt make a strong case for establishing a statutory framework for the following reasons:

_First, fair and transparent procedures lead to decision-making that is better informed, more effective and has greater legitimacy. Second, they should be provided as a matter of principle, as a matter of natural justice, and as a matter of human rights_ (2010:439).

Legal and human rights commentators have refined the arguments in favour of this position and VACRO agrees in principle that this position is convincing.

Challenges

- Inquisitorial or adversarial

While most commentary logically focuses on the rights of prisoners as the primary subject of a decision by the Board, a number of other interested parties also need to be considered in any legislative framing of the decision making process of the Board. Thus, prisoners’ rights to fairness cannot be considered in isolation. Rights - to appear, to present assessments and reports, to access or challenge information provided by other parties or to appeal decisions - may equally be shared by those with a variety of interests in the outcome of a decision, such as victims, prosecutors or even
special interest groups. In such circumstances, it is almost inevitable that the nature of the decision making process will change.

At present, the Board adopts an approach that is closer to that of conducting an inquiry, guided by an engaged case management approach (described above) that actively seeks out the information required to reach a decision. This approach demands an active inquiry into the history, circumstances and progress of the individual that is not in keeping with a traditional approach to legal decision making on the evidence presented. The Board approach has much in common with therapeutic jurisprudence. This means that the Board can explore many areas that are closer to a treatment approach. The Board thus requires a range of skill including, but not limited to, legal skill. Such a process of inquiry can be informed by a range of assessments and views, both formal (neuropsychology assessment) and informal (personal statement from victims or family members). In conducting such an inquiry, the Board is not required to arbitrate a legally constituted contest between parties but instead to reach a decision, balancing complex information and interests. It is also worth noting that Board decisions are made at several other points. While most of this discussion has focused on the decision to grant or refuse parole, the Board must also set and review order conditions and has the power to cancel parole.  

VACRO has some concerns that there may be tensions between the flexibility and breadth of the current inquisitorial, multi-disciplinary case management approach and the attention to legal and administrative process that would be required if the decision making process was formalised in legislation. It would be of concern if the emphasis shifted from an active inquisitorial approach to an adversarial approach, relying on high level legal skills at the expense of a multi-disciplinary approach.

Improving the fairness and transparency of the Board’s processes would include the provision of reasons for decisions, providing offenders and others with access to the bulk of the (non-sensitive) information before the Board, the right to make corrections to inaccurate material or to be represented to ensure proper opportunity to participate in and understand the decision making process. None of these are trivial matters and it is important to consider whether concerns of imposing an ‘administrative burden’ are justified. Naylor and Schmidt (2010) argue convincingly that these issues have been well managed and presented no significant problem in the Canadian setting (446-7). As a result of the experience in other jurisdictions, it is clear that significant resources and changes to the process and organisation of decision making are required to support changes to the legal process of the Board. One approach is to simply consider this as, ‘the cost of doing business’.

The risk attached to this approach is not that it is impossible to overcome these challenges or achieve change in process, but that the necessary resources may not be made available. If the process is inadequately resourced, the ‘cost of doing business’ may simply translate into ‘doing

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14 In addition to the newer functions relating to the Serious Sex Offender Monitoring Act 2005 and the Serious Sex Offender (Detention and Supervision Act 2009).
15 Email from National Parole Board Ontario/Nunavut Region, Canada, to Bronwyn Naylor, 23 December 2008, as cited in Naylor and Schmidt, 1010:447.
business very slowly’. As noted above, the speed of current Board processes is of great value and any delays in hearing matters or making decisions may present new barriers to justice for offenders who will potentially remain in prison pending a decision or in a queue seeking access to legal representation or awaiting the outcome of an appeal.

Just as it is difficult to include questions of cost in any consideration of community safety (see earlier discussion) it is difficult to consider a higher standard of access to justice in light of cost. While cost should ideally present no barrier, inadequate resources may nevertheless produce unintended outcomes in the form of producing new barriers in prisoner’s access to justice.

- **Balance**

If Victoria is to adopt a legislative framework, it will require broad guidelines permitting a high degree of flexibility and supporting the continuation of a case management or therapeutic approach. Guidelines and criteria will need to incorporate complex factors to be considered by the Board in making each decision, tailoring Order requirements to meet the risks, needs and strengths of each individual and then monitoring compliance as described in earlier sections of this submission.

Careful attention is required to articulating the balance between the public interest in the reintegration of the offender as a member of the community and the public interest in community safety. The least restrictive determination is a useful measure of this balance, as noted earlier, and may inform legislative guidelines. Other helpful statements of this balance between risks and benefits are included in the UK directions to the parole board.  

### Conclusion

This submission makes a number of specific comments and recommendations on the purposes of parole and the criteria that may be usefully considered in making decisions about parole.

The key point is that parole must remain a constructive and effective part of the criminal justice system with important functions that relate to safety of the whole community by providing a structure for managing the timing and circumstances of a prisoner’s release from custody. Parole is also an important incentive for good behaviour in custodial settings and provides motivation for change. Further, parole is an effective tool for managing the cost to the public of growing prison populations with increasingly complex needs.

Parole requires careful management and decision making that relies on an active inquiry into a range of personal circumstances, including criminal history and predictions of risk of reoffending. Risk of reoffending should not be considered in isolation. A more complete picture of risk includes an

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In relation to the risk to the public: “This must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervision which might help rehabilitation and so lessen the risk of re-offending in the future.” Accessed 6 September 2011.

“This risk must be balanced against the benefit, both to the public and the offender, of early release back into the community under a degree of supervisions which might help rehabilitation
assessment of needs and strengths, as well as any progress towards rehabilitation and participation in opportunities for learning and treatment while in custody. A complete assessment can then inform any Order conditions and the setting of appropriate levels of supervision and support.

Preparation for release and release planning are essential for all prisoners. Given that there are some barriers for prisoners in accessing programs and services or finalising some post-release planning, flexibility is required when considering matters that are beyond the control of the individual prisoner.

A range of interested parties are entitled to make formal or informal submissions to the Board and the Board must ensure that, where sensitive material is provided, that material is protected. At present, offenders have limited access to material on which the Board base decisions and have few entitlements to seek information from the Board. For some, this lack of access to the detail of decision making, including reasons for refusal to grant parole, causes some confusion and anxiety.

In considering legislative frameworks, VACRO supports changes that retain the positive features of the existing parole system, including the engaged case management approach and the flexibility to take a wide range of matters into account in reaching a decision. The capacity to produce or amend decisions in a timely manner is also critical to the function of parole, given that any waiting period will involve waiting while in custody.

In principle, VACRO is a keen supporter of fairness, transparency, accountability and respect for natural justice and human rights for all members of the community. This includes prisoners. VACRO therefore supports work by legal and human rights specialists towards achieving these ends.

In practice, VACRO has some concerns that there may be unintended consequences produced by adapting to legislative structures and the requirements that follow. These concern potential changes in process that may undermine the current inquisitorial, multi-disciplinary, case management approach and replace this with a process dominated by an adversarial approach. Other practical concerns relate to the costs of managing the administrative changes required. A further concern is that, although administrative changes required to support a fairer process can clearly be managed with adequate resources, any shortfall is likely to result in reduced access to justice in the form of delays or lack of adequate representation.

The critical question, if Victoria is to adopt legislative guidelines, is the high degree of flexibility required, the incorporation of complex factors in decision making criteria and careful attention to articulating the balance between the public interest in the reintegration of the offender as a member of the community and the public interest in community safety. Ideally, parole should be considered a balanced approach to reintegration of offenders in a way that is consistent with community safety and has benefits for the whole community.
List of References


