



Review of the Victorian Adult Parole System Report

Sentencing Advisory Council
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Contents

Contributors v

Preface vii

Executive summary ix

Background ix

Decision-making criteria xi

Decision-making processes xiii

Information sharing for the proper management of parole xiv

Recommendations xv

Chapter 1: Introduction 1

Terms of reference 1

What is parole? 2

History of parole in Victoria 3

The purpose and benefits of parole 4

Sentencing and parole 5

Studies on the effectiveness of parole 7

Scope of report 9

The Council's approach 11

Chapter 2: An overview of Victoria's parole system 13

The Adult Parole Board 14

Corrections Victoria 22

Victoria Police 23

Other agencies 23

Chapter 3: Parole decision-making criteria 25

Guidance for decisions relating to granting parole 27

Guidance for decisions relating to breach of parole 37

Specifying the guidance in legislation 41

Chapter 4: The Board's decision-making processes 51

Procedural fairness and natural justice 52

Chapter 5: Information sharing for the proper management of parolees 77

Introduction 77

Process-related barriers 79

Other barriers to effective information sharing in the parole system 96

Further recommendations 99

Appendix 1: Consultation – meetings and submissions 102

Roundtables 102

Submissions 102

Meetings: Adult Parole Board 103

Meetings: Corrections Victoria 103
Meetings: Victoria Police 104
Inter-agency information-sharing workshop 104
Meetings: Other agencies 104

Appendix 2: Standard and special parole conditions – Victoria 105

Standard conditions 105
Special conditions 106

Appendix 3: Comparative table 108

Additional systems 120

References 121

Bibliography 121
Case law 123
Legislation 124

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Preface

Each year, several thousand people return from Victorian prisons to the community. A significant proportion goes on to commit further offences.

Recently, some parolees have committed very serious offences while on parole. These cases have focused attention on the rate at which prisoners who are released on parole commit further offences, and this in turn raises questions about whether the 'legislative and administrative frameworks' governing parole best serve the Victorian community, particularly in terms of promoting public safety and reducing reoffending.

These issues have prompted the Attorney-General to request the Sentencing Advisory Council ('the Council') to review and report on aspects of the adult parole system. The Council has not been requested to investigate those cases nor to examine the correctness or otherwise of decisions made or actions taken by the Adult Parole Board or other agencies in those or any other cases.¹

No parole system can eliminate the risk of reoffending. The reasons for reoffending are complex. Underlying problems, such as a dependence on drugs and alcohol, poverty and mental illness or impairment, all play a role. In addition, prisoners face many practical obstacles to adjusting to life in the community, such as difficulties in finding appropriate accommodation and employment. These obstacles are compounded for the many prisoners who, even before entering prison, have been at the margins of mainstream society.

What a parole system can do is reduce the risk that prisoners will commit further offences when released into the community, by providing a supervised transition into the community and by seeking to address some of the factors that may lead to reoffending.

In Victoria, the Adult Parole Board plays a crucial role in the parole system. It must make difficult decisions about whether to release particular offenders on parole, what conditions offenders should be subject to while on parole and whether to cancel parole if offenders fail to comply with any of those conditions.

Although technical expertise and professional experience are useful in making such decisions, these decisions are not statistical or scientific; they are complex political and social judgments about which risks are acceptable.

In Victoria, as in many other jurisdictions, the Adult Parole Board comprises a mixture of judicial officers and community members. This mixture of membership (and the requirement that major decisions, such as to grant or deny parole and to cancel parole, are made by a panel of three members) seeks to ensure that a range of perspectives is taken into account in making these complex judgments.

This review has identified some strengths of the Victorian adult parole system. In particular, the Council supports the proactive approach taken by the Board in preparing prisoners for parole and the multidisciplinary and non-legalistic character of its decision-making processes.

The review has also identified areas of weakness in the current adult parole system. The Council recommends improvements to the decision-making guidelines used by the Board and Corrections Victoria. The Council also recommends safeguards to ensure that decisions about parole are based on adequate and accurate information and that relevant information flows effectively between the Adult Parole Board, Corrections Victoria and Victoria Police.

The Council is grateful for the cooperation of the Adult Parole Board, Corrections Victoria and Victoria Police in providing it with information for this review. The three agencies acknowledged in consultations that the Council's review has its roots in a number of high profile cases and a perceived lessening of public confidence in the parole system. They indicated a strong desire to ensure that the adult parole system operates in a way that best serves the Victorian community.

¹ Throughout this report, 'Adult Parole Board' is used to refer to the organisation as a whole, whereas 'the Board' is used when referring specifically to Board members in their decision-making and supervisory capacities.

Executive summary

Background

Terms of reference

On 23 May 2011, the Attorney-General wrote to the Sentencing Advisory Council asking it 'to review and report on the legislative and administrative framework governing the release and management of sentenced prisoners on parole in Victoria'. The purpose of the review was stated to be 'to ensure that the parole system best serves the Victorian community, including promoting public safety and reducing re-offending'.

In particular, the Attorney-General requested the Council to consider:

- whether statutory criteria are desirable to guide decision-making in relation to the 'granting and revocation' of parole, particularly in relation to violent crimes, and if so, the nature of these criteria;
- the framework within which decisions are made by both Corrections Victoria and the Adult Parole Board in relation to breaches of parole and whether statutory criteria are desirable to guide decision-making in relation to breaches; and
- whether the existing 'legislative and administrative framework' facilitates adequate information sharing between relevant agencies for the proper management of parolees.

In conducting the review, the Council was requested to have regard to the purposes and operation of parole and legislative arrangements in other Australian and comparable overseas jurisdictions.

Purpose and operation of the Victorian adult parole system

When sentencing an offender to a period of imprisonment of at least one year, Victorian courts ordinarily fix a non-parole period as part of the sentence. This means that, when the non-parole period expires, the Adult Parole Board has discretion to release the offender into the community to serve the remainder of the sentence on parole, under the supervision of Community Correctional Services.

While on parole, the offender is subject to a range of conditions. If those conditions are breached, the Board may cancel parole, and the offender will be returned to prison. Victoria Police plays an important role, particularly in detecting breaches that involve the commission of further offences.

At the commencement of the Council's review, there was no legislated or agreed articulated purpose of parole in Victoria. As such, there can be misunderstanding in the community about the nature and purpose of parole. There can be a lack of awareness that parole represents only *conditional* release and that a parolee remains under sentence while on parole. There may also be a misapprehension that parole exists only for the benefit of prisoners, whereas parole is – and has historically been – focused on improving the long-term protection of the community through the rehabilitation of prisoners.

In consultations for this review, there was agreement on the importance of having an articulated purpose of parole. The Council considers that the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while they are on parole and after they complete their sentences. This formulation of the purpose of parole was accepted by the majority of stakeholders, including the Adult Parole Board, Corrections Victoria and Victoria Police.

Scope of the project and the Council's approach

The Council has focused on the adequacy of laws relating to parole and the relevant administrative arrangements – particularly the internal guidelines – used by the Adult Parole Board, Corrections Victoria and Victoria Police.

The Council is conscious of the interrelationship between the Adult Parole Board and the Youth Parole Board, particularly with regard to the transfer of offenders between adult prisons and youth justice centres; however, this project is limited to a review of parole as it relates to adults.

Although the timeline for this project did not allow for the publication of formal consultation documents (such as an issues paper, consultation paper or discussion paper), the Council undertook as much consultation as was feasible. The Council held a series of roundtable discussions with legal practitioners, non-government organisations, advocacy groups and victims of crime, as well as separate meetings with the Adult Parole Board, Corrections Victoria, Victoria Police and other agencies involved in the adult parole system, such as the Victims Support Agency.

The Council explored the possibility of consulting with offenders; however, this was not feasible within the timeline for this project.

In order to gain a greater understanding of the issues relating to information sharing across the main agencies, the Council also held a joint meeting with representatives from the Adult Parole Board, Corrections Victoria and Victoria Police.

Finally, the Council made a public call for submissions, which resulted in the receipt of 15 written submissions from a range of individuals and organisations.

Decision-making criteria

Guidance in relation to the granting of parole

The terms of reference ask the Council to consider whether statutory criteria are desirable to guide decision-making in relation to the 'granting and revocation'² of parole, particularly in relation to violent crimes.

The Council has recommended against the introduction of statutory criteria at this stage as the Council considers that, on balance, any potential advantages to statutory criteria are outweighed by potential unintended consequences.

The Council has identified a number of deficiencies in the written guidance for members of the Board in relation to the granting of parole.

The main form of written guidance is contained in the Members' Manual prepared by the Adult Parole Board. (This is not the only source of guidance for members, as the Adult Parole Board provides an induction program for new members and other opportunities for ongoing training.)

At the time this review commenced, the Members' Manual contained a list of factors for members to consider when deciding whether to grant parole. It also set out a general rule to use when considering parole for a person who had no previous episodes of parole.

The Council recommends that the Adult Parole Board replace the general rule in the Members' Manual with a new general principle that is more clearly related to the purpose of parole and that identifies community safety as the paramount consideration. In consultation with the Council, the Adult Parole Board has indicated its willingness to adopt this new principle.

Under the new principle, in assessing whether parole should be granted to a prisoner, community safety is the paramount consideration. In assessing the risk to community safety, the Board will consider:

- whether there is an unacceptable risk to the community if the offender is released on parole; and
- whether the risk to the community would be greater if the offender were released from prison without the supervision and support provided on parole. (This second element is not relevant in the case of an offender who is sentenced to life imprisonment with a non-parole period.)

In applying this principle, the Board must consider the nature and severity of harm that is risked (such as the commission of a violent offence) and the likelihood that the harm will occur. The Board should also consider the extent to which the degree of risk can be reduced through particular forms of supervision (such as a new supervision regime developed by Corrections Victoria for serious violent offenders) and through particular conditions.

Subject to the paramount consideration of community safety, the Board should seek to facilitate the rehabilitation of the offender, in recognition of the fact that the community benefits from the rehabilitation of offenders.

The new general principle expressly refers to violent offences when providing guidance on the assessment of risk.

When deciding whether to grant parole, the Board considers a range of information, including parole assessment reports compiled by Corrections Victoria. These reports contain an assessment using the Victorian Intervention Screening Assessment Tool (VISAT). The Council notes that the capacity of the Board to interpret such assessments and have appropriate regard to them is critical and recommends that the Members' Manual should provide guidance on the interpretation and use of such assessments.

² Revocation of parole occurs after the Board grants parole to a prisoner but before the prisoner is released from prison, as explained in Chapter 2. The Council has not identified any particular issues relating to the revocation of parole.

Guidance in relation to breach of parole

Parole constitutes an undertaking by the parolee to the Board to comply with the conditions of parole. In Victoria, a set of standard conditions applies to every parole order. The first standard condition is to not commit a further offence. Other standard conditions relate to supervision by a community corrections officer and participation in employment, education or unpaid community work. Parole orders typically have special conditions, which include attendance at various treatment programs, and can also include conditions such as requiring the offender to abstain from alcohol or limiting the offender's contact with children.

The Board has the power to cancel parole – with the result that the offender can be arrested and returned to prison – if the offender breaches any of the standard or special conditions. Cancellation is not automatic: it is at the discretion of the Board.

Corrections Victoria also exercises a degree of discretion except in the case of breaches by way of further offending, which must be reported immediately to the Board. Deputy Commissioner's Instructions (DCIs) provide guidance to community corrections officers in relation to their supervision and management of parolees. The DCIs provide that some failures to comply with conditions are acceptable (for example, failure to attend an appointment for health reasons). The DCIs provide for a certain number of unacceptable failures to comply before the Board is notified; however, the DCIs are a guide only, and community corrections officers have discretion as to if and when such breaches are reported to the Board.

Once the Board is notified of a breach, the Members' Manual provides some guidance, but this is largely limited to the situation where a parolee has been charged with further offences and the charges have not yet been determined. The Council recommends that the Board adopt a new general principle to guide breach decision-making. Under this principle, community safety is again the paramount consideration. Parole should be cancelled if the offender poses an unacceptable risk to community safety if parole continues. Corrections Victoria should follow the same principle in relation to non-compliance-type breaches, such that if it has assessed the parolee as being an unacceptable risk to the community, it must recommend to the Board that parole is cancelled.

The Council makes a further recommendation about the factors that the Board must consider in breach decision-making.

Decision-making processes

The Adult Parole Board operates in an inquisitorial rather than adversarial manner and takes a proactive approach to preparing prisoners for parole. This approach enables the Board to progressively form and modify its assessment of prisoners' progress towards rehabilitation and their risk of reoffending, and to actively solicit the information necessary to reach each decision.

Unlike many other bodies with the power to make administrative decisions affecting a person's rights, interests or legitimate expectations, the Board is not bound by the rules of 'procedural fairness' (also known as 'natural justice').

This means that offenders cannot have legal representation at Board hearings; the Board does not provide offenders with access to the information on which its decisions are based and it does not publish written reasons (although the Board may verbally inform prisoners of the reasons for its decisions). There is no right of appeal from a Board decision, although a prisoner can request that the Board review its decision.

The rules of procedural fairness seek to ensure that decisions are made without bias and in a transparent manner, and that decision-makers take into account the views of those affected. The rules are based on the idea that decisions made in accordance with the rules of procedural fairness not only are more acceptable to the parties involved and the community more generally but also will be of a better quality as they will be fairer, more accurate and more consistent than decisions made in the absence of procedural fairness.

The Council notes that there have been many developments in constitutional and administrative law in the decades since the enactment of the provision exempting the Board from having to apply the rules of procedural fairness. In particular, recent case law has served to cast some doubt over the constitutional validity of this provision. However, in the absence of clear authority to the contrary, the Council proceeds on the basis that the provision is constitutionally valid.

Some of the people and organisations consulted by the Council considered that the Board should no longer be exempted from applying the rules of procedural fairness.

Others considered that as a matter of principle the Board should apply the rules but expressed concern about the practical implications of doing so and considered that it may lead to unintended consequences. They supported the proactive, 'hands on' approach that sets the Board apart from parole authorities in many other jurisdictions. Subjecting the Board to the rules of procedural fairness could alter some of the positive characteristics of the way that the Board operates. In the absence of additional resources, it could also result in substantial delays in dealing with matters. In this regard, the Board operates within significant constraints: according to its annual report, in 2010–11 it considered 8,963 matters over 166 meeting days (although only a portion of these matters involved substantive decisions to grant, deny or cancel parole).

The Council considers that the rules of procedural fairness are vital – particularly in relation to decisions affecting a person's liberty and the safety of the community – for two reasons:

- The rules promote high-quality decisions, because they increase the likelihood that decisions are based on accurate and relevant information and are made through a logical reasoning process less likely to be affected by bias or prejudice.
- The rules promote fair decisions. Ensuring that people affected by the decision consider that they have been treated fairly, regardless of the outcome of the decision, is an important end in its own right.

The Council considers that in principle the Board should not be exempt from applying the rules of procedural fairness. However, the terms of reference did not specifically seek advice on this issue, and in this review the Council had neither the resources nor the time to analyse fully the likely effect of a requirement for procedural fairness being imposed on the Board. The Council has taken the view that, before imposing on the Board a requirement to comply with the rules of procedural fairness, further work is required to identify the effect, if any, on the Board's resources and, critically, the delay that would likely be caused for prisoners due to be considered for parole.

The Council's approach at this stage is to make a series of recommendations that seeks to promote the same aims as procedural fairness – to improve the consistency, fairness, transparency and therefore quality of the Board's decision-making – without undermining the positive characteristics of the Board's processes and without placing on the Board an undue administrative burden that would disadvantage both prisoners and the broader community.

Information sharing for the proper management of parole

The terms of reference ask the Council to consider whether the existing 'legislative and administrative framework' facilitates adequate information sharing between relevant agencies for the proper management of parolees. The relevant agencies are the Adult Parole Board, Corrections Victoria and Victoria Police.

The Council notes that there are various legislative provisions that affect the ability of these agencies to share information. In addition, each of the agencies has its own internal guidelines, and there are several bilateral memoranda of understanding. However, there is currently nothing that could appropriately be described as a legislative or an administrative framework covering the adult parole system.

The largely ad hoc (and often undocumented) arrangements among the agencies around information sharing are a risk factor for the breakdown of information flow, which in turn poses a risk to community safety. Accurate and timely information sharing – particularly as it relates to breach of parole – is a vital element in the proper management of parolees.

The Council recommends the establishment of a parole coordinating committee, on which all three agencies are represented. This committee would oversee a coordinated approach to the management of parolees in Victoria and provide clarity and consistency around the respective functions and accountabilities of the Adult Parole Board, Corrections Victoria and Victoria Police. It would also oversee the development and implementation of an inter-agency information-sharing framework and risk-management framework.

The Council makes some further recommendations for improvements to the current parole system as it relates to information sharing, for example, around data collection and analysis and reporting arrangements to the minister.

Recommendations

Recommendation 1

General principle to guide decisions about whether to grant parole

The Adult Parole Board should adopt in its Members' Manual a new general principle to guide decision-making about whether to grant parole.

The new general principle should be to the effect that:

Community safety is the paramount consideration in all decisions relating to the granting of parole.

In assessing the risk to community safety, the Board will consider:

- whether there is an unacceptable risk to the community if the offender is released on parole; and
- whether (except in the case of an offender who is sentenced to life imprisonment with a non-parole period) the risk to the community will be greater if the offender does not have supervised release and support on parole.

In assessing whether the risk of releasing the offender on parole is unacceptable, the Board will have regard to:

- the nature and severity of the harm that is risked (the particular outcome to be avoided, such as the commission of a violent offence); and
- the likelihood that the outcome will occur.

Subject to the paramount consideration of community safety, the Board will seek to facilitate the rehabilitation of the offender, recognising that the community benefits from the rehabilitation of offenders.

Recommendation 2

Guidance on interpretation and use of risk assessments

The Adult Parole Board should amend the Members' Manual to include guidance for members on the interpretation and use of formal risk assessments in relation to the granting of parole.

Recommendation 3

General principle to guide decisions regarding breach of parole

In making decisions about actions to take in response to breach of parole (or alleged breach of parole), the Board and Corrections Victoria should expressly adopt a general principle to the effect that:

- community safety is the paramount consideration; and
- parole should be cancelled (or in the case of Corrections Victoria a cancellation recommendation should be made) when an assessment is made that the offender poses an unacceptable risk to community safety by remaining on parole.

Recommendation 4

Factors to consider in relation to breach of parole

The Adult Parole Board should make it clear in its Members' Manual that, in making decisions about actions to take in response to breach of parole (or alleged breach of parole), the Board should consider the same factors that it considers when deciding whether to grant parole (listed in Table 1) and that, in addition to these factors, it should consider:

- time spent on parole;
- time left before parole expires;
- compliance with conditions (and, in the case of special conditions, the reason why those conditions were imposed); and
- the impact of breach behaviour on the community.

Recommendation 5

Increased transparency

Section 72 of the *Corrections Act 1986* (Vic) should be amended to require the Adult Parole Board to include in its annual report the purpose of parole, the general principles it uses and the factors it takes into account in exercising its discretion in making decisions in relation to parole.

Recommendation 6

No statutory criteria

The Council recommends against the introduction of statutory criteria to guide decision-making in relation to the granting of parole and in relation to breaches of parole.

Recommendation 7

Access to information by prisoners

In consultation with Corrections Victoria, the Adult Parole Board should establish a system under which factual reports provided to the Board (for example, parole assessment reports or breach reports) are also provided to prisoners/parolees. Copies of any such reports should be sent to prisoners/parolees at the same time as to the Board, with an attachment letter stating that if they believe that any of the information contained in the report/s is inaccurate, they can bring this to the attention of either the relevant officer or the Board at the parole hearing. The relevant authority may remove any information deemed confidential or sensitive.

Recommendation 8

Importance of the Board testing material put before it

The Members' Manual should emphasise the importance of Board members testing the information that is put before them (for example, by questioning the community corrections officer who prepared a parole assessment report) in order to satisfy themselves as much as possible of the accuracy and credibility of information.

Recommendation 9

Annual independent audit

The minister should oversee the implementation of an annual independent audit of the Adult Parole Board's processes.

Recommendation 10

Use of support person by prisoner

- a. The Adult Parole Board should ensure that all prisoners are aware that support persons may be requested by prisoners with special needs.
- b. The Adult Parole Board should publish its fact sheets on its website, so that they are easily accessible to all.
- c. Statistics on the use of support persons by prisoners/parolees should be published in the Adult Parole Board's annual report.

Recommendation 11

Explanation of test to prisoner

The Board should, at some stage in every parole hearing at which a prisoner or parolee is present (whether in person or via video link), explain which test or tests it is applying in its decision-making.

Recommendation 12

Review of decisions

- a. The Adult Parole Board should ensure that all decisions about review applications are taken by the Board differently constituted, rather than by the General Manager.
- b. The Adult Parole Board should issue a practice note or include a section on the review process in its Members' Manual.
- c. The Board should ensure that prisoners are informed of the review process, for example, by developing a review application sheet that can be distributed with notices of parole decisions. A separate fact sheet on the review process is also advisable.
- d. The Adult Parole Board should publish review statistics in its annual report, including the number of reviews requested, the number rejected for consideration (and the reason/s for rejection), the number of reviews completed by the Board and the outcomes of these reviews.

Recommendation 13

Review of section 464B of the *Crimes Act 1958* (Vic)

The government should review the impact of section 464B of the *Crimes Act 1958* (Vic) on Victoria Police's procedures for dealing with parolees who are in breach of parole, and make any amendments necessary to streamline the process.

Recommendation 14

One DCI for breach, with the Adult Parole Board taking an active role in deciding content

The Adult Parole Board should take an active role in determining the content of Corrections Victoria's Deputy Commissioner's Instructions (DCIs) relating to procedures – in particular decision-making – around breach of parole.

There should be only one DCI relating to breach of parole. This DCI should set out a 'general rule' for the reporting of breaches by Community Correctional Services to the Adult Parole Board, and this general rule should be clearly linked to the principle for breach of parole decision-making, as set out in Recommendation 3 above.

Recommendation 15

Inter-agency parole committee

- a. The responsible ministers should establish a committee to coordinate parole activities across the three agencies – the Adult Parole Board, Corrections Victoria and Victoria Police.
- b. The terms of reference and/or aims and objectives of this committee should include the following:
 - to oversee a coordinated approach to the management of parolees in Victoria;
 - to provide clarity and consistency around the respective functions and accountabilities of the Adult Parole Board, Corrections Victoria – Community Correctional Services and Victoria Police;
 - to ensure that the agreed purpose of parole is incorporated in all agency manuals/guides and that mechanisms are in place to ensure that agency practices and procedures are at all times consistent with this purpose;
 - to oversee the development and implementation of a risk-management framework across all three agencies;
 - to oversee the implementation of appropriate systems across the agencies, for example, change management and quality management processes; and
 - to provide the three agencies with a forum in which to exchange information about their procedures and/or parole decision-making practices and discuss issues that may arise.

Recommendation 16

Review of agencies' operating manuals

The proposed inter-agency parole coordination committee should, as one of its first tasks, oversee a review of the three agencies' manuals and operating procedures (as they relate to parole), with the view to making them consistent with each other and with the overall purpose of parole and principles of parole decision-making.

Recommendation 17

Review of privacy laws relevant to parole

The government should review – in consultation with the proposed inter-agency parole coordination committee – privacy laws applicable to the parole system to determine whether legislative changes are necessary to allow for the adequate flow of information between the Adult Parole Board, Corrections Victoria and Victoria Police.

Recommendation 18

Information-sharing framework

- a. Information sharing across the three main parole agencies must occur in a coordinated manner. For this to happen, the inter-agency parole coordination committee should oversee the development of an inter-agency information-sharing framework/agreement. A first step towards a framework will be a review of current information-sharing arrangements between the agencies.
- b. Any information-sharing framework or agreement should specify that all inter-agency agreements and/or procedures must be properly documented and periodically reviewed.

Recommendation 19

Adult Parole Board to collect and analyse data

- a. As part of its move to a 'paperless office', the Adult Parole Board should ensure that appropriate systems are in place to allow for the collection of comprehensive parole data. Access to comprehensive data is vital for effective risk assessment, informed and consistent decision-making and accountability purposes. The Adult Parole Board should collect and analyse data including:
 - as much information as possible about each case (such as date of offence, age of offender at time of offence, gender, Indigenous status, Culturally and Linguistically Diverse (CALD) status, health/mental health status, principal proven offence, sentence, programs completed while in prison);
 - whether parole was granted at the earliest possible date or alternatively deferred or refused (and reasons for such deferral or refusal);
 - all parole conditions;
 - information about all breaches of parole referred to the Adult Parole Board, including types of breaches (further offending or otherwise), length of time on parole, description of the relevant behaviour/offence and the Board's decision (for example, no action/warning/cancellation); and
 - how often and in what circumstances 'time to count' is granted.
- b. Funding should be provided to the Adult Parole Board to appoint a data analyst to collect, analyse and report on the data.
- c. After the first year of data collection, the Adult Parole Board should analyse the data and provide a report to the Corrections Minister.

Recommendation 20

Information and liaison officer

Funding should be provided to the Adult Parole Board to employ an information and liaison officer to liaise with other agencies, answer queries from victims and others, ensure that all printed and online resources are up-to-date and accessible and assist with the Adult Parole Board's educative functions.

Recommendation 21

Minister to request report from Adult Parole Board

The Corrections Minister should request – pursuant to section 72(5) of the *Corrections Act 1986* (Vic) – a report from the Adult Parole Board detailing the steps taken to implement the recommendations contained in this report that relate directly to the Adult Parole Board. The request should occur six months after publication of the Council's report.

Chapter 1

Introduction

Terms of reference

- 1.1 On 23 May 2011, the Attorney-General wrote to the Sentencing Advisory Council asking it 'to review and report on the legislative and administrative framework governing the release and management of sentenced prisoners on parole in Victoria'. The purpose of the review was stated to be 'to ensure that the parole system best serves the Victorian community, including promoting public safety and reducing re-offending'.
- 1.2 In particular, the Attorney-General requested the Council to consider:
 - whether statutory criteria are desirable to guide decision-making in relation to the 'granting and revocation' of parole, particularly in relation to violent crimes, and if so, the nature of these criteria;
 - the framework within which decisions are made by both Corrections Victoria and the Adult Parole Board in relation to breaches of parole and whether statutory criteria are desirable to guide decision-making in relation to breaches; and
 - whether the existing 'legislative and administrative framework' facilitates adequate information sharing between relevant agencies for the proper management of parolees.
- 1.3 In conducting the review, the Council was requested to have regard to the purposes and operation of parole, and legislative arrangements in other Australian and comparable overseas jurisdictions.

What is parole?

- 1.4 Parole is the conditional release of an offender from prison to serve the remainder of the sentence³ in the community under the supervision of a community corrections officer.
- 1.5 While on parole, the offender is subject to conditions specified by the parole board in the parole order. Such conditions may include supervision, reporting requirements, treatment programs and conditions relating to place of residence. The offender must formally undertake to comply with these conditions for the duration of the order.⁴ If the offender fails to comply, the parole board has the power to cancel parole and return the offender to prison.
- 1.6 The conditional, supervised release of prisoners on parole aims to minimise the risk that they will commit further offences, by managing their transition back into the community.
- 1.7 The court that sentences the offender to prison determines that offender's eligibility for release on parole by fixing a non-parole period. Once the offender has served that period in prison, the parole board has the power to release the person. Most prisoners serving a term of at least one year of imprisonment in Victoria will become eligible for release on parole during their term. However, in Victoria release on parole is not automatic.⁵ The Victorian Adult Parole Board considers the individual circumstances of each case in order to determine the appropriate time to release a prisoner on parole.⁶

³ *Corrections Act 1986 (Vic) s 76*. In *Power v The Queen*, the High Court said that during release on parole, the head sentence stands 'and during its term the prisoner is simply released upon conditional parole': *Power v The Queen* (1974) 131 CLR 623, 628.

⁴ See, for example, *Corrections Regulations 2009 (Vic) sch 4 form 2*.

⁵ This can be contrasted with other jurisdictions such as New South Wales, where release on parole is automatic for some offenders.

⁶ Adult Parole Board of Victoria, *2009–2010 Annual Report* (2010) 17. Further details about the functions of the Adult Parole Board can be found in Chapters 2 and 3.

History of parole in Victoria

- 1.8 The use of the word 'parole' in the context of an undertaking by a prisoner to comply with conditions upon release most likely derives from the French '*parole d'honneur*', meaning 'word of honour'.
- 1.9 In Victoria, parole as a concept has its origins in the *Indeterminate Sentences Act 1907* (Vic), which provided for the release on probation of prisoners from reformatory prisons. This was a major development in penal legislation and marked a shift from 'the old regime of negative safe custody imposed equally on all to a positive treatment programme with appropriate classification of types'.⁷ This change emerged 'from a realization that the protection of the community can best be achieved by the ultimate rehabilitation of the criminal'.⁸
- 1.10 The *Penal Reform Act 1956* (Vic) abolished the indeterminate sentence (and the Indeterminate Sentences Board) and incorporated parole into all sentences of 12 months or more. The scheme that was put in place did not require a prisoner to apply for parole. The *Penal Reform Act 1956* (Vic) also established the Adult Parole Board, which came into existence on 1 July 1957.
- 1.11 The parole provisions were consolidated in the *Crimes Act 1958* (Vic) where they remained until 1974, when they were moved to the *Social Welfare Act 1973* (Vic), then the *Community Welfare Services Act 1978* (Vic) and finally the *Corrections Act 1986* (Vic).⁹

⁷ Victoria, 'Penal Reform Bill', *Parliamentary Debates*, Legislative Assembly, 1 December 1955, 2381 (Arthur Rylah, Chief Secretary).

⁸ Ibid 2382.

⁹ For a detailed history of the Victorian Adult Parole Board, see David Provan, *Fifty Years of the Adult Parole System in Victoria 1957 to 2007* (2007).

The purpose and benefits of parole

- I.12 The terms of reference state that, in conducting this review, the Council should have regard to the purposes of parole.
- I.13 The *Corrections Act 1986* (Vic) does not define the purpose of parole.
- I.14 In the Second Reading Speech for the Penal Reform Bill 1955, which preceded the *Corrections Act 1986* (Vic) and introduced the current adult parole system in Victoria, the Chief Secretary, Arthur Rylah, indicated that the overriding aim of parole is the protection of the community. In setting out the purpose of parole, he commented that:
- A man cannot be trained to live at peace with the community if he is kept in close captivity under a harshly-regimented régime. The logical and essential thing to do, after he is trained and is ready for release, is to provide a period of supervision in the community. I have no hesitation in declaring that a prisoner's prospects of rehabilitation will be considerably enhanced by the institution of a parole service to provide guidance and supervision to released prisoners. Experience shows that the problems of rehabilitation are greatest immediately following release and recidivism is greatest at this stage. Each prisoner properly rehabilitated and reabsorbed into community life is a social and economic gain to the community, and by such means in the long run society is protecting itself.¹⁰
- I.15 The purpose of parole as a means to improve the long-term protection of society by promoting the rehabilitation of prisoners remains relevant.¹¹
- I.16 In consultations with the Council, stakeholders generally agreed that the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion.¹²
- I.17 It is important for the effective operation of the adult parole system that each of the agencies involved has a common understanding of the purpose of parole. As discussed in Chapter 3, agencies' decision-making guidelines should reflect that purpose. Chapter 5 highlights that the purpose should also be stated in administrative guidelines and that processes relating to parole should be consistent with that purpose.
- I.18 In addition to serving this purpose, parole can provide a number of other benefits.
- I.19 In particular, parole gives prisoners an incentive to behave well while in prison and provides a focus for them to take constructive action by participating in prison-based programs or activities that will improve the chances of release at the earliest eligibility date.¹³
- I.20 Releasing prisoners on parole can also minimise the costs of imprisonment and reduce overcrowding in prisons. For example, a recent performance audit by the Auditor General of Western Australia reports that, from April 2009, there has been a significant reduction in the number of people on parole in that state due to a change in approach by the parole authority (the Prisoners Review Board of Western Australia). The report estimates that these changes have resulted in an additional 700 prisoners at an annual cost of approximately \$42 million.¹⁴

¹⁰ Victoria, 'Penal Reform Bill', *Parliamentary Debates*, Legislative Assembly, 1 December 1955, 2386–2387 (Arthur Rylah, Chief Secretary).

¹¹ The Council notes that parole is not the only mechanism or program that seeks to assist prisoners to transition back into the community. Other programs in Victoria include the Link Out program for male prisoners and the Women's Integrated Support Program. For further information on such programs, see Department of Justice, *Bridging the Gap: A Release Transition Support Program for Victorian Prisoners*, Final Evaluation Report (Department of Justice, 2003) <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Bridging+The+Gap+Final+Evaluation+Report+%28PDF%29>> at 14 November 2011.

¹² This is discussed further in Chapter 3.

¹³ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

¹⁴ Office of the Auditor General (WA), *The Management of Offenders on Parole*, Report no. 11 (2011) 7, 13–15.

Sentencing and parole

- 1.21 In Victoria, if a court sentences an adult offender to more than two years' imprisonment, it must fix a non-parole period.¹⁵ This is the minimum term an offender must serve in prison before becoming eligible to be released on parole. The exception is where the court considers that the 'nature of the offence or the past history of the offender make the fixing of such a period inappropriate'.¹⁶ If a court imposes a head sentence of between one year and two years, it may – but is not required to – set a non-parole period.¹⁷ The non-parole period in all cases must be at least six months less than the sentence imposed.¹⁸ Where a court imposes multiple sentences of imprisonment on a prisoner, the non-parole period will be a single aggregate period.¹⁹
- 1.22 The non-parole period is part of the sentence; it is not a separate sentence.²⁰
- 1.23 If during the non-parole period a prisoner receives a further prison sentence that incorporates a non-parole period, the court must fix a new single non-parole period in respect of all sentences.²¹ The new single non-parole period must not have the effect of allowing the prisoner to be released on parole earlier than under the original sentence.²²
- 1.24 There is no fixed formula or ratio for determining the proper relationship between the non-parole period and the head sentence. In fixing the non-parole period, the sentencing court must consider '[a]ll of the relevant factors'.²³
- 1.25 Following the introduction of parole in New South Wales, the courts in that state took the view that, as parole provides a prisoner with an incentive for rehabilitation, a court should simply fix a non-parole period sufficient to enable the paroling authority to form a proper opinion of the prisoner's prospects for rehabilitation.²⁴
- 1.26 This has never been the approach in Victoria,²⁵ having been rejected by the High Court in *Power v The Queen*.²⁶ The High Court acknowledged that the purpose of parole was 'to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom'. However, the court stressed that this was only to occur 'when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence'.²⁷

¹⁵ *Sentencing Act 1991* (Vic) s 11(1). When sentencing a child under the *Children, Youth and Families Act 2005* (Vic) to a period of detention in a youth residential centre or youth justice centre, the Supreme Court, County Court and Children's Court do not have the power to set a non-parole period, whatever the period of detention imposed.

¹⁶ *Sentencing Act 1991* (Vic) s 11(1).

¹⁷ *Sentencing Act 1991* (Vic) s 11(2).

¹⁸ *Sentencing Act 1991* (Vic) s 11(3).

¹⁹ *Sentencing Act 1991* (Vic) s 11(4).

²⁰ *R v Sener* [1998] 3 VR 749, 754–755. Although the non-parole period is not itself a separate sentence, it can be the subject of an appeal against sentence: *Ludeman v The Queen*; *Thomas v The Queen*; *French v The Queen* [2010] VSCA 333 (10 December 2010) [63].

²¹ *Sentencing Act 1991* (Vic) s 14(1).

²² *Sentencing Act 1991* (Vic) s 14(2).

²³ *R v Merritt* [2008] VSCA 238 (4 December 2008) [17].

²⁴ *R v Portolesi* [1973] 1 NSWLR 105.

²⁵ *R v Currey* [1975] VR 647, 650.

²⁶ *Power v The Queen* (1974) 131 CLR 623.

²⁷ *Ibid* 629.

- 1.27 In *Bugmy v The Queen*,²⁸ the High Court further elaborated on the approach to setting a non-parole period. The majority adopted the view that:
- [The] minimum term is the period before the expiration of which release of that offender would, in the estimation of the sentencing judge, be in violation of justice according to law, notwithstanding the mitigation of punishment which mercy to the offender and benefit to the public may justify.²⁹
- 1.28 In other words, although the purpose of release on parole is to promote the offender's rehabilitation, rehabilitation is not the only consideration when the courts fix a non-parole period. The courts must also take into account other relevant sentencing considerations, such as punishment and deterrence.
- 1.29 The courts have also emphasised that, although the fixing of a non-parole period confers a benefit on the prisoner, it serves the interests of the community because the rehabilitation of the prisoner is in the community's interest.³⁰

²⁸ *Bugmy v The Queen* (1990) 169 CLR 525.

²⁹ *Ibid* 538, adopting the words of Jenkinson J in *R v Morgan* (1980) 7 A Crim R 146, 154.

³⁰ See, for example, *R v Morgan* (1980) 7 A Crim R 146; *Bugmy v The Queen* (1990) 169 CLR 525, 531; *R v Krasnov* [1995] VSC 198 (21 September 1995) [22]; *R v VZ* [1998] VSCA 32 (3 September 1998).

Studies on the effectiveness of parole

- I.30 Some of the people and organisations consulted by the Council expressed scepticism about the extent to which it is possible to achieve rehabilitation of prisoners.³¹
- I.31 There are often significant obstacles to the integration of prisoners back into the community and to reducing the risk that they will return to offending behaviour.
- I.32 A large body of criminological research demonstrates links between demographic factors (such as age and Indigenous status), individuals' lifestyles (activities, social networks and physical and financial circumstances) and a propensity for reoffending. The factors most consistently demonstrated in the Australian literature include:³²
- *unemployment* – offenders who are unemployed or without stable employment are more likely to reoffend;
 - *education and schooling* – those with lower educational attainment are more likely to reoffend;
 - *residential location* – those living in low socioeconomic areas (including government housing), the homeless or those with high residential mobility are more likely to reoffend;
 - *family attachment* – offenders with limited family support or poor family attachment are more likely to reoffend;
 - *mental health* – those with mental health issues and limited medical and social support are more likely to reoffend; and
 - *drug use* – offenders who use drugs are more likely to reoffend.
- I.33 The prevalence of such lifestyle factors among prisoners is very high.³³ In addition, offenders who are returning to the community following a period of imprisonment can face particular challenges, including:
- inadequate personal identification, resulting in delays in accessing welfare benefits and other services;
 - limited financial resources, compounded by limited access to welfare benefits and accumulated debt from other justice sanctions;
 - limited information about the social, health and mental health support services that are available – including housing options;
 - the loss of personal belongings due to the inability to store possessions while in custody;
 - institutionalisation and the decreasing ability to live independently, excessive vigilance, aggression, emotional over-control and a loss of self-worth; and
 - strengthening of criminal social networks.
- I.34 The existence of such factors is likely to be a major cause of the high rate at which offenders reoffend following release from prison.

³¹ Submission 1 (M. Graham); Submission 2 (J. Astbury); Submission 6 (Anonymous); Roundtable Meeting with Individual Victims of Crime (8 September 2011).

³² See generally Jason Payne, *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series no. 80 (2007) 97.

³³ See, for example, Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010*, cat. no. PHE 149 (2011); Payne (2007), above n 32; Department of Justice – Corrections Victoria, *Victorian Prisoner Health Study, Report* (2003).

- I.35 A 2007 study of 3,352 Victorian prisoners found that 35% (1,162 prisoners) returned to prison due to further offending within two years of release.³⁴ Most returned to prison within 12 months (close to 70%). Another Victorian study found that 74% of prisoners were reconvicted at least once within seven years of release, and 54% were reincarcerated at least once within seven years of release.³⁵ The phenomenon is similar in other jurisdictions. For example, a 2006 study of 2,793 New South Wales prisoners found that around two-thirds had appeared in court for further offences within 39 months of release, and a large proportion of these (41% of the cohort) had returned to prison.³⁶
- I.36 In terms of the main risk factors for reoffending following release from prison, the 2007 Victorian study listed as the strongest predictors prior offending history, age of onset of offending, age at release from prison (with younger people far more likely to return to prison than older people) and having a property offence as the most serious prior conviction.³⁷ Fifty percent of Indigenous prisoners returned to prison within two years compared with 34% of non-Indigenous prisoners, and men were more likely than women to return to prison (35% compared with 28%).³⁸
- I.37 The 2007 Victorian study found no difference in the rate of reoffending between those offenders who were released straight from prison and those who were released on parole. However, the study did not seek to examine statistically the effect of parole on recidivism while controlling for other important factors (such as sentence length, offence type and prior offences), which could explain this lack of relationship.³⁹
- I.38 An earlier United Kingdom study reports that there are 'significantly lower reconviction rate[s] for offenders released on parole compared with those who were not paroled'.⁴⁰ In Western Australia, researchers found 'strong evidence that the failure of parole prisoners (using the re-incarceration definition) is significantly less than for prisoners released unconditionally'.⁴¹

³⁴ Shasta Holland, Kym Pointon and Stuart Ross, *Who Returns to Prison? Patterns of Recidivism among Prisoners Released from Custody in Victoria in 2002–03*, Corrections Research Paper Series no. 1 (2007) 6.

³⁵ Stuart Ross and Tricia Guarnieri, *Recidivism Rates in a Custodial Population: The Influence of Criminal History, Offence and Gender Factors*, Criminology Research Council Grant 35/89 (1996) 29.

³⁶ Craig Jones et al., 'Risk of Re-offending among Parolees', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 91 (2006) 5, 9. In contrast to Victoria, where the court may only set a non-parole period if the term of imprisonment is greater than one year, in New South Wales a non-parole period may be set where the period is more than six months.

³⁷ Holland, Pointon and Ross (2007), above n 34, 14–16.

³⁸ *Ibid* 14.

³⁹ As release type was not included in the logistic regression analyses in the 2007 study, all that can be said is that there is no relationship between release type and recidivism at a bivariate level. See Holland, Pointon and Ross (2007), above n 34.

⁴⁰ Tom Ellis and Peter Marshall, 'Does Parole Work? A Post-release Comparison of Reconviction Rates for Paroled and Non-paroled Prisoners' (2000) 33(3) *Australian and New Zealand Journal of Criminology* 300, 312. Stephen Shute writes of the UK research, 'Empirical research has consistently shown that prisoners who are released on parole have lower statistical risks of reconviction than prisoners who are denied it': Stephen Shute, 'Parole and Risk Assessment' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (2007) 21, 27 (citations omitted).

⁴¹ Rod Broadhurst, 'Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?' in Sandra McKillop (ed.), *Keeping People Out of Prison* (1991) 25, 37.

- 1.39 A statistical analysis of parole outcomes in Victoria is beyond the scope of this project and would not have been possible for the Council to do in any event, given the absence of available data. The Council considers it important that such research is conducted, and notes that the Corrections Victoria Research Agenda 2009–2012 includes a proposal to examine the following question:
- Which cohorts benefit most from parole, and under what circumstances and conditions is parole most effective for these cohorts?⁴²
- 1.40 Pending the outcome of such research in Victoria, the Council considers it reasonable, on the basis of research in other jurisdictions, to adopt the hypothesis that, to the extent that parole addresses factors likely to contribute to reoffending, the supervised, conditional release of prisoners on parole is likely to reduce the risk of reoffending.

Scope of report

- 1.41 There are three parole boards in Victoria: the Adult Parole Board, the Youth Parole Board and the Youth Residential Board. The Adult Parole Board has jurisdiction over offenders serving a prison sentence where a non-parole period applies and over young persons who have been transferred to prison from a youth detention facility or from prison to youth detention. The Youth Parole Board has jurisdiction over children and young people (aged 15 to 21) sentenced to a period of detention in a youth justice centre, and those transferred from prison to youth detention by the Adult Parole Board. The Youth Residential Board has jurisdiction over children aged 10 to 14 years who have been sentenced to detention in a youth residential centre.
- 1.42 Given that the terms of reference refer to ‘prisoners’ (a term generally reserved for adult offenders, children in detention being referred to as ‘detainees’) and specifically to the ‘Adult Parole Board’ (in the second bullet point), this report is confined to a review of the adult parole system. Some of the content of the report will also be applicable to the youth parole system.
- 1.43 Prisoners held in Victoria for offences against federal law are not subject to Victorian laws governing parole.⁴³ The report does not cover the federal parole arrangements.
- 1.44 As a public statutory authority, the Council is obliged to give proper consideration to relevant human rights under the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁴⁴ Although the Council has considered human rights in the course of this review, this report does not contain a detailed examination of the relevant Charter rights relating to parole, as these have been the subject of two recent reviews. Both of the reviews relate to the exemption of the Adult Parole Board from the operation of the Charter.⁴⁵

⁴² Department of Justice, *Corrections Research Agenda 2009–2012* (Department of Justice, 2009) <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/4/4/44d65f00404a9f1494a5fff5f2791d4a/Corrections_Research_Agenda_2009.pdf> at 11 October 2011, 36. Later in the present report, the Council makes a recommendation about parole data collection and analysis.

⁴³ These prisoners are subject to release arrangements pursuant to the *Crimes Act 1914* (Cth).

⁴⁴ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 38(1).

⁴⁵ One of the reviews has been published: see The Allen Consulting Group, *Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 Regulatory Impact Statement: Report to the Department of Justice* (Victorian Competition and Efficiency Commission, 2009) <[www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/\\$File/DOJ%20RegulatoryImpactStatement.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/$File/DOJ%20RegulatoryImpactStatement.pdf)> at 15 September 2011. The other is an internal Department of Justice review.

- I.45 There has been a series of cases involving parolees committing serious offences in recent times, which has understandably caused considerable concern within government and the general community. In preparing this report, the Council had regard to these cases but did not investigate them. The Council does not make any comments on these cases throughout this report.
- I.46 There are some further limitations to the material presented in this report, particularly that contained in Chapter 5:
- Time constraints prevented the Council from investigating and documenting all aspects of the existing parole framework.
 - As this was not an audit process (the Council having neither the power nor the expertise to conduct an audit of any sort) and as very little is published about the inner workings of the Victorian parole system, in conducting its review the Council was limited to publicly available documents, information obtained in meetings with agency representatives and documents provided to it by the agencies.
 - The Council did not conduct a formal quality management review or process review, as these are beyond the scope of this reference and outside the expertise of the Council.
 - Changes to operational procedures were underway in all three agencies during the course of the Council's review. The Council sought to understand the nature of the changes, but as some were not yet documented, this was a difficult process.

The Council's approach

- I.47 Two directors of the Council are also members of the Adult Parole Board, and one director of the Council is a senior officer of Victoria Police. To avoid any actual or perceived conflict of interest with these roles in relation to this review, these three directors were excluded from all Council deliberations on this project and had no involvement in the conduct of the review or the preparation of this report.

Consultation

- I.48 The Council made a public call for submissions and received 15 written submissions.
- I.49 Between July and November 2011, the Council held three roundtable meetings, a number of separate meetings with relevant agencies and one inter-agency workshop. Representatives from the Adult Parole Board, Corrections Victoria and Victoria Police attended the workshop, which focused on issues surrounding information sharing within the parole system. The meetings schedule is set out in Appendix I. Some of the recommendations contained in this report, particularly those around information sharing, emerged from these consultations.
- I.50 As this reference raised a number of technical issues outside the Council's range of expertise, two external consultants were engaged. Dr Matthew Groves (Associate Professor, Faculty of Law, Monash University) provided advice on the administrative law aspects of the system. Mr Dave Kelly (Quality Associates International) advised the Council on aspects of information exchange between the key agencies.
- I.51 Given the potential effect that any changes to the adult parole system in Victoria might have on prisoners and parolees, the Council investigated the possibility of consulting directly with prisoners and with offenders in the community about their experiences of parole.
- I.52 Three possible avenues for consultation were considered. The first was to seek permission from Corrections Victoria to gain access to prisoners for consultation purposes. The Council would have first had to obtain formal ethics approval from the Department of Justice Human Research Ethics Committee. Given the tight timelines for this project, it was not possible to attempt both to navigate the ethics process and to organise and undertake the consultation itself within the project's schedule. The second was to seek permission from the Board to attend some of its face-to-face meetings with prisoners who are eligible for parole. Upon request from the Council, the Board did not object to this approach in theory; however, ultimately the Board did not think it practical for the Council to consult with prisoners at 'normal parole sessions conducted by the Board'.
- I.53 In an attempt to find alternative means for consulting with prisoners, the Council requested assistance from the Victorian Association for the Care and Resettlement of Offenders (VACRO) to recruit parolees and/or ex-parolees to participate in focus group discussions. However, it quickly became apparent that within the timelines for the project, and especially given the significant amount of consultation required with the Adult Parole Board, Victoria Police and Corrections Victoria, this would not be achievable.
- I.54 In the absence of direct consultation with prisoners and parolees, the Council has instead relied on the submissions of a number of organisations that address issues of prisoners' rights and the impact of parole on this group.

Chapter 2

An overview of Victoria's parole system

- 2.1 Throughout Australia, statutory authorities (parole boards and parole authorities) make most parole decisions,⁴⁶ with the aim being to ensure appropriate separation from political influence. Parole boards usually comprise a mix of judicial (either serving or retired) and community members. They have the power to order release on parole, defer a decision, deny or revoke parole or cancel parole in the event of breach.
- 2.2 Upon ordering release, parole boards generally impose conditions designed to reduce the risk of reoffending, for example, regular reporting to the relevant corrections authorities, treatment programs, alcohol or drug testing, not residing in certain areas or limiting contact with particular people, such as victims or children.
- 2.3 The main agencies directly involved in management of the Victorian adult parole system are the Adult Parole Board, Corrections Victoria and Victoria Police. Each agency has its own discrete functions, roles and responsibilities.
- 2.4 This chapter provides an overview of the jurisdiction and roles of the three key agencies, as well as a brief discussion of other agencies that are involved in aspects of the system. Chapter 5 contains a detailed discussion of the administrative arrangements of the three key agencies.

⁴⁶ One exception is New South Wales, where the court makes some parole decisions – see Chapter 3 for further details.

The Adult Parole Board

2.5 The Adult Parole Board is neither a court nor a tribunal, but a statutory authority established under the *Corrections Act 1986* (Vic). It exercises executive rather than judicial power. The Adult Parole Board is responsible for overseeing the preparation of prisoners for parole, making decisions as to the granting, revocation and cancellation of parole and overseeing prisoners' supervised release into the community. It performs these functions together with two other key agencies, Corrections Victoria and Victoria Police, with additional agencies providing secondary input.

Jurisdiction and functions

2.6 The Adult Parole Board has jurisdiction when a court has ordered a prison sentence with a non-parole period or when a young person is transferred to prison from a youth detention facility. Apart from parole, the Adult Parole Board also has jurisdiction under the *Serious Sex Offenders Monitoring Act 2005* (Vic) to determine instructions and conditions for offenders on extended supervision orders and to supervise these offenders, and under the *Serious Sex Offenders (Detention and Supervision) Act 2009* (Vic) to supervise and monitor offenders on detention or supervision orders.

2.7 The functions of the Adult Parole Board in relation to parole are set out in section 69 of the *Corrections Act 1986* (Vic). The functions include those conferred on it through the *Corrections Act 1986* (Vic) (set out later in this chapter) and the *Corrections Regulations 2009* (which supplement the Act), and in relation to young people transferred from youth detention facilities to prisons, Part 5.6 of the *Children, Youth and Families Act 2005* (Vic) and regulations made under that Part.

Victorian Adult Parole Board's general approach to parole

2.8 The Adult Parole Board is essentially an inquisitorial body. It takes a proactive approach to preparing prisoners for parole. This may be contrasted with other jurisdictions, for example, New Zealand, where the parole board does not play any role in preparing prisoners for release and meets prisoners for the first time at the hearing on the eligibility date. In Victoria, the Board meets with prisoners relatively early in their sentences to ensure that prisoners are undertaking programs that will assist their eventual re-entry into society.⁴⁷ The Board actively reviews whether appropriate arrangements are made by Community Correctional Services (CCS), a division of Corrections Victoria, for attendance at rehabilitation programs and prison transfers. Long-term offenders and offenders serving life sentences are interviewed by the Board at the start of their sentence and then at regular intervals (annually).⁴⁸ The Board requests regular parole progress reports from Community Correctional Services both before and after release on parole.

2.9 At the expiry of the non-parole period, a prisoner becomes eligible for parole. In contrast to some jurisdictions, release on parole in Victoria is never automatic.

2.10 Although there are no statistics available, the Adult Parole Board states that most prisoners are granted parole at or near their earliest eligibility date.⁴⁹ If a prisoner is not granted parole at the earliest possible eligibility date, the Board maintains ongoing contact with the prisoner via regular meetings and receives progress reports from the prison system, Community Correctional Services and other service providers. The prisoner may reapply for parole.

⁴⁷ Adult Parole Board of Victoria, *2010–2011 Annual Report*, (2011) 2.

⁴⁸ Provan (2007), above n 9, 19.

⁴⁹ Such data are not currently available from the information management systems used by the Adult Parole Board and Corrections Victoria: Meeting with Adult Parole Board (22 November 2011).

- 2.11 The Board is relatively flexible and has fast response times in considering, for example, urgent parole cancellation matters. On occasion, the General Manager, or the General Manager's delegated officer, receives urgent cancellation requests from Victoria Police when they have arrested a parolee on suspicion of having committed a further offence. An out-of-hours sitting of the Board is convened and a decision can be made to cancel parole that same day. The offender is not usually present at such meetings.

Composition

- 2.12 The Chair of the Board is a serving judge of the Supreme Court. There are 10 other judicial members from the Supreme, County and Magistrates' Courts, eight community members and one full-time member. Each of these is appointed by the Governor in Council. In addition, the Secretary of the Department of Justice is a member by virtue of the office (not appointed by the Governor in Council).⁵⁰ As at 30 June 2011, there were 22 members of the Board, with each member appointed for three years.⁵¹
- 2.13 The General Manager⁵² and secretariat staff provide registry and operational support services to the Board. During 2010–11, the Adult Parole Board had 21 administrative staff (including staff in the Detention and Supervision Order Division). The Adult Parole Board's staff provide the administrative and support functions associated with the organisation of the Board's meetings. These functions are set out in an internal Secretariat Manual. The secretariat also 'undertakes significant monitoring, reporting and liaison functions associated with the timely and appropriate processing of all offenders who come within the jurisdiction of the Board'.⁵³
- 2.14 During consultation for this review, some stakeholders expressed dissatisfaction with the composition of the Board. In particular, some stakeholders suggested that, instead of community members selected and appointed by government, community membership should more closely resemble a jury.⁵⁴ Victoria Police also submitted that, as in some other jurisdictions, there should be a position on the Board reserved for a police member.⁵⁵
- 2.15 The Council considers that section 61(2) of the *Corrections Act 1986* (Vic) provides sufficient scope for broad membership of the Board and is not persuaded that there is any need to alter the formal requirements for membership of the Board. It is possible to address any concerns about the breadth of membership through the process of selecting and appointing members under the existing provisions, without any need to amend these provisions. For example, if it were considered desirable to have a member of Victoria Police appointed as a member of the Board, this could be done under the existing provisions.

⁵⁰ *Corrections Act 1986* (Vic) s 61(2).

⁵¹ Adult Parole Board of Victoria (2011), above n 47, 16.

⁵² The annual report refers to the 'General Manager', although the *Corrections Act 1986* (Vic) refers to this role as the 'Secretary of the Board'. This report adopts the usage in the annual report, to avoid confusion with the Secretary of the Department of Justice, who is a member of the Board.

⁵³ Adult Parole Board of Victoria (2011), above n 47, 21.

⁵⁴ Roundtable Meeting with Individual Victims of Crime (8 September 2011).

⁵⁵ Submission 11 (Victoria Police).

Parole statistics 2010–11

- 2.16 In its 2010–11 annual report, the Adult Parole Board reports that it considered 8,963 'cases' over a total of 166 meeting days (an average of approximately 54 cases per meeting day). Of these cases, only a portion involved key substantive decisions by the Board, such as to grant, deny or cancel parole.⁵⁶ The Board made orders for release on parole in 1,792 cases and denied parole in 201 cases. Of those released on parole, 1,132 completed parole successfully.⁵⁷
- 2.17 The Board considered a total of 1,059 breach cases and cancelled parole on 530 occasions (about 50%). Of these 530, 429 (81%) were cancelled due to non-compliance with conditions (mostly relating to continued substance abuse and/or failure to attend supervision appointments and/or programs) and 101 were cancelled due to further conviction and sentence.
- 2.18 It is possible, however, that a large percentage of matters listed in the annual report as involving cancellation due to non-compliance with conditions also involved further offending. In consultation with the Council on a previous project, the Adult Parole Board indicated that it is 'common for offending on parole to be accompanied by other breaching behaviour, such as a failure to reside as directed or to attend appointments'.⁵⁸ Although the offender may ultimately face conviction and sentence for the further offending in these cases, parole may be cancelled prior to that due to failure to comply with conditions. In that particular project, the Council found that in cases where an offender was alleged to have offended on parole and was liable to face a further sentence, the reason for cancellation was listed as 'non-compliance with conditions' in 43.3% of cases and as 'conviction and sentence' in 42.6% of cases.⁵⁹
- 2.19 Over 72% of cancellations occurred in the first six months after the granting of parole. In 529 breach cases (all recorded as involving breach of conditions attached to parole), the Board decided not to cancel parole. Many of these parolees were warned by the Board (121 parolees) or by the Regional or Centre Manager of the Community Correctional Centre (392 parolees).⁶⁰

⁵⁶ The Adult Parole Board's definition of 'case' is very broad and encompasses a wide range of decision and action types, including periodic reviews. Cases not involving grant, deny or cancel parole include reviews, issuing of warnings, variation of conditions, noting of reports or recommendations for treatment programs and breach reports: Email from Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

⁵⁷ Adult Parole Board of Victoria (2011), above n 47, 4.

⁵⁸ Sentencing Advisory Council, *Sentencing, Parole Cancellation and Confiscation Orders*, Report (2009) 53.

⁵⁹ Ibid 54. The Council found that it is more likely for parole to be cancelled before conviction and sentence where there are significant compliance issues in addition to the alleged further offending: *ibid* 58. See also the discussion at [5.48]–[5.65] below.

⁶⁰ Adult Parole Board of Victoria (2011), above n 47, 4, 27–30. As discussed in Chapter 3, because Corrections Victoria exercises some discretion with regard to breaches of parole, many breaches (particularly minor or 'technical' breaches) do not come to the Board's attention. The figure of 1,029 breaches for 2010–11 relates only to breaches considered by the Board rather than actual breaches.

Accountabilities

- 2.20 The *Corrections Act 1986* (Vic) requires the Adult Parole Board to provide an annual report to the minister, and requires the minister to table the report in parliament. The Act also enables the minister to require the Adult Parole Board to provide reports on any prisoner serving a term of imprisonment and any matter relevant to the operation of parole or the Board's activities.⁶¹
- 2.21 Aside from these reporting requirements, the Adult Parole Board is not subject to many of the checks and balances usually applicable to bodies with decision-making power within the executive arm of government. No formal internal performance audits are conducted.⁶² The Board is currently exempt (until 27 December 2013) from compliance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).⁶³ The Adult Parole Board is also exempt from investigation by the Ombudsman,⁶⁴ and it is exempt from the state's freedom of information laws.⁶⁵ Board decisions are not appellable, although they are subject to limited judicial review.⁶⁶
- 2.22 Bimonthly Board members' meetings provide an opportunity for discussion of issues that may arise.⁶⁷
- 2.23 The issue of the Board's accountability is discussed in Chapter 4.

Decision-making

- 2.24 The Adult Parole Board has broad power to regulate its own procedures, and there are no constraints in the *Corrections Act 1986* (Vic) on its decision-making discretion. As explained in Chapter 3, this does not mean that the Board's discretion is unfettered.
- 2.25 In making decisions to grant, deny, defer, revoke or cancel parole, the Board considers each case on its merits, using 'flexible guidelines' developed over many years to aid the decision-making process.⁶⁸
- 2.26 These guidelines are primarily set out in the Adult Parole Board's Members' Manual. This is not a public document. It was originally intended as an induction and training resource, but it was expanded to include information for both new and existing members on the legislative and legal issues underpinning the Board's functions.⁶⁹ The Members' Manual is currently the main resource available to assist Board members in their decision-making. It covers a mix of procedural and administrative topics, such as codes of conduct for Board members, Board meetings, parole decisions, conditions, files, Board policies and information about prisons, prison operations, rehabilitation programs and community support services.
- 2.27 At the time of this review, the Adult Parole Board was revising the first edition of the Members' Manual. The version provided to the Council by the Adult Parole Board (and referred to throughout this report as the Members' Manual) is a draft second edition.
- 2.28 Corrections Victoria and Victoria Police also play a role in parole decision-making, largely through the provision of assessments and information. Corrections Victoria plays an important role in the initial response to breach of parole, assessing breaches and deciding which breaches to refer to the Board. Details about those processes can be found in Chapter 5.

⁶¹ *Corrections Act 1986* (Vic) s 72.

⁶² Meeting with Adult Parole Board (22 November 2011).

⁶³ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* (Vic) reg 6.

⁶⁴ *Ombudsman Act 1973* (Vic) s 13(3)(aa).

⁶⁵ Adult Parole Board of Victoria (2011), above n 47, 50.

⁶⁶ Judicial review is discussed in Chapter 3 at [3.122]–[3.134]. There is further discussion of internal reviews (by the Board) in Chapter 4.

⁶⁷ Meeting with Adult Parole Board (22 November 2011).

⁶⁸ Adult Parole Board of Victoria (2010), above n 6, 18; Provan (2007), above n 9, 19.

⁶⁹ Adult Parole Board of Victoria, 'Members' Manual 2011' (2011) 2.

Key substantive decision types

- 2.29 This section examines the main types of decisions the Board may make and the legislative framework in which these decisions are made.
- 2.30 The Members' Manual lists the decision types the Board may make. They range from minor administrative decisions, such as 'condition added', to substantive decision types, such as '[p]arole cancelled (conviction and sentence or non-compliance with conditions, or unable to comply, or unacceptable risk to self and/or others)'.⁷⁰ This report examines only the most important substantive decisions the Board makes in relation to offenders.

Board meetings

- 2.31 The Board conducts two types of 'meeting': interviews and 'paper meetings'.
- 2.32 Interviews are meetings of a division of the Board (constituted by three members, at least one of whom must be a serving or retired judicial officer⁷¹) at which the offender attends in person or by video link from a prison. Any questions of law that arise in the course of Board meetings must be decided alone by the person presiding at the meeting.⁷²
- 2.33 Prior to the interview commencing, the members review the paper file and any relevant reports and discuss the case. If necessary, members meet with the relevant community corrections officer to obtain further information or to clarify matters in the Community Correctional Services report.
- 2.34 The interview with the prisoner then commences. The Board discusses any concerns it has with the offender. The Board makes its decision⁷³ and verbally informs the offender of the decision and the reasons for it.
- 2.35 'Paper meetings' are simply a review of the paper file by a single member (usually the full-time member of the Board). They occur in the absence of the offender. Decisions are made regarding non-contentious matters, such as calling for a further progress report, scheduling a further review or scheduling an interview.

⁷⁰ Ibid 16–18.

⁷¹ *Corrections Act 1986* (Vic) s 64(2). Section 64(1) provides that '[t]he Board may exercise its powers and functions in divisions of the Board'.

⁷² This is to be the chairperson of the Board, or in the chairperson's absence, a member appointed under *Corrections Act 1986* (Vic) ss 61(2)(a), (b) or (c), or, where the Board meets as a division of the Board, the judicial officer (who is chairperson of the division) must decide the question of law: *Corrections Act 1986* (Vic) ss 64–65.

⁷³ The Board sometimes breaks connection with the prisoner for a short time so that the sitting members can discuss the case among themselves.

Decision to grant, defer or deny parole

Decision to grant parole

- 2.36 The power to grant parole is contained in section 74(1) of the *Corrections Act 1986* (Vic). When on parole, an offender must comply with the terms and conditions of the parole order (section 75(7)). Section 78 of the Act allows the Board to release an offender on parole more than once in respect of the same prison sentence – in other words, if the Board grants parole and subsequently cancels it because the offender has breached the conditions, it is possible for the Board to release the offender again on parole.
- 2.37 The Members' Manual (section 1.2) details the procedure by which a prisoner is considered for parole. The Criminal Justice Enhancement Program System (E-Justice) automatically generates a request to Community Correctional Services for a parole assessment report for all offenders who fall within the Board's jurisdiction. Community Correctional Services interviews the prisoner and provides a parole assessment report to the Board approximately six weeks prior to the prisoner's earliest eligibility date for parole.
- 2.38 The Adult Parole Board's registry manager is responsible for ensuring that parole assessment reports are received prior to the offender's earliest eligibility date. Upon receiving a parole assessment report, the secretariat prepares the file for consideration by the Board. At the parole interview, the Board reviews the parole assessment report along with other information, which may include incident reports from the Prisoner Information Management System (PIMS), medical staff and mental health professionals, court-related documents, criminal history information, victim submissions and memoranda by staff members assisting the Board.
- 2.39 The factors considered by the Board in deciding whether to grant parole are examined in Chapter 3. Generally, parole is granted to a prisoner being considered for first parole at the earliest eligibility date.⁷⁴

Standard and special conditions

- 2.40 Every parole order is subject to 10 standard conditions. They include not breaking the law, submitting to supervision by a community corrections officer and undertaking employment, training or unpaid community work. The standard conditions relating to supervision include reporting to the community corrections officer at least twice a week, being available for interview by the community corrections officer and reporting as and when directed by the community corrections officer.⁷⁵ Although the standard conditions always apply, the Board has some power to vary them.⁷⁶
- 2.41 The Board also has the power to order that the offender comply with special conditions. In practice, the Board makes such orders having regard to a list of 40 special conditions. These conditions cover matters such as place of residence, assessment and program/treatment attendance and curfews.
- 2.42 Seventeen of the 40 special conditions are classified as 'red conditions'.⁷⁷ These include a condition that the offender abstain from alcohol. They also include a series of conditions involving or limiting access to children (such as a prohibition on entering into or loitering at a children's playground). The remaining ('non-red') special conditions predominantly relate to participation in treatment programs.

⁷⁴ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 35.

⁷⁵ *Corrections Regulations 2009* (Vic) sch 4 form 1. Refer to Appendix 2 for the full list of standard conditions.

⁷⁶ *Corrections Act 1986* (Vic) s 74(5).

⁷⁷ See Appendix 2, 'Special Conditions' (red conditions in bold italics).

2.43 The Board usually adds special conditions to a parole order. According to the 2009–10 annual report,⁷⁸ the Board imposed special conditions in 99% of cases.⁷⁹ The special condition that the parolee ‘undergo assessment or treatment for alcohol or drug addiction or submit to medical, psychological or psychiatric treatment as required’ was imposed on 59% of parolees in 2010–11, and the condition that the parolee have restricted residential arrangements and/or no contact with victims was imposed in 22% of cases.⁸⁰ Generally, the Board will identify the particular needs of the prisoner and direct the community corrections officer to organise the appropriate treatment or programs.

Decision to defer parole

2.44 The Board can also defer its decision as to whether to grant parole. Deferrals are generally made when the Board requires further information, for example, outcomes of outstanding charges, results of drug testing, or confirmation of the successful completion of a particular program, or when a parole plan or psychiatric report has not yet been provided.⁸¹

Decision to deny parole

2.45 In 2010–11, the Board denied parole to 201 prisoners.⁸² The 2010–11 annual report lists four (non-exclusive) reasons for which parole may be denied. The Members’ Manual 2011 is a little more comprehensive and states that the Board may deny parole for the following reasons:

- insufficient time left to receive the full benefit of parole;
- failure to comply with the direction of the Board to participate in offence specific programs;
- failure to refrain from drug use while in custody;
- involvement in serious incidents while in custody;
- repeated failure to comply with parole conditions on previous occasions;
- circumstances where the Board believes that the offender will not benefit from a period of conditional release; or
- at the prisoner’s request.

Decision to revoke parole

2.46 Revocation of parole is different from cancellation, as it occurs after the Board has granted parole but before the prisoner is released. Cancellation of parole occurs after the prisoner is released on parole. Revocation may occur in situations where the prisoner is involved in an adverse incident, for example, a positive drug test result or an assault.⁸³ The power to revoke a parole order before the prisoner is released is governed by section 74(2) of the *Corrections Act 1986* (Vic). As soon as possible after revoking parole, the Board must give a copy of the revocation determination to the prisoner, including the reasons for the determination (section 74(8)).

⁷⁸ The 2010–11 annual report does not provide any comparable data.

⁷⁹ Adult Parole Board of Victoria (2010), above n 6, 19.

⁸⁰ Adult Parole Board of Victoria (2011), above n 47, 28.

⁸¹ Email from the Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

⁸² Adult Parole Board of Victoria (2011), above n 47, 3.

⁸³ Adult Parole Board of Victoria (2011), ‘Members’ Manual 2011’, above n 69, 39–40.

Decision to cancel parole

- 2.47 The power to cancel parole is contained in section 77 of the *Corrections Act 1986* (Vic).
- 2.48 According to the Board's annual report, common reasons for cancellation of parole are failure to comply with the conditions of a parole order and conviction and sentence for further offences committed while on parole. If the offending occurs during the parole period and conviction and sentence (of more than three months' imprisonment) occur after parole has expired then the Board has jurisdiction to cancel the offender's parole, even though it has expired.⁸⁴
- 2.49 Difficulties arise where the court deals with an offender for a number of offences at the same time, and some of these offences have occurred on parole, while others have occurred before or after parole. If the court imposes an aggregate sentence, the Board does not have jurisdiction to cancel parole, as it is not possible to determine that the offender received a sentence of imprisonment of greater than three months for the offence(s) committed on parole.⁸⁵
- 2.50 If parole is cancelled, the Act states that any period during which the parole order has been in force 'is not to be regarded as time served in respect of the prison sentence'.⁸⁶ However, the Board may direct that 'some or all of the period during which a parole order that has been cancelled, or deemed to be cancelled, was in force is to be regarded as time served in respect of the prison sentence'.⁸⁷ The Members' Manual indicates that the Board considers granting 'time to count' or 'street time' where the community corrections officer recommends it in the breach report, the Board believes that the person was making good progress on parole and/or not granting street time would significantly disadvantage the offender.⁸⁸
- 2.51 There are no statistics available on how often and in what circumstances 'time to count' is granted. Corrections Victoria states that:
- In rare circumstances, the APB may choose to credit a period of time that was served in the community. For example a prisoner serving a long parole period who for a considerable amount of time abided by the conditions of the order and actively worked towards their rehabilitation and reintegration into the community.⁸⁹
- 2.52 It would be useful to have data on 'time to count' available. The Council makes recommendations on data collection and analysis later in the report.⁹⁰

⁸⁴ *Corrections Act 1986* (Vic) s 77(5).

⁸⁵ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 41.

⁸⁶ *Corrections Act 1986* (Vic) s 77(7).

⁸⁷ *Ibid* s 77(7A).

⁸⁸ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 38.

⁸⁹ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders', (2011) 21 ('Correctional Standard B2 – Offender Management').

⁹⁰ See Recommendation 19 at [5.126].

Corrections Victoria

- 2.53 Corrections Victoria has three main roles in the parole process:
- pre-release supervision of prisoners and parole planning;
 - supervision of parolees; and
 - reporting to the Board at all stages of the parole process.
- 2.54 Aside from its work with parolees, Community Correctional Services supervises offenders serving community correction orders.
- 2.55 In relation to parole orders, community corrections officers are subject to the direction of the Board.⁹¹
- 2.56 Corrections Victoria has issued Deputy Commissioner's Instructions (DCIs), which provide administrative direction and guidance to Community Correctional Services operational and management work. These instructions govern Corrections Victoria's statutory duties under the *Corrections Act 1986* (Vic) in the area of offender management.⁹² There is an overriding requirement that the Board must be notified immediately of any incident that 'may affect the integrity of the parole system and/or may raise community concern'.
- 2.57 Corrections Victoria and the Adult Parole Board hold regular practice meetings. Corrections Victoria has significant discretionary powers in relation to the reporting of (non-offending) breaches, and the Board relies to a large degree on the judgment of corrections officers in certain aspects of breach decision-making. This issue is discussed in Chapter 5.

Corrections reports

- 2.58 Parole assessment reports cover matters including the offender's background, prior convictions, rehabilitation, treatment and education programs and conduct in prison, including disciplinary offences (particularly those relating to violent behaviour or drug use). Parole assessment reports also include a parole plan, addressing issues such as accommodation arrangements, employment options and treatment programs. Importantly, parole assessment reports contain Community Correctional Services' recommendations with respect to release on parole.
- 2.59 In the case of offenders already on parole, reports from Corrections Victoria include information relating to the offender's progress. This information includes compliance with parole conditions, general progress (such as gaining employment and development of family and social networks), any concerns relating to the offender's progress and risk of reoffending (for example, association with other known criminals, suspected drug or alcohol use or any breakdown or difficulties in family or social support networks) and recommendations as to change of conditions. In the case of poor progress or non-compliance with conditions, the report will include a recommendation that the Community Correctional Services Centre Manager or the Board warn the offender or that the Board cancel parole.

⁹¹ *Corrections Act 1986* (Vic) s 73(1).

⁹² Until recently, the instructions were called 'Director's Instructions'.

Victoria Police

- 2.60 Victoria Police also performs an important role in relation to parole.
- 2.61 The most obvious aspect of its role relates to compliance with the condition to not commit further offences; however, police are also potentially in a position to monitor compliance with some parole conditions. For example, a parolee may be subject to a condition to abstain from alcohol, and police may detect the parolee appearing drunk in a public place.

Other agencies

Victims Support Agency

- 2.62 The Victims Support Agency (VSA), a division of the Victorian Department of Justice, provides state-wide services to victims of violent crimes and coordinates a whole-of-government approach to victim services. Among its functions (which include providing a victims of crime helpline and conducting research) is coordination of the Victims' Register.⁹³ Victims included on the Register are informed of details about the length of the prisoner's sentence and the date on which the prisoner was or is likely to be released for any reason, and they are entitled to make written submissions regarding parole.⁹⁴

Offender support agencies

- 2.63 There are several offender support agencies that play an important role in assisting offenders to re-enter society after a prison term. They include the Victorian Association for the Care and Resettlement of Offenders (VACRO), the Australian Community Support Organisation (ACSO) and Jesuit Social Services (JSS).
- 2.64 Such agencies benefit not only offenders but also the community generally, as the support they provide is vital in minimising the factors that lead to reoffending. Several submissions to the Council commented on the important role that properly resourced services for offenders exiting the prison system play in minimising the risk of reoffending.⁹⁵ As discussed in Chapter 1, many offenders face difficult issues upon release from prison, whether that be on parole or straight release. Some have additional problems, such as legal issues and limited accommodation options, all of which contribute to the likelihood that the person will reoffend.

⁹³ Department of Justice (Vic), *Victims Support Agency* (Department of Justice, 2010) <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Victims+Support+Agency>> at 8 November 2011.

⁹⁴ *Corrections Act 1986* (Vic) s 30A. The Victims' Register is discussed in Chapter 4.

⁹⁵ Submission 5 (Australian Community Support Organisation); Submission 7 (Jesuit Social Services); Submission 8 (Forensicare. Victorian Institute of Forensic Mental Health); Submission 9 (Victorian Association for the Care and Resettlement of Offenders); Submission 12 (Victoria Legal Aid); Submission 13 (Victorian Aboriginal Legal Service).

Chapter 3

Parole decision-making criteria

- 3.1 The terms of reference ask the Council to advise whether statutory criteria are desirable to guide decision-making in relation to:
- the 'granting and revocation' of parole, particularly in relation to violent crimes; and
 - breaches.
- 3.2 Currently, the *Corrections Act 1986* (Vic) provides the Board with the power to make decisions relating to parole,⁹⁶ but the Act does not specify how the Board must make those decisions. In particular, it does not specify any tests (criteria)⁹⁷ that the Board must apply. Nor does it provide any guidance or list any particular factors or items of information that the Board must consider when making its decisions.
- 3.3 This is different from many other jurisdictions where legislation lists a series of factors or items of information that the parole authority must consider. In a smaller number of jurisdictions, the legislation states an overriding principle that must be followed or sets out a test or criterion that must be satisfied.⁹⁸

⁹⁶ *Corrections Act 1986* (Vic) ss 74–77.

⁹⁷ For the meaning of 'criterion' as a test, rule, standard or requirement, see *Pillay v Minister for Immigration and Multicultural Affairs* [2000] FCA 112 (16 February 2000) [29]–[35].

⁹⁸ See Appendix 3 for a comparison of the schemes in 11 relevant adult parole systems.

- 3.4 The absence of statutory criteria or a list of factors to which the Board must have regard does not mean that there are no controls over the Board's discretion in making decisions about parole. The courts have long implied limits (or 'fetters') on discretionary powers that are not subject to express statutory limits. These implied limits include:
- that where a dispute arises about the precise legal interpretation of the powers of a decision-making body, this is a matter for interpretation by the courts.
 - that the powers of a body with decision-making power must be exercised in good faith (which is based on the assumption that parliaments intend all statutory powers to be exercised in good faith).
 - that the power of a decision-making body cannot be exercised for an ulterior or improper purpose. What is 'proper' or 'ulterior' is determined by reference to the scope and purpose of the legislation in which the power is located. In relation to the Adult Parole Board, this means that decisions of the Board should relate to parole and correctional issues.⁹⁹
- 3.5 Although it is not bound by any statutory provisions governing or guiding the exercise of its discretion, the Adult Parole Board itself has developed internal guidelines, including factors to consider, which it takes into account in making parole decisions. These guidelines are set out in the Members' Manual.
- 3.6 This chapter examines first the *content* of any guidelines or provisions and then their *form* (that is, whether they should be set out in legislation or should remain as guidelines developed by the Adult Parole Board). The issues are distinct, and regardless of their content, there may be significant advantages or disadvantages to setting them out in legislation.

⁹⁹ Matthew Groves, 'Advice to Sentencing Advisory Council' (2011), 5–6.

Guidance for decisions relating to granting parole

Current guidance

- 3.7 The draft second edition of the Members' Manual seen by the Council for this review sets out a list of factors to be considered by members of the Board when deciding whether to grant parole. These factors are similar to, but not identical with, those published in the Adult Parole Board's annual report. Both are set out in Table 1 below.
- 3.8 In discussions with the Council, Adult Parole Board representatives agreed that the factors set out in the Members' Manual and the annual report should be consistent with each other, and undertook to ensure that any missing factors would be inserted into the Members' Manual immediately and that future annual reports would mirror the Members' Manual.¹⁰⁰

Table 1: Factors considered by the Board when deciding whether to grant parole

	Members' Manual 2011	Annual Report 2010–11
1.	Interests of/risk to the community	Assessment of potential risk to the community if the offender is released
2.	Interests of the offender	
3.	Intentions and comments of the sentencing authority	Comments made by the sentencing court
4.	The nature and circumstances of the offence(s)	Nature and circumstances of the offence
5.	The offender's criminal history	Prior criminal history
6.	Previous community-based dispositions and compliance on such	Previous history of supervision in the community
7.	Release plans	Release plans and whether suitable accommodation is available
8.	Reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychologists, psychiatrists, custodial staff, support agencies and community corrections officers	Assessments and recommendations by appropriate professionals (e.g. community corrections officers, psychologists, psychiatrists)
9.	Submissions made by the offender, the offender's family, friends and potential employers, or any other relevant individuals	Submissions of the offender, the offender's family, friends, prospective employer or other relevant individuals
10.	Representations made by the victim or the victim's family, or other relevant individuals	Written submissions from the victim or victim's family
11.	Representations made by the offender or others with a legitimate interest in the case	
12.		Conduct of the offender in prison, including whether any positive drug test results have been recorded
13.		Willingness to participate in relevant programs and courses while in custody

¹⁰⁰ Meeting with Adult Parole Board (22 November 2011).

- 3.9 The list guides members of the Board as to information that is relevant to deciding whether to grant parole. However, it does not provide any explicit guidance on how that information should be used. In particular, it does not provide any specific guidance in relation to violent offences.
- 3.10 The Members' Manual distinguishes between cases where the prisoner has not previously been on parole and cases where the prisoner has had prior episodes of parole.

First parole – general rule

- 3.11 The Members' Manual states that, as a 'general rule', parole is granted on the earliest eligibility date to an offender being considered for first parole unless the offender:
- has refused to participate in offence-specific programs;
 - has returned a positive urinalysis result (indicating the use of illicit drugs);
 - has a number of prison incidents;
 - has no suitable accommodation available;
 - has outstanding matters for serious offences, and bail has not been granted;
 - is participating in an offence-specific program and the completion date is after the earliest eligibility date for parole;
 - has secured accommodation at a residential facility but the availability date is not yet known or the residential facility has recommended a specific release date; or
 - is required to see the Board in person.¹⁰¹
- 3.12 The Members' Manual notes that '[t]he Board considers each case on an individual basis and makes decisions based on the material available in its files'.¹⁰² Therefore, the rule is expressed as general guidance, rather than as an inflexible test or criterion. The structure of the Members' Manual implies that members of the Board should still consider the factors listed in Table 1; however, it is not obvious how that list and the general rule are to be reconciled.

Subsequent parole

- 3.13 The Members' Manual states that, if an offender has had more than one parole cancellation, the Board views each case individually to assess the issues that have been addressed since the last breach of parole.
- 3.14 The Members' Manual further states that, aside from the factors listed in Table 1, the Board considers the nature of the further offences and the extent of non-compliance with the previous parole order. For example, the Board may direct the offender to undertake programs to address offending behaviour or to undertake a residential rehabilitation program in cases where drug use was a precursor to the offending. The Board may request a progress report, which outlines the offender's progress in custody and provides the Board with a recommendation.
- 3.15 The Members' Manual provides that, if the offender has complied with the Board's advice and the report supplies the Board with a positive recommendation, the Board may grant a further parole period, subject to the relevant conditions. However, offenders who have had their parole cancelled a number of times and who have demonstrated consistent non-compliance, either by failing to comply with parole conditions or by committing further offences during a parole period, may be deemed an unacceptable risk, and the Board may deny parole or deny re-parole.¹⁰³

¹⁰¹ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 35. The last bullet point refers to the fact that first-time offenders are not usually required to attend the grant parole hearing: Meeting with Adult Parole Board (22 November 2011).

¹⁰² Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 34.

¹⁰³ Ibid 36.

Adoption of new general principle

- 3.16 As explained in Chapter 1, in consultation for this review there was broad support for the view that the purpose of parole is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion. The Council considers that the general rule as stated in the Members' Manual does not adequately reflect this purpose, in particular because it fails to address the issue of public safety directly.
- 3.17 In consultation with the Council, the Board indicated its preparedness to replace the existing general rule (as set out in the Members' Manual) with a new principle.
- 3.18 The Council examined 11 relevant adult parole systems (see Appendix 3) and considered views expressed by stakeholders in Council consultations in formulating a new principle.

Tests or overriding principles for granting parole

- 3.19 The other jurisdictions examined by the Council include all Australian states and territories, the United Kingdom and Canada. The tests to be applied and factors to be considered by parole boards in each of these jurisdictions are set out in Appendix 3.
- 3.20 There are significant differences in the range of prisoners dealt with in each jurisdiction, and it is necessary to use caution in comparing the factors or tests. For instance, in New South Wales prisoners who receive a sentence of less than three years are released on parole automatically. Accordingly, the jurisdiction of the New South Wales State Parole Authority principally relates to prisoners serving longer sentences (although the Authority has the power to revoke automatic parole in certain situations). Queensland has a system under which, in some cases, it is the courts, rather than the parole boards, that grant parole. Therefore, any comparison of factors or tests needs to be considered in light of the nature of the parole system as a whole in each jurisdiction.
- 3.21 In five of the jurisdictions examined by the Council, the parole board or authority must apply a specified test or paramount principle. They fall into three broad types:
- **Public interest test.** Legislation in New South Wales and the Australian Capital Territory requires the boards to be satisfied that release on parole is in 'the public interest'.¹⁰⁴
 - **Safety of the community – unqualified test.** Legislation in South Australia and Western Australia requires the boards to treat 'the safety of the community' as the 'paramount consideration' or 'highest priority'.¹⁰⁵
 - **Safety of the community – qualified test.** In Canada and Queensland, the boards must treat community safety as the paramount consideration; however, this is qualified in slightly different ways:
 - a. In Canada, the board must make the least restrictive determination consistent with the protection of society.¹⁰⁶
 - b. In Queensland, the board must consider whether there is 'an unacceptable risk to the community if the offender is released to parole and whether the risk to the community would be greater if the offender does not spend a period of time on parole'.¹⁰⁷

¹⁰⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) s 135; *Crimes (Sentence Administration) Act 2005* (ACT) s 120.

¹⁰⁵ *Correctional Services Act 1982* (SA) s 67(3a); *Sentence Administration Act 2003* (WA) s 5B.

¹⁰⁶ *Corrections and Conditional Release Act*, SC 1992, c 20, s 101(a), (d).

¹⁰⁷ Queensland Corrective Services, *Ministerial Guidelines to the Queensland Parole Board* (Queensland Corrective Services, 2011) <http://www.correctiveservices.qld.gov.au/About_Us/Community_Corrections_Board/ministerial_guidelines_to_the_parole_board_aug2011.pdf> at 4 October 2011, [1.3]. The guidelines are issued under the *Corrective Services Act 2006* (Qld) s 227.

- 3.22 In consultation, concerns were expressed about the use of an imprecise 'public interest' test, such as the test in New South Wales.¹⁰⁸ The Council shares these concerns, and considers that 'public interest' tests are too vague to be of real value and can mask too many untestable value assumptions.
- 3.23 There was some support for the 'least restrictive' approach used in Canada¹⁰⁹ and strong support for the Queensland approach involving comparing the risk of release on parole with the risk posed by straight release without supervision or support.¹¹⁰ In its submission, the Victorian Association for the Care and Resettlement of Offenders (VACRO) commented that:
- 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.¹¹¹
- 3.24 Another important aspect of the Queensland approach in addition to the comparative aspect is the use of the phrase 'unacceptable risk'. This phrase is used in at least two analogous situations in Victoria: when deciding whether to refuse to release a person on bail¹¹² and when making orders for the supervision or detention of serious sex offenders after they have served their sentence.¹¹³

The Council's view

- 3.25 The Council gave extensive consideration to the nature of an 'unacceptable risk' test in an earlier report advising the Attorney-General on the merits and structure of a post-sentence supervision and detention scheme for high-risk offenders. In its final report for that project, the Council observed that assessments of the acceptability or unacceptability of risk require consideration of three separate issues:
- the nature of the risk (the outcome to be avoided, such as the sexual abuse of a child);
 - the degree of risk of a negative outcome; and
 - the severity of the harm that may be caused in the event of a negative outcome.¹¹⁴
- 3.26 The terms of reference for the present review place particular emphasis on violent crimes. Under this approach, it is possible for the decision-maker to decide that a risk is unacceptable if the possible harm is serious (such as death or very serious injury), even if there is a relatively low likelihood that the risk will come to fruition.
- 3.27 Additionally, under this approach the decision-maker may decide that a risk is unacceptable even if the likelihood of further offending cannot be determined with a high degree of confidence.

¹⁰⁸ Submission 3 (Law Institute of Victoria).

¹⁰⁹ Ibid 4–5, 9 ('Recommendation 2'); Submission 9 (Victorian Association for the Care and Resettlement of Offenders); Submission 13 (Victorian Aboriginal Legal Service).

¹¹⁰ The Australian Community Support Organisation commented: 'where statutory criteria for granting parole are proposed an equal weighting should be maintained between consideration of the risk that an individual poses to the community and the potential benefits to the community that a successful re-integration supported by a parole period may engender': Submission 5 (Australian Community Support Organisation). Victoria Legal Aid also supports consideration of the risk to the community if the prisoner were to serve the whole of the sentence in custody and be released without supervision or support: Submission 12 (Victoria Legal Aid). The Victorian Aboriginal Legal Service makes the same point and suggests focusing on the needs and strengths of the offender as well as issues of risk to the community: Submission 13 (Victorian Aboriginal Legal Service).

¹¹¹ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

¹¹² *Bail Act 1977 (Vic)* s 4(2)(d)(i).

¹¹³ *Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)* ss 9, 35.

¹¹⁴ Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (2007), [3.10.25].

- 3.28 In recommending the adoption of an 'unacceptable risk' test in the *High-Risk Offenders: Post-Sentence Supervision and Detention* report, the Council recognised that:
- determinations about the proper use of predictions are, in the end, not a statistical or scientific matter, but a political and social judgment about what risks are unacceptable, and what responses to risks should be allowed.¹¹⁵
- 3.29 The Council strongly favours the Queensland test and endorses the adoption of a similar test by the Board. In doing so, the Council notes that while the Members' Manual currently contains references to 'unacceptable risk', it places insufficient emphasis on this aspect and provides no direct guidance as to its application.
- 3.30 The Council considers that the Queensland test is consistent with the purpose of parole as set out in Chapter 1 above. The test does not shy away from the difficult value judgment that must be made in granting or refusing parole, and provides meaningful guidance to the Board in the exercise of its discretion.
- 3.31 In applying this test, the Board should consider the nature and severity of the harm that is risked and the likelihood that the harm will occur.
- 3.32 In recommending that the Members' Manual include a principle focusing on community safety, the Council is conscious of the recent experience in Western Australia. The Auditor General of Western Australia conducted a performance review of the adult parole system in that state. The Auditor General found that there had been a dramatic increase in the number of prisoners and that this was due to stringent application by the parole authority (the Prisoners Review Board) of statutory release considerations when making parole decisions. In particular, the Auditor General reported that the Prisoners Review Board was giving increased emphasis to its statutory requirement to have priority regard to the safety of the community when considering parole applications. The report also noted that there had been a significant increase in the proportion of parole orders being cancelled. This was the result of a new policy requiring all breaches of conditions to be reported to the Prisoners Review Board and reduced tolerance by the Prisoners Review Board to parolees breaching parole conditions.¹¹⁶
- 3.33 The Council does not consider that the adoption of a test similar to that used in Queensland will necessarily result in significantly fewer prisoners being released on parole in Victoria. Unlike in Western Australia, where the legislative test specified simply requires the Prisoners Review Board to give paramount consideration to community safety in exercising its functions,¹¹⁷ in Queensland the test requires a balancing of the risk of release under supervision with the risk of straight release at the end of the sentence. Were the Victorian Board to adopt such a test, it would be required to consider the extent to which the degree of risk can be reduced through particular forms of supervision and conditions. For example, Corrections Victoria has recently instituted a new supervision regime for serious violent offenders. This is discussed in Chapter 5.

¹¹⁵ Ibid [3.10.27], quoting Marc Miller and Norval Morris, 'Predictions of Dangerousness: An Argument for Limited Use' (1988) 3(4) *Violence and Victims* 263, 268.

¹¹⁶ Office of the Auditor General (WA) (2011), above n 14, 13–14.

¹¹⁷ *Sentence Administration Act 2003* (WA) s 5B.

Recommendation 1

General principle to guide decisions about whether to grant parole

The Adult Parole Board should adopt in its Members' Manual a new general principle to guide decision-making about whether to grant parole.

The new general principle should be to the effect that:

Community safety is the paramount consideration in all decisions relating to the granting of parole.

In assessing the risk to community safety, the Board will consider:

- whether there is an unacceptable risk to the community if the offender is released on parole; and
- whether (except in the case of an offender who is sentenced to life imprisonment with a non-parole period) the risk to the community will be greater if the offender does not have supervised release and support on parole.

In assessing whether the risk of releasing the offender on parole is unacceptable, the Board will have regard to:

- the nature and severity of the harm that is risked (the particular outcome to be avoided, such as the commission of a violent offence); and
- the likelihood that the outcome will occur.

Subject to the paramount consideration of community safety, the Board will seek to facilitate the rehabilitation of the offender, recognising that the community benefits from the rehabilitation of offenders.

Particular considerations in relation to violent crimes

- 3.34 There has been significant public concern about serious violent offences committed by parolees. The terms of reference ask the Council to give particular consideration to guidance in relation to violent crimes.
- 3.35 The gravest form of risk to community safety is that a person released on parole will commit a violent offence. The general principle set out in Recommendation 1 explicitly addresses this by referring to violent offences when providing guidance on the assessment of risk.
- 3.36 Three of the factors listed in Table 1 are directly relevant to the issue of violent offences. They are:
- the nature and circumstances of the offence(s) (item 4);
 - the offender's criminal history (item 5); and
 - reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychologists, psychiatrists, custodial staff, support agencies and community corrections officers (item 8).
- 3.37 None of these factors is determinative.

- 3.38 The nature and circumstances of the offence for which an offender has been imprisoned and the offender's criminal history are clearly relevant matters for the Board to consider. However, the absence of prior convictions for violent offences does not necessarily mean that the offender presents an acceptable risk. One submission to the Council¹¹⁸ discusses in detail a case in which an offender was on parole serving a sentence for drug trafficking. At the time parole was granted the offender had no prior convictions for violent offences;¹¹⁹ however, while on parole he committed several sets of offences, including murder.
- 3.39 The Council makes no comment on the decision of the Board to grant parole in that case. The Council notes that the case highlights the fact that an offender having had no prior convictions for violent offences should not necessarily preclude a conclusion that the offender presents an unacceptable risk. Conversely, the fact that an offender does have prior convictions for violent offences should not necessarily result in a conclusion that the offender presents an unacceptable risk. In each case, the offender's prior history is just one factor to be taken into account.
- 3.40 A vital factor in the Board's consideration is the reports, assessments and recommendations from professionals. In particular, for every prisoner who is eligible for parole, Corrections Victoria compiles a parole assessment report. This report includes a risk and criminogenic needs assessment based on the Victorian Intervention Screening Assessment Tool (VISAT).
- 3.41 VISAT examines four 'primary criminological factors' (current offence and criminal history, violence, sexual offending and drugs and alcohol) and five 'psychosocial factors' (social integration, education and employment, family and other relationships, physical and mental needs and attitudes and beliefs) in order to address the following questions:
- What is the likelihood that the individual will engage in offending, if no efforts are made to manage risk?
 - What is the probable nature, severity and frequency of any future offending?
 - Who are the likely victims of any such future offending?
 - What steps may be taken to manage the individual's risk of offending?
 - What circumstances may exacerbate the individual's risk of offending?¹²⁰
- 3.42 VISAT contains specific provisions regarding the risk of sexual or violent reoffending.¹²¹
- 3.43 VISAT is relatively recent, having been developed within the last decade by Corrections Victoria and a team of consultants, and it is based on Victorian data and field testing (although the developers also drew on international research).¹²²
- 3.44 The VISAT Administration Manual emphasises that:
- No system for making judgements about risk will be equally valid across all settings and assessment contexts. Risk depends on the specific combination of risk factors, not just the number of risk factors present ... Thus, assessors should consider the factors present in the case at hand and make a final decision about risk using their professional experience and [judgment].¹²³

¹¹⁸ Submission 15 (Corp family).

¹¹⁹ *Clifford v The Queen* [2011] VSCA 199 (30 June 2011) [18].

¹²⁰ Corrections Victoria, 'VISAT Administration Manual' (2009), 13, 21–22.

¹²¹ *Ibid* 8–11.

¹²² *Ibid* 5.

¹²³ *Ibid* 20–21.

- 3.45 The importance of expertise in making such assessments was stressed in two submissions to the Council.¹²⁴ The Council shares this view and considers that a critical factor in the use of instruments such as VISAT is the professional experience and judgment of those who administer the instrument.
- 3.46 The capacity of the Board to interpret the VISAT results and to have appropriate regard to them in making its decisions is also critical. The Council notes that, while the Members' Manual contains a brief discussion of VISAT,¹²⁵ this is in a section dealing with rehabilitation. There is no guidance on VISAT in the section of the Members' Manual dealing with decisions to grant parole. While the Council understands that Board members have access to information and guidance through mechanisms other than the Members' Manual, the Council considers that this issue is so important that it should also be expressly dealt with in the section of the Members' Manual relating to the granting of parole.

Recommendation 2

Guidance on interpretation and use of risk assessments

The Adult Parole Board should amend the Members' Manual to include guidance for members on the interpretation and use of formal risk assessments in relation to the granting of parole.

Are the factors currently considered by the Board appropriate?

- 3.47 The factors specifically relating to the risk of future violent offences were considered in the preceding section. This section analyses the factors more generally.
- 3.48 The Council considers that the aggregate list of factors in Table 1 is relevant and logically related to the purpose of parole. Most of the factors are clearly relevant to the assessment of the risk of the prisoner committing further offences. Some factors are not directly relevant to the assessment of that risk, for example the '[i]nterests of the offender' (Table 1, item 2). However, this factor is relevant to the purpose of parole because both the prisoner and the community have an interest in the prisoner's rehabilitation.
- 3.49 The factors listed in Table 1 were supported by many stakeholders consulted by the Council.
- 3.50 The Victorian Aboriginal Legal Service (VALS) commented on criminal history (Table 1, item 5). In their view, an offender's criminal history 'should not just provide a reason to refuse parole because of community risk, but should be used as a guide to preparing a tailored release plan to improve likelihood of success'.¹²⁶
- 3.51 The Council agrees that criminal history should be used as a guide to preparing a release plan. The Council also considers that criminal history as well as the nature and circumstances of the offence for which the offender has been imprisoned are clearly relevant to the assessment of risk and of whether the risk is unacceptable, as discussed above.

¹²⁴ Submission 3 (Law Institute of Victoria) ('Recommendation 3'); Submission 5 (Australian Community Support Organisation).

¹²⁵ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 132-133.

¹²⁶ Submission 13 (Victorian Aboriginal Legal Service).

- 3.52 Several stakeholders commented on the factors relating to attendance at programs, noting the importance of considering whether programs are available.¹²⁷ To a degree this is covered by the reference in Table 1 to the 'willingness [of the offender] to participate in relevant programs' (item 13). This suggests that, if the program were not available, the Board would take into account the fact that the offender was willing to participate in the program. In its *High-Risk Offenders: Post-Sentence Supervision and Detention* report, the Council emphasised the principle of reciprocal obligation, noting that:
- When the state imposes a sentencing order upon an offender ... it expects the offender to comply with its terms. On the other hand, the offender has a right to expect that the services explicitly or implicitly linked to these orders, whether they be supervision, treatment or the provision of community work, will be adequately provided. All too often it is said that an offender has been 'set up to fail' because no, or inadequate, treatment or other services were provided following the imposition of the sentence.¹²⁸
- 3.53 The Council reiterates its view of the importance of this principle.
- 3.54 In submissions for this review, stakeholders also emphasised the importance of providing culturally appropriate programs¹²⁹ and the desirability of being able to complete the community programs begun in prison.¹³⁰
- 3.55 The Victorian Aboriginal Legal Service stressed the importance of expertise in relation to cultural factors specific to Aboriginal and Torres Straight Islanders and relevant to their risk assessments.¹³¹
- 3.56 The Council notes all of the comments made by stakeholders about the factors above; however, it considers that the comments relate to *how* the factors are applied, rather than to the factors themselves.
- 3.57 In the majority (five out of eight) of the parole systems examined in the comparative table in Appendix 3, legislation specifies the factors that a parole board must consider when granting parole. In Queensland, the legislation does not specify any factors, but it gives the minister the power to issue guidelines for the boards.¹³² The guidelines list factors that the boards must consider. In the Northern Territory, as in Victoria, the Parole Board has itself developed a list of factors to be considered. Despite these formal differences, as Appendix 3 shows, there are broad similarities between the factors to be considered in each jurisdiction.

¹²⁷ Submission 5 (Australian Community Support Organisation); Submission 7 (Jesuit Social Services); Submission 8 (Forensicare, Victorian Institute of Forensic Mental Health); Submission 9 (Victorian Association for the Care and Resettlement of Offenders); Submission 12 (Victoria Legal Aid); Submission 13 (Victorian Aboriginal Legal Service).

¹²⁸ Sentencing Advisory Council (2007), above n 114, [3.10.37], quoting Arie Freiberg, *Pathways to Justice: Sentencing Review 2002*, Report (2002) 44.

¹²⁹ Submission 13 (Victorian Aboriginal Legal Service).

¹³⁰ Ibid 23–24; Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

¹³¹ Submission 13 (Victorian Aboriginal Legal Service). The Victorian Aboriginal Legal Service noted that currently there is a member of the Aboriginal community on the Board, but expressed concern about the absence of mechanisms to ensure that expertise if a person from that community is not on the Board in future.

¹³² See Queensland Corrective Services (2011), above n 107, and the accompanying commentary.

Are any relevant factors not currently included?

- 3.58 Three matters were raised in consultation that could potentially be considered as additional criteria.
- 3.59 The first matter is 'compulsory (and properly resourced) treatment'.¹³³ The Council considers that this is best addressed through the 'unacceptable risk' principle. If the offender needs treatment to address offending behaviour but has not undertaken it, this will be an important factor in assessing whether release on parole without such treatment poses an unacceptable risk to community safety.
- 3.60 The second matter is the effect of mental illness. In its submission, Forensicare stated that:
- If it is determined that statutory criteria are required, we would request that the criteria consider the effect of mental illness in making parole decisions and providing opportunities for achieving successful community reintegration. Importantly, any statutory criteria introduced must be practical and appropriately resourced.¹³⁴
- 3.61 The Council considers that, while this is not expressly dealt with in the current factors, it is sufficiently covered.
- 3.62 The third matter, which was strongly and consistently raised by victims of crime, is the importance in their view of considering the offender's degree of remorse and demonstrated changes in attitude.
- 3.63 For example, one submission stated: 'There needs to be a LESSON LEARNED of some kind before they are fully released, so that they take seriously the offence that they have committed'.¹³⁵ Another argued that offenders 'must have addressed their issues in a demonstrated and sustainable manner ... (not just the 6 week short course)'.¹³⁶
- 3.64 This issue is potentially addressed by seven of the factors currently considered by the Board (Table I, item 1 and items 8–13). However, as noted above, the general rule in the Members' Manual for granting first parole was until recently that the Board would ordinarily grant parole to an offender unless that offender 'has refused to participate in offence specific programs'. In other words, if, for example, the Board had indicated to a violent offender a need to do an anger management program in prison in order to be eligible for parole, as long as the prisoner undertook that program (and complied with the other relevant requirements), the Board would be likely to grant parole. The general rule suggested that the Board would not focus on the extent to which the prisoner was able to demonstrate actual change as a consequence of undertaking the program.
- 3.65 This would not be the case under the unacceptable risk principle.
- 3.66 The issue of remorse is complex because absence of remorse is a factor taken into account in sentencing by the judge. Use of this factor by the Board in refusing parole could be argued to constitute double punishment. However, the Council considers that the absence of remorse may be relevant to an assessment of the risk that the offender will commit further offences and as such it may be appropriate to take the absence of remorse into account in exercising the discretion to grant or refuse parole.

¹³³ Submission 1 (M. Graham).

¹³⁴ Submission 8 (Forensicare, Victorian Institute of Forensic Mental Health).

¹³⁵ Submission 6 (Anonymous) (emphasis in original).

¹³⁶ Submission 1 (M. Graham). The importance of remorse was also emphasised in Submission 2 (J. Astbury).

Guidance for decisions relating to breach of parole

- 3.67 Parole constitutes an undertaking by the parolee to the Board to comply with the conditions of parole. As explained in Chapter 2, in Victoria a set of standard conditions applies to every parole order. The first standard condition is to not commit a further offence. Other standard conditions relate to supervision by a community corrections officer and participation in employment, education or unpaid community work. Parole orders typically also have special conditions, which include attendance at various treatment programs, and can include conditions such as requiring the offender to abstain from alcohol or limiting the offender's contact with children.
- 3.68 The Board has the power to cancel parole – with the result that the offender can be arrested and returned to prison – if the offender breaches any of the standard or special conditions. Cancellation is not automatic: it is at the discretion of the Board.¹³⁷

Decision-making by Corrections Victoria

- 3.69 Breaches of parole can range from a failure to attend an appointment with a community corrections officer to the commission of a very serious offence. An important aspect of decision-making in relation to breaches of parole is the decision by Community Correctional Services whether to report the breach to the Board.
- 3.70 This decision is governed by a set of formal instructions issued by Corrections Victoria. The Deputy Commissioner's Instructions (DCIs) are examined in Chapter 5.
- 3.71 The DCIs distinguish between 'non-compliance' with conditions and 'breach' of conditions.
- 3.72 Non-compliance is further divided according to whether it is acceptable or unacceptable. Acceptable non-compliance usually involves, but is not restricted to, circumstances surrounding employment, education, health and carer responsibilities. Unacceptable non-compliance is when an offender does not provide a reasonable explanation or does not provide the necessary documentation at the next scheduled appointment or within three days thereafter: 'Claims to have "missed the bus", "helped a friend", or "slept in" should not be considered acceptable'.¹³⁸
- 3.73 The DCIs provide for a certain number of unacceptable failures to comply before Community Correctional Services provides a breach report to the Board. However, as discussed in Chapter 5, the DCIs are a guide only, and case managers have discretion as to if and when these types of breaches are reported to the Board.
- 3.74 An intermediate step before a breach report is the imposition of a compliance plan on the offender by Community Correctional Services. Further unacceptable failures to comply will then result in a formal warning by Community Correctional Services. The number of unacceptable failures at each step varies according to whether the offender is assessed as being a 'high' or a 'moderate or low' risk.¹³⁹
- 3.75 The DCIs highlight that the case manager should consider the time between unacceptable absences when determining non-compliance steps. The DCIs also highlight that steps may overlap (a compliance

¹³⁷ *Corrections Act 1986* (Vic) s 77(1).

¹³⁸ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.15: Non-Compliance' (2011) 9.

¹³⁹ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 7 ('Non-compliance'). The instructions provide for up to four unacceptable instances of non-compliance by a 'high' risk offender prior to a breach report to the Board. For a 'medium to low' risk offender, the instructions provide for up to six such instances before a breach report to the Board.

plan and formal warning may be initiated at the same time) and that it may be appropriate to advise the Board at any stage in consultation with a senior officer of Community Correctional Services.¹⁴⁰

- 3.76 The DCIs deal separately with the situation where the breach is of the condition not to commit further offences. On becoming aware of an offender being charged with further offences, the case manager must prepare a report to the Board.

Decision-making by the Board

- 3.77 The Members' Manual distinguishes between:
- '[f]ailure to comply with conditions'; and
 - 'conviction and sentence for further offences during the parole period'.¹⁴¹
- 3.78 If the failure to comply does not involve the condition regarding further offences, the Board may give the offender an opportunity to comply by directing that the manager of the Community Correctional Service office issue a warning to the offender or that the offender attend the Board for a warning or a 'show cause' hearing.
- 3.79 If the failure relates to alleged further offences and the charges are outstanding, the Members' Manual provides that, unless the offender is not complying with conditions of parole, the Board may await the result of the outstanding matters. Issues about the process by which the Board becomes aware of that result are examined in Chapter 5.
- 3.80 A submission to the Council raised strong concerns about a particular case in which a person committed a series of separate offences while on parole, culminating in a murder. The submission questioned why parole was not cancelled as soon as the person was charged with the first offences on parole.¹⁴²
- 3.81 While the Council cannot comment on the circumstances of the particular case, the Council has examined the approach of the Board generally in situations where a parolee is charged with further offences while on parole.
- 3.82 The Members' Manual does not elaborate on the reasons why the Board would await the result of the charges. In consultation with the Council on an earlier review, the Board explained that:
- Sometimes we want to see how the court is going to treat the offence. For example, if they get time served or a suspended sentence we may not cancel if they have performed well on parole but if they get actual imprisonment ... we may be more likely to cancel.¹⁴³
- 3.83 The Members' Manual states that 'occasionally' the Board may opt to cancel prior to the finalisation of the outstanding charges. This depends on 'a number of factors' including:
- the nature of the original/outstanding offences;
 - time spent on parole;
 - time left before parole expires;
 - compliance with conditions;
 - whether or not the offender has been remanded in custody pending the hearing of the outstanding offences; and
 - various other factors.¹⁴⁴

¹⁴⁰ Ibid 7 [5.1].

¹⁴¹ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 37.

¹⁴² Submission 15 (Corp family).

¹⁴³ Meeting with Adult Parole Board (18 June 2009), quoting Sentencing Advisory Council (2009), above n 58, [4.124].

¹⁴⁴ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 37.

- 3.84 In consultations with the Council for this review, the Board commented that it comes down to whether the parolee is a violent risk or not. The Board also stated that Community Correctional Services will not recommend cancellation if a parolee has committed a breach but is not considered at risk for violence.¹⁴⁵ The complexity of such assessments is discussed earlier in this chapter in relation to the grant of parole.
- 3.85 The Council has recommended that the Board adopt a principle stating that 'community safety' is the paramount consideration.
- 3.86 'Community safety' is a concept that can extend beyond actual physical safety to *perceptions* of safety. A broad range of behaviours can influence perceptions of safety. For example, parolees entering a restricted geographic zone could cause intense distress to victims and others. Victoria Police notes in its submission that it is important that the impact of parolee behaviour is considered when assessing whether behavioural breaches justify cancellation of parole:
- behavioural breaches may be indicative of offending and recidivism ... Parole is intended to guide the safe release of prisoners, setbacks should not necessarily result in cancellation. However, the objectives of parole are also embedded in harm minimisation, for the community and for the parolee. Parolees are under the supervision of the state and the impacts on the community need to be considered.¹⁴⁶

The Council's view

- 3.87 The Council considered the Board's approach to parole cancellation as part of a broader review in 2009 (*Sentencing, Parole Cancellation and Confiscation Orders*).
- 3.88 In the final report for that review, the Council expressed some support for the Board's practice of awaiting the outcome of charges before considering whether or not to cancel parole. In doing so, the Council noted that:
- A requirement that parole be cancelled before sentence in every case risks causing unfairness to offenders and being contrary to common law and human rights principles to be presumed innocent until proven guilty.¹⁴⁷ People charged with offences may not ultimately be convicted of all or any of these offences.¹⁴⁸
- 3.89 The Council is still of the view that these are relevant considerations. However, the Council stresses that there are important limits to them. By cancelling parole, the Board is not determining guilt and punishing the parolee for the further offence. Rather, the existence of new charges is a factor that the Board should take into account in reassessing the risk of the offender remaining on parole.
- 3.90 In doing so, the Board must make an assessment that is analogous to the assessment that a court must make in deciding whether to refuse bail to a person charged with an offence on the basis that the person poses an unacceptable risk of committing further offences while on bail.
- 3.91 In that context, the assessment of whether the risk is unacceptable depends on not just the likelihood that the person will commit further offences but also the length of time before the charges will be determined and the strength of the prosecution case in relation to those charges.¹⁴⁹
- 3.92 In the context of allegations of further offending against a parolee, an additional consideration is that, unlike an applicant for bail, the parolee is not starting from a point of being fully at liberty, but is already under supervision and conditions for serious prior offending.

¹⁴⁵ Inter-agency Information-Sharing Workshop (4 October 2011). See Appendix I for a list of attendees.

¹⁴⁶ Submission 11 (Victoria Police).

¹⁴⁷ *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 25(1).

¹⁴⁸ Sentencing Advisory Council (2009), above n 58, [4.88], [4.129].

¹⁴⁹ See, for example, *Haidy v DPP* [2004] VSC 247 (22 April 2004) [18]–[20].

- 3.93 The general principle set out above in relation to decisions to grant parole is also relevant to decisions about whether to cancel parole. Community safety remains the paramount consideration, and in considering its response to the breach of a condition, the Board should assess whether there is an unacceptable risk to the community if the offender remains on parole.
- 3.94 This is not currently explicit in the Members' Manual. The Council recommends that the Members' Manual should clearly relate to breach decision-making both the paramount consideration of community safety and the assessment of whether there is an unacceptable risk.

Recommendation 3

General principle to guide decisions regarding breach of parole

In making decisions about actions to take in response to breach of parole (or alleged breach of parole), the Board and Corrections Victoria should expressly adopt a general principle to the effect that:

- community safety is the paramount consideration; and
- parole should be cancelled (or in the case of Corrections Victoria a cancellation recommendation should be made) when an assessment is made that the offender poses an unacceptable risk to community safety by remaining on parole.

- 3.95 The Members' Manual should also clearly state that the Board, when responding to an alleged breach, should consider the same factors as those considered when deciding whether to grant parole (listed in Table 1). In addition to those factors, the Board should consider:
- time spent on parole;
 - time left before parole expires;
 - compliance with conditions (and, in the case of special conditions, the reason why those conditions were imposed); and
 - the impact of breach behaviour on the community.

Recommendation 4

Factors to consider in relation to breach of parole

The Adult Parole Board should make it clear in its Members' Manual that, in making decisions about actions to take in response to breach of parole (or alleged breach of parole), the Board should consider the same factors that it considers when deciding whether to grant parole (listed in Table 1) and that, in addition to these factors, it should consider:

- time spent on parole;
- time left before parole expires;
- compliance with conditions (and, in the case of special conditions, the reason why those conditions were imposed); and
- the impact of breach behaviour on the community.

Specifying the guidance in legislation

- 3.96 The terms of reference require the Council to consider 'whether statutory criteria are desirable to guide decision-making in relation to the granting and revocation of parole, particularly in relation to violent crimes, and if so, the nature of these criteria'.
- 3.97 In consultation with the Council, the Adult Parole Board has indicated an openness to making changes to its Members' Manual to incorporate the general principles recommended above. Provided that the Board is willing to make those changes, a question that arises is, are there any advantages in specifying the purpose, principles and factors in the *Corrections Act 1986 (Vic)*?
- 3.98 The Council has identified a series of possible implications of specifying decision-making criteria and factors in legislation:
- increased transparency;
 - increased consistency of decision-making;
 - changes to the nature and reviewability of Board decisions; and
 - constitutional implications and changes to the composition of the Board.

Increased transparency

- 3.99 A submission from the parent of a woman who died in the company of a parolee stated that:
- Advantages of a formal statement of the Board's criteria are simply that we, (society) all know where we stand. We would then know the substance abuser, the sex offender, etc. etc., had received some treatment – of course, realistically, this doesn't always work, but at least we would know the criteria under which the offender was released on parole.¹⁵⁰
- 3.100 In its submission, Victoria Legal Aid noted the importance of transparency, observing that publishing the full guidelines used by the Board to assist in decision-making 'would enable more informed public debate about the decisions of the Board, and would go some way towards affording procedural fairness to prisoners'.¹⁵¹
- 3.101 The Council considers that this point is particularly important. The issue of procedural fairness is examined in Chapter 4. In that chapter, the Council recommends that the Board should continue to be exempt from the rules of natural justice, in particular the requirement to provide reasons for its decision in each case. That exemption makes it imperative that the Board have other mechanisms to provide transparency about the principles it applies and the factors that it considers when making decisions.
- 3.102 The Australian Community Support Organisation (ACSO) made a similar comment, noting that some staff were in favour of statutory criteria on the basis that such criteria 'would ensure that the prisoner/parolee would not be in any doubt as to what they needed to do in order to be granted or to maintain their parole, and it would give them something clear to aim for'.¹⁵²

¹⁵⁰ Submission 1 (M. Graham).

¹⁵¹ Submission 12 (Victoria Legal Aid).

¹⁵² Submission 5 (Australian Community Support Organisation).

- 3.103 The significance of this was also noted by VACRO, which stated that 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'.¹⁵³ This argument has previously been noted in separate reviews of parole by the New South Wales Law Reform Commission¹⁵⁴ and the Australian Law Reform Commission.¹⁵⁵
- 3.104 Victoria Legal Aid considered that publication of the Board's assessment criteria on its website would be sufficient and did not consider it necessary or desirable for the criteria to be in legislation. In its view:
- [f]or prisoners experiencing difficulty understanding the decision-making process of the Board, it is considered unlikely that legislative criteria would assist. It would be of greater assistance to allow prisoners greater support, such as access to interpreters or caseworkers to explain the process'.¹⁵⁶
- 3.105 This point was also made to the Australian Law Reform Commission in its review of parole, where:
- [a] number of parole authorities noted that setting the criteria out in the legislation will not assist offenders – who are unlikely to be familiar with the legislative provisions – and that it was essential that parole authorities and corrective services agencies ensured that offenders were informed about these issues.¹⁵⁷
- 3.106 The Council considers that the factors and criteria used by the Board should be transparent; however, the Council agrees with Victoria Legal Aid that simply specifying them in legislation would not achieve any significant practical improvement in the transparency of the Board's operations. In Chapter 4, the Council considers a series of complex issues in relation to improving the transparency of the Board's decision-making processes.
- 3.107 Rather than specifying the factors and criteria in legislation, the Council considers that the Adult Parole Board should continue to publish the factors and criteria in its annual report and on the Department of Justice website. There may be advantages in formalising the Adult Parole Board's obligation to publish these factors and criteria and to ensure that the factors and criteria are consistent in the annual report, in the Members' Manual and on the Department of Justice website. Section 72 of the *Corrections Act 1986* (Vic) requires the Adult Parole Board to provide an annual report to the minister and the minister to table the annual report in parliament. The section sets out a list of matters that must be included in the annual report. It does not require the Board to report on the factors it takes into consideration or the criteria it uses for making its decisions.
- 3.108 This mechanism avoids undesirable rigidity by enabling the Adult Parole Board to change the criteria if appropriate (as it has done through this consultation process), while still being accountable to parliament and the public.

Recommendation 5

Increased transparency

Section 72 of the *Corrections Act 1986* (Vic) should be amended to require the Adult Parole Board to include in its annual report the purpose of parole, the general principles it uses and the factors it takes into account in exercising its discretion in making decisions in relation to parole.

¹⁵³ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

¹⁵⁴ New South Wales Law Reform Commission, *Sentencing*, Report no. 79 (1996) [11.51]–[11.52].

¹⁵⁵ Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report no. 103 (2006) [23.70].

¹⁵⁶ Submission 12 (Victoria Legal Aid).

¹⁵⁷ Australian Law Reform Commission (2006), above n 155, [23.72].

Increased consistency of decision-making

- 3.109 In consultation with the Council, some stakeholders expressed concerns about a lack of consistency in decisions made by the Board.
- 3.110 The Australian Community Support Organisation (ACSO)¹⁵⁸ submitted that, amongst its clients, staff and Consumer Advisory Group, there was a general feeling that the Board's decision-making is inconsistent. Some of the people it consulted noted that it was difficult to predict what the outcomes were going to be in both the granting and cancellation of parole.
- 3.111 ACSO's submission, however, noted that these concerns were not necessarily related to the absence of statutory criteria. Instead, it was considered that inconsistencies arose due to several factors:
- the high number of cases dealt with by the Board;
 - the rotation of the Board members – multiple sittings on one matter may mean that several different sets of Board members deal with that matter and these members may have different understandings of the applicable criteria and varying degrees of insight into the prisoner's/parolee's circumstances;
 - the limited scope for review of documents and evidence due to time and resource constraints; and
 - the reliance on community corrections officers who have varying skill levels, high caseloads and high turnover.¹⁵⁹
- 3.112 The submission notes that some ACSO staff supported the introduction of statutory criteria on the basis that:
- it would 'enhance predictability and consistency in decision making, as inconsistency feeds the rumour mill of the prison setting [that] if there is no uniform approach it is particularly hard for first time offenders to understand and comply'; and
 - it would lead to less disparity from one community corrections officer to the next as to when parolees 'would be breached'.¹⁶⁰
- 3.113 In its submission, Forensicare also commented on impressions of inconsistency:
- Our clinicians report that there appears to be a significant variation in practice in the supervision of parolees. For example, there have been instances where referral from a Community Correctional Officer to Forensicare is accompanied by information stating that the parolee is abusing substances which may be associated with a deterioration in the parolee's mental state. Again, in making this observation, Forensicare offers no opinion as to whether this is something that would be best addressed by the introduction of statutory criteria or formal policies/practice guidelines that will establish consistency in service delivery and monitoring.¹⁶¹
- 3.114 The Council considers that an appropriate degree of consistency (in which like cases are treated alike) is crucial to the proper operation of parole. However, legislation is not the only mechanism to ensure an appropriate degree of consistency.
- 3.115 The Council considers that consistency of approach can be ensured by having appropriate guidelines available to all members of the Board, by adopting appropriate procedures to ensure that members are aware of the guidelines and understand how the guidelines operate in practice and by publishing the guidelines.

¹⁵⁸ ACSO provides transitional support and case management services to ex-prisoners.

¹⁵⁹ Submission 5 (Australian Community Support Organisation).

¹⁶⁰ Ibid 7.

¹⁶¹ Submission 8 (Forensicare. Victorian Institute of Forensic Mental Health).

Effect of statutory criteria on the nature and reviewability of parole decisions

3.116 An important consideration in deciding whether to introduce statutory criteria or factors for consideration is the potential for such provisions to alter the nature and reviewability of parole decisions.

3.117 Parole decision-making has been characterised as:

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[’s] 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[s] 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. If parole is granted, the Board takes an active and ongoing role in monitoring compliance, based on all of the knowledge gained through the inquisitorial process.¹⁶²

3.118 In its submission, VACRO expressed concern 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.¹⁶³

3.119 Many other submissions to the Council expressed similar concerns. Victoria Legal Aid expressed a concern that enshrining in legislation factors for the Board to consider raises the risk that decision-making would become too rigid.¹⁶⁴ In its submission, ACSO stressed the importance of retaining flexibility and discretion, especially in relation to prisoners and parolees with mental illness or disability.¹⁶⁵ Jesuit Social Services also expressed concern about the possible loss of discretion:

Far from enhancing the decision-making process or indeed improving the efficacy of the parole system, introducing statutory criteria can only be seen as an infringement on the discretion of the Parole Board and lead to poorer outcomes.¹⁶⁶

3.120 Jesuit Social Services proposed that, if statutory criteria were to be introduced, they would have to be balanced with procedural fairness:

In the event that the government pursues the idea of including the statutory criteria in relation to the granting and revocation of parole, then, statutory obligations in regard to procedural fairness should be inserted into the legislation to ensure fairness and greater transparency.¹⁶⁷

3.121 The issue of procedural fairness is addressed in Chapter 4.

¹⁶² Submission 9 (Victorian Association for the Care and Resettlement of Offenders) (citations omitted).

¹⁶³ Ibid.

¹⁶⁴ Submission 12 (Victoria Legal Aid).

¹⁶⁵ Submission 5 (Australian Community Support Organisation).

¹⁶⁶ Submission 7 (Jesuit Social Services).

¹⁶⁷ Ibid 12–13.

Judicial review and statutory criteria or factors

- 3.122 The introduction of statutory criteria or a statutory list of factors for consideration would substantially increase the scope for people affected by a decision of the Board to have the decision reviewed in the Supreme Court.¹⁶⁸ While the introduction of such provisions would not alter the grounds on which such decisions could be reviewed, they would create more 'footholds' for judicial review.¹⁶⁹
- 3.123 A basic ground of judicial review is that the decision-maker failed to adhere to the terms of a statute. Accordingly, if such provisions were introduced, the decisions of the Board could be carefully inspected by any persons affected by the decision and their lawyers to see if the Board had applied a test or taken account of factors not mentioned by statute, or had failed to apply or had ignored factors mentioned by the statute.¹⁷⁰
- 3.124 The case of *Murray v NSW State Parole Authority*¹⁷¹ provides a good example of how this could occur.
- 3.125 Section 135 of the *Crimes (Administration of Sentences) Act 1999* (NSW) provides that the Parole Authority 'must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest'. It also sets out a list of matters to which the Parole Authority must have regard when deciding whether or not the release of an offender is 'appropriate in the public interest'.
- 3.126 In *Murray v NSW State Parole Authority*,¹⁷² the Parole Authority purported to revoke parole of a particular offender. In its reasons for the decision, the Parole Authority indicated that this finding was based on a Probation and Parole Service view that the offender 'is *unlikely* to adapt to a normal lawful community life' (emphasis added). However, the legislation referred to 'circumstances in which the Parole Authority decides, before releasing the offender, that the offender is *unable* to adapt to normal lawful community life' (emphasis added).
- 3.127 The Parole Authority revoked the offender's parole. The offender applied for judicial review of the decision by the Supreme Court.
- 3.128 The Supreme Court overturned the Parole Authority's decision and sent the case back to the Parole Authority with an order that it determine the matter according to law. The court held that the Parole Authority had acted in the absence of evidence of the criterion that it was required to consider and that it had asked itself the wrong question and acted upon the wrong criterion.¹⁷³ The court considered that:
- that mistake goes to a fundamental precondition on the exercise of its jurisdiction. Alternatively, it has taken account of an irrelevant consideration. As such, there is jurisdictional error, because the Authority misunderstood the nature of the opinion that it was to form. The exercise of the jurisdiction has been, and remains, constructively unexercised. There is error of law and error of jurisdiction. Prerogative writ, or orders in the nature of prerogative writ, will issue.¹⁷⁴
- 3.129 It may be that the confusion in the wording used by both the Parole Authority and the Probation and Parole Service arose because the criterion in a separate section relating to decisions to *grant* parole (rather than to *revoke* parole) was 'the likelihood of the offender being able to adapt to normal lawful community life'.

¹⁶⁸ This would be through the exercise by the Supreme Court of the jurisdiction described in Order 56.01(1) of *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

¹⁶⁹ Groves (2011), above n 99, 12.

¹⁷⁰ *Ibid* 12.

¹⁷¹ *Murray v NSW State Parole Authority* [2008] NSWSC 962 (17 September 2008).

¹⁷² *Ibid*.

¹⁷³ *Ibid* [32].

¹⁷⁴ *Ibid* [35].

- 3.130 There is no evidence that such cases are common in jurisdictions that have a statutory test or list of factors for the parole board to consider. In addition, the application by the Victorian Adult Parole Board of the former statutory test and the consideration by the Board of a statutory list of factors¹⁷⁵ when granting 'back end' home detention has not been the subject of such judicial review.
- 3.131 There are a number of reasons why such review has been uncommon. Prisoners may be unaware of the opportunity for such review, or they may have insufficient capacity to bring actions. In relation to the Victorian home detention provisions, the exclusion of the Adult Parole Board by section 69 of the *Corrections Act 1986 (Vic)* from the requirements of natural justice – including the requirement to give reasons for its decisions – affects parties' ability to seek review of those decisions.
- 3.132 Nevertheless, it may be that the prospect of such review could alter the character of parole decision-making, by encouraging much greater attention to legalistic reasoning.
- 3.133 It is possible that a more legalistic system, in which the decisions of the Board are open to greater scrutiny by the Supreme Court, could alter the nature of decisions. When giving evidence to the Victorian Parliament Scrutiny of Acts and Regulations Committee hearing on the review of the Charter, the Chair of the Board, Justice Simon Whelan, commented that:
- The reason that we think a more court-based system tends to grant less parole is basically because of this cancellation issue. Your appetite for risk with a particular parolee is very much dependant upon what you can do about it if something goes wrong. If you can cancel the person without too much worry, you will be more likely to take a risk with someone. If cancellation is going to result in a court case and might be delayed, or you might be inhibited in your ability to cancel, you might be less willing to take the risk in the first place.¹⁷⁶
- 3.134 In its submission, VACRO expressed a concern that, if statutory criteria were to be introduced, in the absence of additional resources – which are unlikely – a more legalistic approach could create an administrative burden for the Adult Parole Board. This could lead to delays in processing cases, which may have negative effects for offenders.¹⁷⁷

¹⁷⁵ This is as set out in the former section 60B of the *Corrections Act 1986 (Vic)*.

¹⁷⁶ Evidence to Scrutiny of Acts and Regulations Committee, Parliament of Victoria, Melbourne, 22 July 2011, 5. Note that the Law Institute of Victoria quoted this extract from Justice Whelan's comments to the Committee in its submission to the Council and noted that the Law Institute is 'sympathetic' to his views around the benefits of the 'case management' system of parole that operates in Victoria; however, these benefits should not be at the cost of procedural fairness. Submission 3 (Law Institute of Victoria).

¹⁷⁷ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

Constitutional implications and changes to the composition of the Board

- 3.135 Section 61(2)(a) of the *Corrections Act 1986* (Vic) specifies that the Board be chaired by a Supreme Court judge. This provision continues a requirement that has applied since the Adult Parole Board was established in 1957.
- 3.136 In exercising powers as a member of the Board, the judge is doing so in a personal capacity (under the *persona designata* doctrine): the powers are not conferred on or exercised by the Supreme Court.
- 3.137 The importance of having a Supreme Court judge as Chair was stressed in the Second Reading Speech for the legislation establishing the Adult Parole Board.¹⁷⁸ The potential for enhancing the integrity of – and the public confidence in – the Board by having a serving Supreme Court judge as Chair of the Board was also noted in *Kotzmann v Adult Parole Board of Victoria*.¹⁷⁹
- 3.138 The introduction of statutory criteria governing the decision-making of the Board may present difficulties in maintaining the requirement that the Chair of the Board be a Supreme Court judge.
- 3.139 In 2008, the involvement of serving Supreme Court judges on the Board was challenged in *Kotzmann v Adult Parole Board of Victoria* on the ground that it was constitutionally incompatible with serving judges' judicial functions.¹⁸⁰
- 3.140 The challenge rested on the basis that, under Australian constitutional law, a judge cannot perform a function that is incompatible with that judge's judicial function. This is determined by assessing the extent to which the performance of the non-judicial function would undermine the institutional integrity of the courts by eroding public confidence in the court and the judiciary.
- 3.141 The challenge was rejected. The court observed that the involvement of judges in an administrative body such as the Adult Parole Board actually enhances public confidence in both the Board and the Supreme Court.
- 3.142 The court expressed concern about the exclusion of the Adult Parole Board from the rules of natural justice, the collective nature of Board decisions (which draw non-judicial members and judicial members together) and the possibility that the minister could direct the Adult Parole Board to undertake an administrative inquiry into the circumstances of a prisoner.¹⁸¹
- 3.143 The court concluded, however, that, on balance, the practice of a judge sitting on the Board did not affect the actual and perceived integrity of the Supreme Court because the Adult Parole Board was sufficiently independent of government.
- 3.144 The Council considers that there is a risk that the introduction of statutory criteria to govern decisions of the Board could affect this reasoning.
- 3.145 In particular, it has been submitted to the Council that a 'hallmark of the judicial function is the power to decide cases according to the circumstances at hand'. The introduction of statutory criteria may be seen to 'constrain the ability of a judge to do so (though the level of constraint depends greatly on the individual and collective nature of any criteria)'.¹⁸²

¹⁷⁸ Victoria, 'Penal Reform Bill', *Parliamentary Debates*, Legislative Assembly, 1 December 1955, 2386 (Arthur Rylah, Chief Secretary).

¹⁷⁹ *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356 (15 September 2008) [44].

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid* [43] –[50].

¹⁸² Groves (2011), above n 99, 29.

- 3.146 Whether this aspect of the statutory criteria would cause constitutional problems is difficult to predict, but if the limitations created by the statutory criteria are added to the exclusion of the rules of natural justice,¹⁸³ the combined effect could be one of invalidity. In other words, the sum of the two could be greater in constitutional terms.
- 3.147 This may be so particularly following the 2010 decision of the High Court in *Kirk v Industrial Relations Commission*.¹⁸⁴ It is possible that the recognition in that case of an entrenched supervisory jurisdiction in state Supreme Courts can lead to a stricter view of what is and is not a compatible function for a State judge to exercise.¹⁸⁵ The implications of the decision in *Kirk v Industrial Relations Commission* are discussed further in Chapter 4.

The Council's view

- 3.148 In giving the Adult Parole Board the powers to grant, revoke, amend and cancel parole, the *Corrections Act 1986* (Vic) does not structure or constrain the discretion of the Board in the exercise of those powers.
- 3.149 The Adult Parole Board has developed lists of factors to consider when making decisions about parole. Although Victoria is relatively unusual in not enshrining the factors in legislation, on balance the Council does not consider that enshrining the factors in the *Corrections Act 1986* (Vic) would significantly improve the operation of the parole system, enhance transparency or accountability or improve public safety.
- 3.150 There are substantial and legitimate concerns about a lack of transparency in the Board's decision-making processes. In Chapter 4, the Council makes a series of recommendations to redress these concerns. While the introduction of statutory criteria may in some circumstances promote transparency, the Council does not consider that in the context of parole this would achieve a practical improvement in transparency sufficient to outweigh the possible unintended consequences of such criteria.
- 3.151 The introduction of statutory factors or criteria is not necessary to ensure consistency in Board decisions, because consistency can be achieved by listing the factors in the Members' Manual and by adopting procedures to ensure that all members of the Board are aware of the factors.
- 3.152 It does not appear necessary to introduce legislation in order to change the principle adopted and the factors considered by the Board, as the Adult Parole Board has indicated its willingness to make changes in light of the Council's recommendations.

¹⁸³ In his advice to the Council, Matthew Groves notes that the federal authority cited by the court on the exemption of the Board from the rules of natural justice was weak. In *Kotzmann v Adult Parole Board of Victoria*, the High Court relied on *Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 (15 July 2008), in which the Full Court of the Federal Court accepted that a judge of the Federal Court could preside in a hearing in the Security Appeals Division of the Administrative Appeals Tribunal, in which several basic procedural protections were removed by statute. *Kotzmann v Adult Parole Board of Victoria* accepted this case as authority for the proposition that the statutory denial of natural justice did not alone demonstrate that a judge cannot sit on such a body. The legislation cited in *Kotzmann v Adult Parole Board of Victoria* did not completely exclude natural justice in the way section 69(2) does, so the decision that considered it does not provide strong support for the continued role of judges: Groves (2011), above n 99.

¹⁸⁴ *Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010).

¹⁸⁵ Groves (2011), above n 99, 29.

- 3.153 The current non-legalistic character of the Board's decision-making is a strength of the Victorian adult parole system. The introduction of statutory criteria has the potential to undermine this strength significantly. The likelihood of this potential being realised if statutory criteria were to be introduced is difficult to assess. The experience in New South Wales indicates the sorts of reviews that could occur. Such reviews have not been frequent; however, it may be that the prospect of such reviews, rather than their actual frequency, could result in a more legalistic approach.
- 3.154 Another characteristic and strength of the Victorian parole system is that it involves ongoing case management of the offender. The Council considers that the introduction of statutory provisions to structure and limit the Board's discretion in making decisions could result in a more rigid or static approach – placing undue emphasis on particular decisions at points in that process – that fails to recognise the dynamic nature of the system.
- 3.155 The Council also considers that the longstanding requirement that the Board be chaired by a serving Supreme Court judge is desirable, and notes that the introduction of statutory criteria may jeopardise the possibility of that practice continuing.

Recommendation 6

No statutory criteria

The Council recommends against the introduction of statutory criteria to guide decision-making in relation to the granting of parole and in relation to breaches of parole.

Chapter 4

The Board's decision-making processes

- 4.1 The Adult Parole Board operates in an inquisitorial rather than adversarial manner and takes a proactive approach to preparing prisoners for parole. This approach enables the Board to progressively form and modify its assessment of the prisoners' progress towards rehabilitation and their risk of reoffending, and to actively solicit the information necessary to reach each decision.
- 4.2 Although the Adult Parole Board's annual report sets out some information about the Board's decision-making processes, detailed information is not readily available. Since 2007, the Adult Parole Board has participated in several reviews to investigate specific technical aspects of parole, but only some of this information is on the public record.¹⁸⁶
- 4.3 In order to obtain an understanding of the Board's decision-making processes, the Council examined the Members' Manual and held numerous discussions with Adult Parole Board representatives. This chapter examines how the Board makes its decisions, with a focus on issues relating to procedural fairness.
- 4.4 The rules of procedural fairness seek to ensure that decisions are made without bias and in a transparent manner, and that decision-makers take into account the views of those affected. The rules are based on the idea that decisions made in accordance with the rules of procedural fairness not only are more acceptable to the parties involved and the community more generally but also will be of a better quality as they will be fairer, more accurate and more consistent than decisions made in the absence of procedural fairness.

¹⁸⁶ See The Allen Consulting Group (2009), above n 45.

Procedural fairness and natural justice

- 4.5 Legislation and regulations set the limits of what public authorities can do; the rules of procedural fairness control the way in which public authorities carry out their powers, ensuring that they accord basic fairness.¹⁸⁷ All public officials who have the power to make administrative decisions that affect people's rights, interests or legitimate expectations must apply the rules of procedural fairness, unless statute clearly states otherwise.¹⁸⁸ A public official in this context is not confined to judges and tribunal members, but includes administrators with decision-making powers within the executive arm of government.
- 4.6 The term 'decision' can have different meanings. In administrative law it is usually confined to a final or conclusive decision as distinct from decisions made along the way to reaching a determinative conclusion (for example, findings of fact in the course of decision-making).¹⁸⁹
- 4.7 In administrative law, procedural fairness (or natural justice) is a well-defined concept. Justice Deane in *Australian Broadcasting Tribunal v Bond* described the application of the principle of natural justice in the context of statutory tribunals, but the description could equally be relevant to any body bound to apply the rules of natural justice:
- Of its nature, a duty to act judicially (or in accordance with the requirements of procedural fairness or natural justice) excludes the right to decide arbitrarily, irrationally or unreasonably. It requires that regard be paid to material considerations and that immaterial or irrelevant considerations be ignored. It excludes the right to act on preconceived prejudice or suspicion. Arguably, it requires a minimum degree of 'proportionality'.¹⁹⁰
- 4.8 One of the fundamental requirements of procedural fairness is the right to be heard. A party whose rights, property or legitimate expectations may be affected by an administrative decision has the right to be heard; thus, the decision-maker is obliged to 'hear both sides'. Other kinds of natural justice protections are a right to legal representation, a right to reasons, a right to disclosure of evidence relied on by the decision-maker and a right to cross-examine those giving evidence to the decision-maker.¹⁹¹
- 4.9 What exactly is required in terms of procedural fairness depends on the circumstances of the case – the nature of the inquiry, the subject matter and the rules under which the decision-maker is acting.¹⁹²
- 4.10 The Board makes decisions affecting the rights and legitimate expectations not only of prisoners but also of victims.

¹⁸⁷ For an overview of natural justice, see, for example, William Wade, *Administrative Law* (1988).

¹⁸⁸ *Kioa v West* (1985) 159 CLR 550, 584–585 (Mason J); *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ). It is an 'open question' as to whether procedural fairness should be regarded as a 'common law duty or an implication from statute': John Gilmour, 'Kirk: Newton's Apple Fell' (2011) 34(2) *Australian Bar Review* 155, 88, citing *Abebe v Commonwealth* (1999) 197 CLR 510 (Gaudron J) and *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 (Gaudron and Gummow JJ).

¹⁸⁹ *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 335–336 (Mason CJ).

¹⁹⁰ *Ibid* 367.

¹⁹¹ For a detailed examination of the various components of procedural fairness, see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (2009), 519–637.

¹⁹² *Kioa v West* (1985) 159 CLR 550, 584–585 (Mason J), citing as authority for this proposition the cases of *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546, 552–553 and *National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296, 311, 319–321.

The Adult Parole Board and procedural fairness

- 4.11 It is open to the legislature to exclude or modify the rules of procedural fairness, provided that there is a sufficient indication of exclusion or modification through the plain words of the statute.¹⁹³ A government may wish to exclude or modify procedural fairness to increase efficiency and thereby reduce costs, or to allow an authority to maintain a non-legalistic character. Sometimes legislation includes a 'procedural fairness code' that specifies exactly which elements of procedural fairness are to be applied, as for example, much migration legislation has attempted to do.¹⁹⁴
- 4.12 Section 69(2) of the *Corrections Act 1986* (Vic) provides that '[i]n exercising its functions, the board is not bound by the rules of natural justice'. Section 69(2) appears to exclude both the hearing and bias rules, and the Act does not provide a substitute procedural fairness code. This type of provision is unusual and has no parallel outside parole.¹⁹⁵
- 4.13 The Court of Appeal of Western Australia in *Seiffert v Prisoners Review Board*¹⁹⁶ considered a very similar provision to section 69(2) under the *Sentence Administration Act 2003* (WA).¹⁹⁷ Section 115 of that Act provides:
- The rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to the doing or omission of any act, matter or thing under Parts 2 to 6 by ... (c) the Board.
- 4.14 Chief Justice Martin commented on the exclusion of natural justice, with which the other justices agreed. In particular, Justice Martin found that section 115 excluded 'any obligation' under the rules of natural justice. Its intention was so clear that it was not possible to find any 'obligation to partially comply with the rules of procedural fairness, nor are there any terms which would suggest that it was not the intention of the Parliament to totally exclude any and all obligations to comply with the rules of procedural fairness'.¹⁹⁸ Section 69(2) is just as clear as section 115, and it is likely that a Victorian court would come to the same conclusion as Chief Justice Martin.
- 4.15 Chief Justice Martin also held that the various ethical requirements of the members of the Western Australian Parole Board pursuant to statute and guidelines were separate from and not coinciding with the rules of natural justice.¹⁹⁹ It is highly likely that such reasoning would apply to the situation in Victoria, where the *Corrections Act 1986* (Vic) requires members to comply with the *Public Administration Act 2004* (Vic).²⁰⁰
- 4.16 The result in *Seiffert v The Prisoners Review Board* would suggest that section 69(2) is very broad in its scope and that a court would be unlikely to give it a narrow interpretation.²⁰¹
- 4.17 As the Victorian Adult Parole Board is not currently bound by the rules of natural justice, it is not subject to the *Administrative Law Act 1978* (Vic). The *Administrative Law Act 1978* (Vic) applies only to decision-makers found to comply with 'one or more' rules of natural justice. The Adult Parole Board also has an exemption until 27 December 2013 from complying with the requirements of the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

¹⁹³ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* [2008] HCA 4 (7 February 2008).

¹⁹⁴ As Matthew Groves comments: '[t]he Commonwealth is yet to enact a procedural code that fully displaces the hearing rule principles of natural justice': Groves (2011), above n 99, 24.

¹⁹⁵ *Ibid* 15.

¹⁹⁶ *Seiffert v The Prisoners Review Board* [2011] WASCA 148 (8 July 2011), cited in Groves (2011), above n 99.

¹⁹⁷ The Northern Territory has a similar provision: *Parole of Prisoners Act* (NT) s 3HA.

¹⁹⁸ *Seiffert v The Prisoners Review Board* [2011] WASCA 148 (8 July 2011) [82].

¹⁹⁹ *Ibid* [89].

²⁰⁰ *Corrections Act 1986* (Vic) s 63(7); Groves (2011), above n 99, 16.

²⁰¹ Groves (2011), above n 99, 16.

- 4.18 The Adult Parole Board does not follow any of the usual rules of procedural fairness routinely applied by judicial bodies or tribunals. For example, no legal representation is available to offenders at Board hearings; the Board does not provide prisoners with access to the information on which its decisions are based, and it does not publish reasons (although the Board may verbally inform prisoners of the reasons for its decisions). There is no right of appeal from a Board decision, although a prisoner can request that the Board review its decision.²⁰² The various components of procedural fairness are discussed later in this chapter. Overall, the operation of the Board is far removed from the processes seen in courts and tribunals.
- 4.19 Although the Adult Parole Board does not follow the rules of procedural fairness, its annual report states that the Board 'aims to ensure that its proceedings are conducted properly and fairly for all parties involved'.²⁰³ Board members are also bound by the Adult Parole Board's self-generated 'Code of Conduct', a document that provides guidance on the general standards of performance and ethical conduct expected of all Board members. The Members' Manual states: 'In order to maintain public confidence in the Board, it is essential that members exhibit, and are seen to exhibit, the highest ethical standards and professional conduct'.²⁰⁴
- 4.20 As noted earlier, the Adult Parole Board is neither a court nor a tribunal. It is a statutory agency that, in fulfilling its statutory functions, adopts a proactive, 'hands on' approach that sets it apart from parole boards in many other jurisdictions. It also operates within significant constraints: in 2010–11 it considered 8,963 matters over 166 meeting days – an average of approximately 54 matters per meeting day.²⁰⁵
- 4.21 The absence of procedural fairness has implications not only for offenders but also for victims and the broader community. A parole system that is opaque and inaccessible to victims and other interested parties may inspire little community confidence, and may even contribute to fear and distrust. This affects community safety – a concept that extends beyond actual physical safety to perceptions of safety.²⁰⁶

²⁰² These aspects of the Board's processes are discussed later in this chapter.

²⁰³ Adult Parole Board of Victoria (2011), above n 47, 27.

²⁰⁴ Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 4.

²⁰⁵ See above n 56 for a discussion of what is included in the Adult Parole Board's definition of 'cases'. Only a portion of these involve major parole decisions, such as grant, deny or cancel parole.

²⁰⁶ As Naylor and Schmidt comment: 'the assessment of risk [in the parole context] is inevitably linked to levels of community fear, or perception of risk': Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners Have a Right to Fairness before the Parole Board?' (2010) 32 *Sydney Law Review* 437, 442.

Constitutional status of section 69(2)

- 4.22 Since the enactment of section 69(2), there have been many changes in administrative and constitutional law. In particular, two decisions of the High Court in 2010 raise questions that are relevant to the validity of provisions such as section 69(2).
- 4.23 In *Saeed v Minister for Immigration and Citizenship*,²⁰⁷ the High Court held that because the common law principle of natural justice is so 'fundamental', the legislature can only exclude it by legislation worded with 'irresistible clearness'.²⁰⁸ In contrast to section 69(2), the legislation in that case was not worded with such clarity. As such, it was not necessary for the court to determine whether natural justice is a fundamental principle impliedly protected by section 75(v) of the Commonwealth Constitution²⁰⁹ and therefore incapable of exclusion by legislation.²¹⁰ Dr Matthew Groves remarks: 'Until [this] point is directly confronted by the High Court, the validity of s 69(2) cannot be regarded as settled'.²¹¹
- 4.24 In *Kirk v Industrial Relations Commission*,²¹² the High Court held that state parliaments cannot validly exclude the supervisory jurisdiction for jurisdictional error of state Supreme Courts over inferior courts or tribunals (or statutory bodies such as the Adult Parole Board) because this jurisdiction is constitutionally entrenched.
- 4.25 In relation to parole in Victoria, *Kirk v Industrial Relations Commission* has the effect of confirming that the Adult Parole Board is subject to judicial review pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) and that such review cannot be excluded by parliament.²¹³ Judicial review – unlike appeal – is confined to examining the legality of a decision, namely, whether or not the decision was made within the scope of the decision-maker's functions and powers.
- 4.26 In a recent paper on the effect of *Kirk v Industrial Relations Commission*, Justice Gilmour states that:²¹⁴
- Decision-makers can go beyond their true functions and powers by exercising, or rather purporting to exercise, a function or power that they do not have, or that has not yet arisen ... But they can also be taken beyond the true functions and powers by things that they erroneously did, or failed to do, in attempting to discharge functions or powers that have been enlivened in them.
- 4.27 One of the errors that falls into the latter category described by Justice Gilmour is a failure to accord natural justice.²¹⁵

²⁰⁷ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252.

²⁰⁸ *Ibid* 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

²⁰⁹ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, ch 12, s 75(v) reads: 'In all matters ... in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth ... the High Court shall have original jurisdiction'.

²¹⁰ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 257 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ).

²¹¹ Groves (2011), above n 99, 17.

²¹² *Kirk v Industrial Relations Commission of New South Wales; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010).

²¹³ Judicial review is discussed in Chapter 3, [3.122]–[3.134].

²¹⁴ Gilmour (2011), above n 188, 60–61.

²¹⁵ *Ibid* 85. See also Eric Dyrenfurth and Emma Mealy, 'State Tax Privative Clauses after *Kirk*: Opening the Gates to Review' (2011) 85(10) *Law Institute Journal* 52, 54. The authors, citing Peter Hanks, set out the 'usual grounds of judicial review'. In addition to those listed above, they include bad faith, acting for an improper purpose, considering irrelevant material/factors and making a decision for which there is no supporting evidence.

- 4.28 Justice Gilmour asks whether the outcome in *Kirk v Industrial Relations Commission* also means that states cannot avoid through legislation any aspect of the Supreme Court's power of judicial review. He focuses in particular on procedural fairness, a 'well-established species of jurisdictional error', and questions whether, following *Kirk v Industrial Relations Commission*, it is now beyond the competence of state parliaments to provide that decisions made under an enactment will be valid for all purposes even if made without according procedural fairness.²¹⁶
- 4.29 The Council notes that section 69(2) may well be vulnerable to challenge; however, in the absence of clear authority to the contrary, it proceeds on the basis that section 69(2) is constitutionally valid.
- 4.30 A further point to note is that section 69(2) would not sit comfortably alongside more legalistic Board procedures. As discussed in Chapter 3, if statutory criteria were introduced to guide the Board's decision-making on granting and cancelling parole, it is likely that the Board's processes would become more legalistic – due largely to the greater likelihood of judicial review of Board decisions. This would no doubt open section 69(2) to closer scrutiny.
- 4.31 If section 69(2) were to be struck down or repealed, the Adult Parole Board would be bound by the rules of natural justice. Which rules the Board would need to apply in its decision-making would depend on the context and may differ from case to case.²¹⁷ At the very least, it is clear that the Board would be required to give reasons for its decisions pursuant to the *Administrative Law Act 1978* (Vic), which would then be deemed part of the 'record' of the Board.

Submissions on whether the Adult Parole Board should be bound by the rules of procedural fairness

- 4.32 Some submissions to the Council were firmly in favour of the Adult Parole Board being bound by the rules of natural justice. The Victorian Aboriginal Legal Service (VALS) argued for the same level of procedural fairness as granted in criminal proceedings.²¹⁸ The Federation of Community Legal Centres (FCLC) stated that they:
- strongly oppose the legislative provision exempting the Board from complying with the rules of natural justice set out in section 69(2) of the *Corrections Act* (1986) ... Given the serious consequences that can flow from the Board's decisions, it is entirely appropriate that proper safeguards be implemented to ensure the quality of those decisions. Requiring the Board to comply with natural justice is a critical safeguard.²¹⁹
- 4.33 Similarly, the Law Institute of Victoria submitted that section 69(2) of the *Corrections Act 1986* (Vic) 'should be repealed, and the APB should be bound by the rules of natural justice'.²²⁰ The Law Institute of Victoria was of the opinion that in the current situation, whereby the Adult Parole Board is exempt from applying the rules of procedural fairness, the Board is:
- more likely to make decisions in good faith based on incorrect information, leading to unjust results. Further, any negative decisions may reduce the integrity and confidence in the system, from the perspectives of prisoners and the community.²²¹

²¹⁶ Ibid 85.

²¹⁷ Groves (2011), above n 99, 18.

²¹⁸ Submission 13 (Victorian Aboriginal Legal Service).

²¹⁹ Submission 14 (Federation of Community Legal Centres). This submission consisted of a covering letter to the Council attaching a submission they had completed in relation to the Charter review.

²²⁰ Submission 3 (Law Institute of Victoria).

²²¹ Ibid.

- 4.34 The Human Rights Law Centre submission emphasised that the Board's decision-making should be subject to procedural fairness considerations, 'because of the potential impact on human rights, and the reliance and dependence that offenders have on the APB's processes'.²²² The submission stated that:
- Fairness in decision-making is at least as much about how decisions are taken – the manner of the person's treatment – as it is about the outcomes. Indeed, outcomes may be *less* significant to the person's sense of the fairness of the decision.²²³
- 4.35 Other submissions did not go so far as to recommend the repeal of section 69(2). For example, Jesuit Social Services (JSS) argued that only if the government decides to introduce statutory decision-making criteria should it also legislate 'to promote procedural fairness in relation to Parole Board Hearings'.²²⁴
- 4.36 The Australian Community Support Organisation (ACSO) submission similarly stated that if statutory criteria were introduced, they must be balanced with 'transparent processes and procedural fairness'.²²⁵ ACSO is one of Victoria's leading community support organisations, which assists marginalised members of the community (including former prisoners). In developing its submission, ACSO consulted with its clients and staff, as well as its Consumer Advisory Group.
- 4.37 ACSO was in favour of the Board retaining its current flexibility and discretion in decision-making, as its stakeholders perceived this to be particularly beneficial in decision-making relating to prisoners and parolees with mental illness, cognitive impairment or intellectual disability. ACSO suggested that introducing more transparent processes for Board decision-making – for example, prisoners having access to material submitted to the Board before the hearing, making reasons for adverse decisions available to the prisoner/parolee, allowing support workers to attend parole hearings, especially where the prisoner/parolee has a mental illness or intellectual disability and making available an appeal process – would allow the Board to retain its flexibility at the same time as improving consistency in decision-making.
- 4.38 The Victorian Association for the Care and Resettlement of Offenders (VACRO), although declaring itself a 'keen supporter of fairness, transparency, accountability and respect for natural justice and human rights for all members of the community', expressed concern that a shift to a more legislatively constrained approach may lead to 'unintended consequences'. VACRO stopped short of recommending that the Board be required to comply with the rules of procedural fairness.
- 4.39 Victoria Legal Aid also did not recommend the repeal of section 69(2); however, it submitted that certain measures to increase transparency, along with procedural safeguards, should be introduced. For example, it suggested that the Board publish the guidelines it uses to guide its decision-making (which would be those contained in its Members' Manual), inform prisoners of its decisions and provide reasons to them in accessible format prior to publication, and publish its (de-identified) decisions and reasons for decisions, when in the public interest to do so.²²⁶

²²² Submission 4 (Human Rights Law Centre).

²²³ Ibid 5 (emphasis in original) (citations omitted).

²²⁴ Submission 7 (Jesuit Social Services).

²²⁵ Submission 5 (Australian Community Support Organisation).

²²⁶ Submission 12 (Victoria Legal Aid).

The Council's view

- 4.40 The rules of procedural fairness are vitally important – particularly in relation to decisions affecting a person's liberty and the safety of the community – for two reasons:
- The rules promote high-quality decisions, because they increase the likelihood that decisions are based on accurate and relevant information and are made through a logical reasoning process less likely to be affected by bias or prejudice.
 - The rules promote fair decisions. Ensuring that people affected by the decision consider that they have been treated fairly, regardless of the outcome of the decision, is an important end in its own right.
- 4.41 Accordingly, the Council has strong reservations about section 69(2) of the *Corrections Act 1986* (Vic), which states that the Adult Parole Board is not bound by the rules of natural justice.
- 4.42 The Council considers that in principle the Adult Parole Board should be subject to the rules of procedural fairness. However, the Council shares the concerns of some stakeholders that repealing section 69(2) could have unintended consequences.
- 4.43 The first of these potential consequences is that requiring the Board to comply with the rules of procedural fairness could lead to significant delays, because it may take more time to process each case (particularly if, for example, the Board were required to provide detailed written reasons for its decisions). In the absence of additional resources for the Adult Parole Board, this could result in a backlog of cases. As noted by VACRO: 'If the process is inadequately resourced, the "cost of doing business" may simply translate into "doing business very slowly"'.²²⁷
- 4.44 The Law Institute of Victoria submitted to the Council that pragmatic reasons are inadequate justification for excluding the fundamental rules of natural justice, although it was 'anxious to ensure that as many prisoners as possible are afforded the benefits of parole'.²²⁸
- 4.45 The Council considers that the Adult Parole Board should be provided with sufficient resources to enable it to comply with the rules of procedural fairness. However, in the absence of such resources, the Council considers that there is a substantial risk that some prisoners who do not present an unacceptable risk to the community would not be granted parole at their earliest eligibility date, simply because the Board was unable to reach their case.
- 4.46 The second potential negative consequence of requiring the Adult Parole Board to comply with the rules of procedural fairness is that the Board's processes may become more formal and legalistic and that, as discussed in Chapter 3, the Board may become more risk averse.
- 4.47 A case in point here is the Western Australian parole system. A recent Auditor General report found that, following the adoption of a more legalistic parole approach in that state, there was a dramatic reduction in the proportion of prisoners who were released on parole and an increase in the rate of parole cancellation. In the nearly five years up to October 2008, the Prisoners Review Board granted parole to 92% of eligible prisoners. Since September 2009, this has decreased to 21%.²²⁹

²²⁷ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

²²⁸ Submission 3 (Law Institute of Victoria). See also Naylor and Schmidt (2010), above n 206. The authors comment that: '[a]rguments based on administrative inconvenience cannot outweigh fundamental rights to a fair hearing': Naylor and Schmidt (2010), above n 206, 454.

²²⁹ Office of the Auditor General (WA) (2011), above n 14, 7.

- 4.48 What is required by the rules of procedural fairness varies depending on the context and nature of the decision in question. Therefore, the likelihood and gravity of either of the potential consequences outlined above would depend very much on the approach taken by the courts in relation to which particular aspects of procedural fairness the Adult Parole Board must adhere to.
- 4.49 It has not been possible to resolve the uncertainty around precisely what would be required if the Adult Parole Board were subject to the rules of procedural fairness and the degree of risk of the potential consequences outlined above. This is due in part to the short timeline for this project, which required the Council to confine its consultations largely to the core questions in the terms of reference (of which this is not one).
- 4.50 Accordingly, although the Council considers that in principle the Adult Parole Board should be bound by the rules of procedural fairness, the Council has provisionally concluded that at this stage the exemption from applying the rules of procedural fairness as set out in section 69(2) of the *Corrections Act 1986* (Vic) should remain in place.
- 4.51 The Council notes that the Adult Parole Board would in all likelihood become subject to the rules of procedural fairness in the event of a successful challenge to section 69(2) or if the exemption from the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is not renewed at its expiry on 27 December 2013. The recommendations set out in the remainder of this chapter have the advantage of bringing the Board's processes closer to what would likely be required were that to occur.
- 4.52 The Council's approach is thus to recommend procedural changes that aim at improving the quality (that is, consistency, fairness and transparency) of the Board's decision-making. The Council's recommendations represent an attempt to draw some important aspects of procedural fairness into the Board's processes. This will improve the Board's transparency and accessibility without placing undue administrative burden on the Board. In this regard, the Council reiterates that in the absence of additional resources, such a burden would potentially translate to disadvantage to both prisoners and the broader community.
- 4.53 The Council's approach to procedural fairness in this report is consistent with the approach it took in section 3.7 of its final report, *High-Risk Offenders: Post-Sentence Supervision and Detention* (2007).²³⁰

²³⁰ Sentencing Advisory Council (2007), above n 114, [3.7.39]–[3.7.55] ('Recommendation 12').

The various components of procedural fairness in the context of parole

- 4.54 When comparing the various approaches to procedural fairness, it is important to understand that each Australian jurisdiction has its own parole system, as does the United Kingdom, New Zealand and Canada, and these systems differ quite significantly in their structure, operation and funding. For example, the Australian Capital Territory, which grants prisoners a relatively high degree of natural justice in parole matters, has a very small prison population – in both absolute and per capita terms.²³¹ Queensland has a system where the courts deal with some parole matters and the Parole Board with others.
- 4.55 Similar to Victoria, Western Australia and the Northern Territory both have provisions that expressly exclude their parole boards from the requirements of natural justice.²³² New South Wales legislation appears to provide for a limited form of procedural fairness; for example, it allows specific parties access to documents held by the Parole Authority.²³³ Prisoners are entitled to make written or oral submissions to parole hearings, be represented by legal practitioners and call and examine witnesses.²³⁴ However, New South Wales prisoners who receive a sentence of less than three years are released automatically on parole; therefore the Parole Authority's caseload is largely confined to long-term prisoners, which means that it is far smaller than in Victoria.
- 4.56 In Canada, New Zealand and the United Kingdom, prisoners are afforded a relatively high level of procedural fairness in parole proceedings.²³⁵

Access to information/capacity to challenge

- 4.57 A fundamental fair hearing principle is that participants know the basis on which decisions are made and they can challenge reliance on this information when necessary. Naylor and Schmidt argue that '[a]ccess to information is, arguably, central to the ability of prisoners to make effective contributions to decision-making affecting them'.²³⁶
- 4.58 In Canada, New Zealand and the United Kingdom, all material is provided to prisoners prior to any parole hearing, subject to some exceptions.²³⁷ Aside from provisions relating to the parole jurisdictions of both the Australian Capital Territory and Tasmania,²³⁸ offenders in Australia have no formal right to access information that is before a parole board.

²³¹ Groves (2011), above n 99, 37.

²³² *Sentence Administration Act 2003* (WA) s 115(c); *Parole of Prisoners Act 1979* (NT) s 3HA.

²³³ *Crimes (Administration of Sentences) Act 1999* (NSW) s 193A. Section 193A gives the minister access to all documents held by the Parole Authority, as well as victims of serious offenders – but only to material indicating the measures the offender is taking or has taken to address the offending behaviour.

²³⁴ *Ibid* ss 140, 147, 190.

²³⁵ *Corrections and Conditional Release Act*, SC 1992, c 20 (Canada); *Parole Act 2002* (NZ); *Criminal Justice Act 2003* (UK) c 44. These three jurisdictions have implemented some major changes to their parole systems in recent years.

²³⁶ Naylor and Schmidt (2010), above n 206, 444.

²³⁷ For example, in Canada, the information or summary of the information must be provided at least 15 days prior to the hearing. Certain exceptions are made, for example, where it is not in the public interest to provide the prisoner with the information or where it would jeopardise the safety of a person: *Corrections and Conditional Release Act*, SC 1992, c 20, s 141. The *Parole Act 2002* (NZ) s 13 provides that information on which the Board will rely must be provided to the offender at least five days prior to the hearing. Similar to the Canadian legislation, this is subject to exceptions.

²³⁸ *Crimes (Sentence Administration) Act 2005* (ACT) s 127; *Corrections Act 1997* (Tas) s 74.

- 4.59 In the Australian Capital Territory, the Parole Board is subject to the rules of natural justice.²³⁹ It must conduct an 'on the papers' inquiry into parole, and if it concludes that parole should be denied, a hearing must be held. The prisoner is given notice of the hearing, along with copies of documents the Parole Board will be relying on (subject to confidentiality); at the hearing the prisoner may appear, be legally represented, make submissions and give evidence on oath.²⁴⁰
- 4.60 In Victoria, the Board does not generally provide to prisoners any documentation on which it bases its decisions. In response to a query from the Council, the Adult Parole Board advised:
- Rarely does the Board provide any material to the prisoner. As has previously been outlined, this may restrict the candour in which these reports are written. However, prisoners will often have copies of certificates they have received for completing programs. In the event (although there are no recorded occurrences of this) that a victim has requested their submission be provided to a prisoner then the Board could consider this on a case by case basis.²⁴¹
- 4.61 In response to a query about whether there is any mechanism by which a prisoner may challenge the accuracy of any information relied on by the Board, the Adult Parole Board informed the Council that:
- prisoners are able to request that a second drug testing sample be taken if they do not agree with the findings of the first one. Also, while there are no formal rules of evidence, prisoners are able to provide relevant documentation for the Board to consider (e.g. if a prisoner is accused to have entered into a prohibited geographic region and they deny this and have receipts to document this, they could supply this information to the Board). Although as noted previously, the prisoner does not have access to all of the information provided to the Board and therefore it would be difficult to challenge all information.
- 4.62 In *Kotzmann v Adult Parole Board of Victoria*²⁴² the Supreme Court of Victoria commented on the inherent unfairness of a decision-making process that does not provide the offender with the opportunity to test the accuracy of the information being relied on. The applicant had sought judicial review of a decision of the Board to cancel his parole and the Board's failure to direct that the sentence be reduced by the time served on parole.²⁴³ The applicant challenged the (Victorian Parole) Board's reliance on a particular piece of information. Justice Judd made some remarks about the correct exercise of power under section 77(7A) on the part of the Board:
- A decision to revoke a parole order might be validly made on the basis of incorrect information provided to the Board privately, without notice to the person affected and without any opportunity given to the prisoner to be heard in relation to it ... If the power under s 77(7A) is to be exercised properly the Board ought to be required to satisfy itself of the correctness of the information taken into account. That opportunity is significantly diminished if natural justice is denied a prisoner whose parole order is revoked.²⁴⁴

²³⁹ *Crimes (Sentence Administration) Act 2005* (ACT) s 196(1). This is due to amendments made in 2005, since the enactment of the *Human Rights Act 2004* (ACT).

²⁴⁰ *Crimes (Sentence Administration) Act 2005* (ACT) ss 125–127, 192, 209.

²⁴¹ Email from the Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

²⁴² *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356 (15 September 2008).

²⁴³ The review was made pursuant to *Supreme Court (General Civil Procedure) Rules 2005* (Vic) O 56 ('*Supreme Court Rules*').

²⁴⁴ *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356 (15 September 2008) [45]. In referring to 'revoking' parole, the judge means 'cancellation' of parole. The Law Institute of Victoria cited this passage of the judgment in its submission to the Council: Submission 3 (Law Institute Victoria).

4.63 However, Justice Judd rejected the application on the basis of section 69(2):

Mr Kotzmann was unaware of the content of the report until after it was acted on by the Board. These circumstances may be regarded as harsh and unjust, but the legislation has expressly abrogated any entitlement to procedural fairness.²⁴⁵

4.64 It follows that the offender in this case did not have the opportunity to correct any incorrect information relied on by the Board. Attrill and Liell, in an article on offenders' views on risk assessment, reported that some offenders expressed concern about the accuracy of risk assessments when they had no opportunity to contribute to the process.²⁴⁶

4.65 Several submissions were of the view that prisoners should be provided with at least some of the information on which the Board relies, prior to parole hearings.²⁴⁷

4.66 The Federation of Community Legal Centres said in its submission:

The Board is not immune from making errors in its decisions, which significantly affect people's lives. The current lack of human rights accountability increases the chance that the Board will make bad decisions that result in serious breaches of Victorians' human rights. A human rights framework would constitute a valuable safeguard against human error in Victoria's parole system.²⁴⁸

4.67 The Law Institute of Victoria was of the opinion that the Board should supply to prisoners/parolees information on which it is relying. It preferred the approach in the Australian Capital Territory – due to the lesser administrative burden on the Parole Board – where hearings are only held when an adverse decision is likely.²⁴⁹ It approved of the Australian Capital Territory approach of denying access to information in certain circumstances, for example, where information includes any contact details of a victim or could otherwise prejudice the public interest; however, it submitted that where information is not released to a prisoner, the United Kingdom approach should be adopted. Under this approach, if the information that is withheld is considered relevant to the decision in question, consideration must then be given to whether that information can be summarised, such that sensitive information is not disclosed but the gist is conveyed.²⁵⁰

4.68 Similarly, the Human Rights Law Centre submitted that it is essential that parolees be given access to information relevant to the Board's decision-making and the chance to respond to it, so they may put forward any relevant mitigating circumstances or correct any errors.²⁵¹ The Human Rights Law Centre also thought that the Australian Capital Territory approach to safeguarding confidential information was sensible.

²⁴⁵ *Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356 (15 September 2008) [61].

²⁴⁶ Gill Attrill and Glenda Liell, 'Offenders' Views on Risk Assessment' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (2007) 191, 199–200. However, this research was conducted in England, where the Parole Board does not meet with prisoners prior to its hearings (unlike the situation in Victoria, where the Board may meet a prisoner on multiple occasions prior to a parole decision).

²⁴⁷ Submission 3 (Law Institute of Victoria); Submission 4 (Human Rights Law Centre); Submission 5 (Australian Community Support Organisation); Submission 9 (Victorian Association for the Care and Resettlement of Offenders); Submission 12 (Victoria Legal Aid); Submission 13 (Victorian Aboriginal Legal Service); Submission 14 (Federation of Community Legal Centres).

²⁴⁸ Submission 14 (Federation of Community Legal Centres).

²⁴⁹ Submission 3 (Law Institute of Victoria).

²⁵⁰ *Ibid* 6.

²⁵¹ Submission 4 (Human Rights Law Centre). The Australian Community Support Organisation also wanted access to information prior to parole hearings for prisoners/parolees: Submission 5 (Australian Community Support Organisation).

- 4.69 The Victorian Aboriginal Legal Service submitted that prior to a parole hearing, prisoners be provided with copies of reports and materials before the Board, and that the Board should consider providing the prisoner with a copy of any victim statement, subject to the victim's consent.²⁵²
- 4.70 Victoria Legal Aid submitted that:
- Providing prisoners with the opportunity to view material to be put before the Board, and make submissions on these, particularly where an adverse finding is anticipated, not only improves a prisoner's understanding of the decision-making process, but may also improve the quality of the information available to the Board.²⁵³
- 4.71 In its submission to the Council, VACRO was mindful of the fact that some material before the Board, for example, material provided by family, friends or potential employers, is sensitive and that the Board must retain mechanisms to ensure such information is protected. VACRO also commented that under the current arrangements, prisoners would not be in a position to determine whether the Board's decision-making process was fair in their case or not, 'as they simply do not have sufficient information available'.²⁵⁴ VACRO provided an example: a parole plan prepared without consultation with a prisoner erroneously omitted to state that the prisoner had arranged housing upon release. Parole was rejected on this basis. In this case, a VACRO worker managed to arrange an urgent amendment and parole was granted; however, not all prisoners have access to such support.²⁵⁵
- 4.72 VACRO recommended that due to offenders having such 'limited access' to information before the Board, reliable processes are necessary to allow for the quick correction of technical inaccuracies that have the potential to change the outcome of a decision. In this regard, VACRO raised the concern that some prisoners would not be in a position to check 'lengthy or complex' reports for accuracy and they may need assistance in understanding and responding to the information:
- This opens up a whole new area in which the process can become unfair, given the importance of reports – and suggests that legal representation or advice might then be required.
- In practice, there is some logic to the argument that a summary of key information may be more accessible to many prisoners and provide the opportunity to make simple corrections.²⁵⁶
- 4.73 The Council notes the concerns and suggestions that stakeholders have raised in relation to the provision of information/documentation to prisoners and parolees. It agrees in principle that in the interests of fair decision-making, it is desirable that prisoners/parolees have access to (non-confidential) documentation on which the Board is relying, in order to be in a position to correct any technical inaccuracies. However, it is difficult to see how this is possible unless the Board provides prisoners with at least some of the information it is considering. The Board acknowledged as much in correspondence to the Council.²⁵⁷

²⁵² Submission 13 (Victorian Aboriginal Legal Service).

²⁵³ Submission 12 (Victoria Legal Aid).

²⁵⁴ Submission 9 (Victorian Association for the Care and Resettlement of Offenders). The Association was referring here to the fact that the prisoner has no right to appear before the Board, seek reasons for a decision or challenge material presented before the Board. The Association was 'in principle' a 'keen supporter' of procedural fairness, but was mindful of potential unintended consequences of a move to more legislative-based structures.

²⁵⁵ Ibid.

²⁵⁶ Email from Victorian Association for the Care and Resettlement of Offenders to Sentencing Advisory Council, 27 October 2011.

²⁵⁷ Email from Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

- 4.74 The Council is attracted to VACRO's idea of the Board providing prisoners with a summary of key information it is relying on, as this is likely to be more accessible to prisoners than full copies of reports. However, this would require significant extra work by the Board, as the summaries would need to be thorough and prepared in advance of parole hearings, thus necessitating an additional 'on the papers' meeting for each case. Instead, the Council suggests that Corrections Victoria and the relevant prison authority should provide prisoners with copies of the reports they are providing to the Board – for example, the parole assessment report prepared by Community Correctional Services approximately six weeks prior to any parole hearing, or any report provided by the prison authorities – to the extent that reports do not contain sensitive and/or confidential information.

Recommendation 7

Access to information by prisoners

In consultation with Corrections Victoria, the Adult Parole Board should establish a system under which factual reports provided to the Board (for example, parole assessment reports or breach reports) are also provided to prisoners/parolees. Copies of any such reports should be sent to prisoners/parolees at the same time as to the Board, with an attachment letter stating that if they believe that any of the information contained in the report/s is inaccurate, they can bring this to the attention of either the relevant officer or the Board at the parole hearing. The relevant authority may remove any information deemed confidential or sensitive.

- 4.75 The Council recognises that some of the information before the Board may be confidential or sensitive, and so such information will not be available to the prisoner to examine and challenge. The Council notes the inquisitorial nature of the Board's operation and considers it important that, particularly in relation to material that is not made available to the prisoner, Board members themselves routinely critically assess the material and, where possible, question the officers who prepare the material. The Members' Manual does not currently address this issue.

Recommendation 8

Importance of the Board testing material put before it

The Members' Manual should emphasise the importance of Board members testing the information that is put before them (for example, by questioning the community corrections officer who prepared a parole assessment report) in order to satisfy themselves as much as possible of the accuracy and credibility of information.

- 4.76 The Board has a large caseload and relatively little time to consider each case. This constraint, when combined with the very limited opportunity for offenders and others to scrutinise the material put before the Board, poses a risk of Board decisions being made on the basis of information that is incomplete or factually incorrect. Recommendations 7 and 8 are aimed partly at minimising human error. A further means of detecting errors and providing assurance that the Board is following its processes is to subject the Board to periodic independent audits, performed by an external, appropriately qualified organisation.
- 4.77 As noted in Chapter 2, the Board is not subject to many of the usual accountabilities of public bodies with decision-making power.²⁵⁸ The independent audit proposed by the Council would not seek to assess the correctness of Board decisions. Instead, it would examine a sample of files to identify matters such as:
- whether the procedures in the Secretariat Manual and Members' Manual were complied with;
 - when the parole assessment report was provided to the Board;
 - what other information the Board considered and when that information was provided;
 - what information was provided to the prisoner, parolee and/or victim and when;
 - whether the information on which the Board based its decision was factually correct; and
 - whether decisions were properly recorded.

Recommendation 9

Annual independent audit

The minister should oversee the implementation of an annual independent audit of the Adult Parole Board's processes.

²⁵⁸ The Council was advised that Community Correctional Services has an annual internal audit process in place, but the Adult Parole Board of Victoria does not: Meeting with Adult Parole Board (22 November 2011).

Legal representation

- 4.78 Legal representation is not an automatic right under the rules of procedural fairness. Legal representation in parole hearings is allowed in some jurisdictions, including New South Wales, the Australian Capital Territory and South Australia.²⁵⁹ In Canada, prisoners are allowed legal assistance at parole hearings (to advise the prisoner and address the Parole Board on the prisoner's behalf) and in New Zealand prisoners may seek leave of the Parole Board to be legally represented.²⁶⁰
- 4.79 There is no right to legal representation for prisoners under the current Victorian parole system. The situation is the same in Western Australia and the Northern Territory.
- 4.80 The Law Institute of Victoria submitted that due to the 'natural power imbalance' at parole hearings, prisoners should have the right to apply for legal representation.²⁶¹ It made particular reference in this regard to the fact that the rate of mental disorders is particularly high in the offender population. The Victorian Aboriginal Legal Service submission recommended that prisoners be afforded the right to appear before the Board. The Victorian Aboriginal Legal Service submitted that the current exclusion of legal representatives from Board hearings be removed.
- 4.81 Victoria Legal Aid recognised that the introduction of a requirement for legal representation at Board hearings would increase cost and may cause delays in decision-making. Victoria Legal Aid noted that many prisoners face practical legal problems upon release, for example, debt issues, family violence or child protection proceedings. It suggested that under its mandate to provide early intervention and preventative legal services it could work with Corrections Victoria and other agencies to provide legal assistance to consenting prisoners and parolees through its Legal Help Line. It also suggested that it could develop targeted information and education initiatives to assist prisoners to understand and prepare for parole proceedings.²⁶²
- 4.82 The Australian Community Support Organisation did not suggest that prisoners/parolees should be legally represented at parole hearings; however, it did suggest that support workers should be allowed to attend hearings, particularly in cases where their clients suffer from a mental illness or intellectual disability.²⁶³
- 4.83 On the issue of support persons, the Victorian Aboriginal Legal Service (uniquely among the submissions) noted that to its knowledge, prisoners are currently allowed a support person with prior approval of the Chair of the Board, and this may include an Aboriginal Wellbeing/Indigenous Liaison Officer. The Victorian Aboriginal Legal Service was interested to know the statistics around this – for example, how many prisoners are aware of this option and how many apply for approval of a support person.

²⁵⁹ *Crimes (Administration of Sentences) Act 1999* (NSW) s 190(1); *Crimes (Sentence Administration) Act 2005* (ACT) s 209(a); *Correctional Services Act 1982* (SA) s 77(3).

²⁶⁰ *Corrections and Conditional Release Act*, SC 1992, c 20, ss 140(7)–(9); *Parole Act 2002* (NZ) s 49(3)(c). In New Zealand, the offender may also be accompanied by one or more support persons, who may, with the leave of the Board, speak in support of the offender: *Parole Act 2002* (NZ) s 49(3)(d).

²⁶¹ Submission 3 (Law Institute of Victoria). The Law Institute of Victoria preferred the New Zealand approach, which encourages prisoners to speak for themselves in a free and frank manner, but prisoners have the right to apply for legal representation.

²⁶² Submission 12 (Victoria Legal Aid).

²⁶³ Submission 5 (Australian Community Support Organisation).

- 4.84 The Adult Parole Board confirmed that support persons are allowed at the discretion of the Chair.²⁶⁴ These may include intellectual disability support workers, Koori Liaison Officers, psychiatric nurses, etc. Interpreters are booked and provided by the Board as a matter of course for those with low-level English skills. The Adult Parole Board is of the view that a 'support person' may be inappropriate if that person acts in the manner of an advocate for the prisoner/parolee.
- 4.85 According to the Board, there are a number of sources of information that advise prisoners about the possibility of requesting a support person. These include Adult Parole Board fact sheets and education initiatives, for example its peer educator sessions called 'Conversation with the Board'.²⁶⁵ Other sources include prisons (prison officers can advise prisoners), or in some cases the Board may itself request that a support person be present.²⁶⁶
- 4.86 There is nothing, however, in the Adult Parole Board's annual report or Members' Manual about support persons. The Board's collection of fact sheets is not available on the internet, and the list of available fact sheets can only be found at the back of the annual report.²⁶⁷ An internet search for 'APB Fact Sheets' failed to reveal the list, nor did it come up with any information on how to access the Adult Parole Board's fact sheets. The Adult Parole Board's fact sheets should be more easily accessible than this.
- 4.87 Given that only one submission to the Council (Victorian Aboriginal Legal Service) demonstrated a knowledge of the fact that support persons are available at the Chair's discretion for prisoners with special needs, it seems clear that the Adult Parole Board has not been successful in communicating the availability of such support. With no legal representatives available to assist prisoners/parolees at parole hearings, it is vital that those with special needs – including, for example, mental illness, intellectual disability or acquired brain injury, poor English skills or Indigenous status – are afforded the appropriate assistance to understand the parole process.
- 4.88 The Adult Parole Board could provide information about the availability of support by publishing a fact sheet specifically about support persons that details the procedure for applying to the Chair. It could also include this information in education initiatives with prison officers and community corrections officers and in its face-to-face reviews with prisoners.

Recommendation 10

Use of support person by prisoner

- a. The Adult Parole Board should ensure that all prisoners are aware that support persons may be requested by prisoners with special needs.
- b. The Adult Parole Board should publish its fact sheets on its website, so that they are easily accessible to all.
- c. Statistics on the use of support persons by prisoners/parolees should be published in the Adult Parole Board's annual report.

²⁶⁴ Email from Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

²⁶⁵ See Adult Parole Board of Victoria (2011), above n 47, 48.

²⁶⁶ Email from Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

²⁶⁷ See, for example, Adult Parole Board of Victoria (2011), above n 47, 50.

Submissions to the Adult Parole Board by victims and other interested parties

- 4.89 In New Zealand, every victim is entitled to make submissions in person and (with leave of the Board) be legally represented or accompanied by one or more support persons who may (again with the Board's leave) speak on behalf of or in support of the victim.²⁶⁸
- 4.90 In its decision-making, the Victorian Adult Parole Board may consider submissions from a variety of individuals, including '[s]ubmissions made by the offender, the offender's family, friends and potential employers, or any other relevant individual' and '[w]ritten submissions made by the victim(s) or by persons related to the victim(s)'.²⁶⁹ In 2010–11, the Adult Parole Board received 69 written submissions from victims on the Victims' Register. The Victims' Register commenced operation in 2004 and is managed by the Victims Support Agency, Department of Justice.²⁷⁰
- 4.91 Sections 74A and 74B of the *Corrections Act 1986* (Vic) deal with victim submissions. A person included on the Victims' Register may make a written submission to the Adult Parole Board upon receiving notification of the release or likely release of a person on parole.²⁷¹ Only particular victims are entitled to be included on the Victims' Register. They include those who are victims of criminal acts of violence,²⁷² and those who are family members of someone who died as a direct result of a criminal act of violence, or family members of a victim of a criminal act of violence who is under the age of 18 or is unable to manage personal affairs due to mental impairment.²⁷³
- 4.92 Victim submissions must include the victims' views about the effect on them of the potential release of the prisoner on parole and may include any comments about conditions of parole.²⁷⁴
- 4.93 The Board *must* consider any victim submission it receives before making a parole order under section 74 and *may* give that submission such weight as it sees fit.²⁷⁵ The Board must not release a victim submission to a prisoner unless it is in the interests of justice to do so and the victim consents to such release.²⁷⁶ The Act does not make mention of submissions of other individuals, so presumably the form of such submissions is at the discretion of the Board. The Council understands that the Board only accepts written submissions from these individuals.

²⁶⁸ *Parole Act 2002* (NZ) s 49(4). Offenders are also entitled to be legally represented in parole hearings: *Parole Act 2002* (NZ) s 49(3)(d).

²⁶⁹ Adult Parole Board of Victoria (2011), above n 47, 27. On its website (part of the Department of Justice website), the Adult Parole Board lists some of the factors that the Board takes into account in parole decision-making. Two of these factors are: 'submissions made by the offender, the offender's family, friends and potential employers or any other relevant individuals' and 'representations made by the victim or by persons related to the victim': Department of Justice (Vic), *Adult Parole Board of Victoria* (Department of Justice, 2011) < <http://www.justice.vic.gov.au/home/about+us/our+organisation/business+area+profiles/justice+-+adult+parole+board+of+vic>> at 9 February 2012. The Members' Manual refers to 'representations made by the victim or the victim's family, or other relevant individuals': Adult Parole Board of Victoria (2011), 'Members' Manual 2011', above n 69, 35.

²⁷⁰ Adult Parole Board of Victoria (2011), above n 47, 28.

²⁷¹ *Corrections Act 1986* (Vic) s 74A. The victim submission must be made within the time specified in the notification: at s 74A(3).

²⁷² 'Criminal act of violence' is defined in *Corrections Act 1986* (Vic) s 30A to cover various assaults, sex offences, stalking, child stealing, kidnap, aggravated burglary or conspiracy/incitement to commit/attempt to commit any of these offences.

²⁷³ *Corrections Act 1986* (Vic) s 30A(1). There are other categories of eligible victims covered by section 30A, some of which require the Secretary's written approval: *Corrections Act 1986* (Vic) s 30C(2).

²⁷⁴ *Corrections Act 1986* (Vic) s 74A(2).

²⁷⁵ *Corrections Act 1986* (Vic) s 74B(1).

²⁷⁶ *Corrections Act 1986* (Vic) s 74B(2). The Board may alternatively ask victims whether they wish to amend the submission so that it can be released to the prisoner or whether they wish to withdraw the submission: *Corrections Act 1986* (Vic) s 74B(2)(b).

- 4.94 The Council held two roundtable meetings with victims and victims' representative groups as part of its consultation process. One of the strongest themes to emerge from these roundtables was that victims felt that their voices were not adequately heard in the parole process. Those on the Victims' Register acknowledged that they were allowed to make written submissions and put a great deal of thought and effort into conveying their thoughts in writing, but because the Board does not provide reasons for its decisions nor any feedback to victims personally, they had no idea whether their submissions were considered, let alone taken into account.
- 4.95 This suggests that the Board may not be making clear enough to victims that it is obliged by the legislation to take into account their submissions and that it indeed *always* takes victims' submissions into account. The Adult Parole Board advised the Council that a fact sheet for victims ('General Guide for Victims') has been available since July 2009. However, as noted above, the Adult Parole Board's collection of fact sheets is not available on the internet, and the list of available fact sheets can only be found at the back of the Adult Parole Board's annual report.²⁷⁷ The Council was also advised by the Adult Parole Board that its General Manager runs information sessions for victim support groups.
- 4.96 There was concern expressed at the Council's victims' roundtables that some victims are illiterate or have limited skills in writing and are therefore at a disadvantage in making submissions to the Board. In this regard, the Victims Support Agency advised the Council that victims may – if they are eligible²⁷⁸ – receive assistance from the Victims Assistance and Counselling Program (VACP) in preparing their submissions. However, only some victims can access this service.²⁷⁹ Further, the Victims Support Agency must remain impartial and cannot suggest what a victim might write, but rather can only prompt the victim by asking questions.²⁸⁰
- 4.97 Many participants in the Council's roundtables thought that victims ought to be able to attend parole hearings personally to make their submissions – either in the presence or in the absence of the offender, according to the victim's wishes.
- 4.98 VACRO commented on the importance of engaging others in the parole process, as this allows others to become more engaged with the prisoner's reintegration process:
- 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.²⁸¹
- 4.99 When asked to clarify what is meant by 'informal manner', VACRO responded that it 'supports the Board accessing a range of information from a range of parties and having a high degree of flexibility in doing this (in keeping with the engaged case management approach)'.²⁸² VACRO suggested that the Board should consider hearing from family members in person or by prearranged telephone

²⁷⁷ Fact Sheet 4 is 'General Guide for Victims': Adult Parole Board of Victoria (2011), above n 47, 50. See further Recommendation 10 above.

²⁷⁸ There are separate eligibility criteria for the two Victims Assistance and Counselling Program services: 1. Practical support – victims of a violent crime against the person perpetrated in Victoria, reported and unreported; 2. Counselling service – primary and secondary victims of violent crime, including family members of homicide victims; the crime must have occurred within the last two years in Victoria and was reported to police: Email from Victims Support Agency to Sentencing Advisory Council, 4 November 2011.

²⁷⁹ As at 31 October 2011, 29% of prisoners serving a sentence for a serious offence against the person had victims who were on the Victims' Register: Email from Victims Support Agency to Sentencing Advisory Council, 14 November 2011.

²⁸⁰ Meeting with Victims Support Agency (27 October 2011).

²⁸¹ Submission 9 (Victorian Association for the Care and Resettlement of Offenders).

²⁸² Email from Victorian Association for the Care and Resettlement of Offenders to Sentencing Advisory Council, 17 October 2011.

calls, where the support of family is a key consideration.²⁸³ VACRO recognised that some material provided by friends, family or potential employers may be sensitive, and the Adult Parole Board should maintain mechanisms to protect it.

- 4.100 The Council agrees that it may be beneficial to some victims to have an alternative to a written submission. Allowing victims to appear in person at Board hearings is unlikely to be practical under current Board arrangements. There does not seem to be any good reason why victims could not provide the Board with a prerecorded audio or a videotaped submission in place of a written submission, if they wished to do so. This would require an amendment to section 74A of the *Corrections Act 1986* (Vic). However, a thorough examination of victims' needs in the parole system is beyond the scope of this report.
- 4.101 The Council suggests that the government conduct further research into the issue. In addition to considering victim submissions to the Board, it would be worthwhile to examine the possibility of some kind of restorative justice process for consenting victims and offenders.

Access to reasons

- 4.102 Currently, there is no requirement that the Board provide written reasons for its decisions, other than for revocation of parole.²⁸⁴ However, if the Board speaks to a prisoner in person or via video conference, then reasons for cancellation, denial or revocation are 'generally provided'.²⁸⁵ If the decision is made 'off the file or on the papers', the Board's process is:

a note is sent to the prisoner/parolee via the records area at the relevant prison (if the offender is in prison), which outlines the decision and a brief reason for the decision, e.g. 'parole cancelled – conviction' (if the offender is at large and a cancellation decision is made then it is recorded on the document management systems).²⁸⁶

- 4.103 Some participants at the Council's victims' roundtables were of the opinion that if the offender can be told the reasons for the Board's decision, then the victim should be too. At present, information that may be provided (by the Victims Support Agency) to victims on the Victims' Register is limited by the Act to include:
- details about the length of the prisoner's sentence for the relevant offence and of any other sentences of imprisonment the prisoner must serve;
 - the date on which (and the circumstances in which) the prisoner was, is or is likely to be released for any reason, for example, bail, parole or custodial community permit; and
 - details of any escape by the prisoner from the legal custody of the Secretary or any other person.²⁸⁷
- 4.104 Parole boards in some other jurisdictions (with more legalistic structures than Victoria's) are required to provide written reasons for their decisions. For example, reasons must be provided when parole is refused in Queensland, Tasmania and South Australia.²⁸⁸

²⁸³ Ibid.

²⁸⁴ *Corrections Act 1986* (Vic) s 74(8). Revocation is different from cancellation. Revocation occurs between formal granting of parole and actual release. See Chapter 2.

²⁸⁵ Email from the Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

²⁸⁶ Ibid.

²⁸⁷ *Corrections Act 1986* (Vic) s 30A(2).

²⁸⁸ *Corrective Services Act 2006* (Qld) s 193(5)(a); *Corrections Act 1997* (Tas) s 72(8); *Correctional Services Act 1982* (SA) ss 67(9)(a)–(b).

- 4.105 In New South Wales, the Parole Authority must record (in its minutes of meetings) reasons for all decisions relating to granting or refusing parole, and cancellation or refusal to revoke parole.²⁸⁹ In *Al Qatrani v Parole Authority of New South Wales*,²⁹⁰ the Supreme Court of New South Wales held that, in the course of recording its reasons, the Parole Authority failed to provide reasons that properly or adequately explained that decision. The court stated that:
- It seems to me to be sensible, and not contrary to relevant authority, that an administrative body that chooses, or is required, to furnish reasons for a decision, should thereby become exposed to scrutiny in the same way as a judge or magistrate. The wisdom that informs the standard in the latter case could not sensibly be discarded when applied to *the particular circumstances of the defendant* in the present case. If it were otherwise, an obligation or decision to give reasons would have the potential to degenerate into formulaic repetition and the production of reasons of no practical use.²⁹¹
- 4.106 The South Australian legislation requires these reasons to include details of 'any matters that might assist the prisoner in making any further application for parole'.²⁹² The reasons provided by the South Australian Parole Board are quite lengthy (approximately two pages) and, the Council was told by the Secretary of the South Australian Parole Board, almost akin to reasons for decision recorded by courts.²⁹³
- 4.107 The Parole Board of New Zealand publishes its decisions in cases of public interest.²⁹⁴ The published examples are frequently lengthy and are also akin to reasons for decision provided by courts.
- 4.108 In the Australian Capital Territory, the legislation governing the Parole Board does not require it to provide reasons for its inquiry decisions. However, the Parole Board is subject to the duty to provide reasons under the *Administrative Decisions (Judicial Review) Act 1989 (ACT)* – which is clearly applicable to decisions of the Parole Board – and a prisoner need not commence a judicial review application in order to obtain reasons.²⁹⁵
- 4.109 Several submissions to the Council specifically referred to the desirability of the Victorian Board providing prisoners/parolees with reasons for decisions.²⁹⁶ For example, the Human Rights Law Centre submitted that the provision of reasons 'can only serve to benefit the process and enhance prisoners', and indeed the community's, confidence in it'.²⁹⁷

²⁸⁹ *Crimes (Administration of Sentencing) Act 1999 (NSW)* s 193C. Copies of these reasons must be supplied on request to the Minister, Commissioner and the Probation and Parole Service: *Crimes (Administration of Sentencing) Act 1999 (NSW)* s 193C(3).

²⁹⁰ *Al Qatrani v Parole Authority of New South Wales* [2007] NSWSC 1270 (9 November 2007).

²⁹¹ *Ibid* [44] (emphasis in original).

²⁹² *Correctional Services Act 1982 (SA)* s 67(9)(b).

²⁹³ Telephone call with Kevin Hill, Secretary of the South Australian Parole Board, 10 November 2011.

²⁹⁴ See New Zealand Parole Board, *Decisions of Public Interest* (New Zealand Parole Board, 2012) <<http://www.paroleboard.govt.nz/decisions-statistics-and-publications/decisions-of-public-interest.html>> at 10 February 2012.

²⁹⁵ Groves (2011), above n 99, 36.

²⁹⁶ Submission 3 (Law Institute of Victoria); Submission 4 (Human Rights Law Centre); Submission 5 (Australian Community Support Organisation); Submission 9 (Victorian Association for the Care and Resettlement of Offenders); Submission 7 (Jesuit Social Services) – although Jesuit Social Services was of the view that procedural fairness safeguards, such as access to reasons, should be applicable only if the government decides to introduce statutory criteria to guide the Board's decision-making.

²⁹⁷ Submission 4 (Human Rights Law Centre).

- 4.110 VACRO stated in its submission that the lack of reasons makes some Board decisions appear mysterious or inconsistent, and this can create high levels of anxiety among the prison population. VACRO quoted a support worker as saying:
- [prisoners] sometimes indicate their distrust for the APB ... 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.²⁹⁸
- 4.111 Another VACRO worker said in relation to a client who had been denied parole, despite completing the program as directed by the Board:
- 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.²⁹⁹
- 4.112 On a further occasion, a VACRO support worker emailed the Adult Parole Board asking for reasons why a client's parole application was declined and why the client was required to serve a further three months. The Adult Parole Board responded that: 'It's the policy of the Board not to give reasons for their decisions'. It later became apparent that the client was told to serve the extra time in order to address his mental health issues and stabilise his medication.³⁰⁰
- 4.113 VACRO is in favour of the Board providing reasons for refusal of parole, on the ground that this would assist offenders and support workers to address areas of need and focus release planning in a manner most likely to be acceptable to the Board.
- 4.114 There would be advantages in having written reasons from the Board for key parole decisions. It would improve the transparency of its decision-making process, allowing prisoners, victims and the community more generally to understand the Board's reasoning, thereby increasing trust and confidence in the Board. Written reasons would allow prisoners whose parole has been denied to know which information was most important in the Board's decision and what to concentrate on for the next attempt at parole. Written reasons may also allow prisoners to correct technical inaccuracies. Further, the very act of reducing a decision to writing may improve the intellectual rigour of the Board's decision-making processes and have the potential to improve the quality of its decisions.
- 4.115 The Council agrees in principle that in the interests of transparency, the Board should provide written reasons for its decisions. However, from a practical standpoint, within the framework of the Board's current approach to parole – inquisitorial, case management-based, processing a very large number of matters – it would not be reasonable without additional resourcing to require the Board to produce anything but very short reasons for its decisions. In its parole decisions, the Board must weigh the risk to the community in releasing the prisoner (or in allowing the prisoner to continue on parole) against the risk to the community if the person is denied parole or has parole cancelled and is released without supervision and support at the end of the sentence. This sort of decision does not lend itself easily to written reasons and would no doubt require a great deal of time and thought on the part of Board members.

²⁹⁸ Submission 9 (Victorian Association for the Care and Resettlement of Offenders) (VACRO Transitional Support Worker 3).

²⁹⁹ Ibid (VACRO Transitional Support Worker 2).

³⁰⁰ Ibid 13 (VACRO Transitional Support Worker 1).

- 4.116 One alternative would be for the Board to produce brief written reasons for its decisions and publish these (de-identified). For example: 'parole denied due to failure of prisoner to actively participate in x course and failure to participate in individualised treatment plan to address mental health issues. Prisoner is considered too great a risk to release on parole'. The prisoner would receive a copy of the written reasons for decision at the end of the Board hearing. The disadvantage of such an approach is that it may become a formulaic exercise, given the large number of cases processed by the Board and the very limited time per case. The Council does not believe that there would be any particular advantages to this approach, especially as the Board generally provides verbal feedback to prisoners receiving adverse decisions (although the Council acknowledges the difference between 'feedback' and 'reasons').
- 4.117 The Board should, however, at least be clear about the test or tests that it is applying in its decision-making. A statement to this effect could be incorporated into every parole hearing.
- 4.118 There are other mechanisms to encourage rigorous decision-making that are canvassed elsewhere in this report. These may assist members to make better quality decisions. Periodic workshops for Board members addressing, for example, the reasoning process in parole decision-making and how the purpose and principles of parole translate into practice may also be useful.

Recommendation 11

Explanation of test to prisoner

The Board should, at some stage in every parole hearing at which a prisoner or parolee is present (whether in person or via video link), explain which test or tests it is applying in its decision-making.

Right of appeal

- 4.119 One of the fundamental components of procedural fairness is having an avenue to review and redress a decision. The New Zealand and Canadian parole systems both allow for appeal of board decisions.³⁰¹ In Australia, New South Wales, Queensland and Western Australia provide some statutory avenues of review.³⁰²
- 4.120 In Victoria, there is no statutory provision for appeal from the Board's decisions.³⁰³ However, an offender or an offender's representative may request (in writing) that the Board review a previous decision.³⁰⁴ A request for review is unlikely to be granted by the General Manager if no new information is provided by the prisoner (for example, evidence of a successfully completed program

³⁰¹ In Canada, an offender may appeal a decision of the Board to the Appeal Division on grounds including failure to observe a principle of justice; error of law; breach of, or failure to apply, a policy; making a decision based on erroneous information; or acting without jurisdiction: *Corrections and Conditional Release Act*, SC 1992, c 20, s 147. In New Zealand, an offender may apply in writing for the Board to review a decision on grounds set out in the legislation, and an offender may appeal that review decision to the High Court on the ground that the order ought not to have been made: *Parole Act 2002* (NZ) ss 67–68.

³⁰² *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(2) (review by Board regarding denial of parole); *Corrective Services Act 2006* (Qld) s 196 (review by Board regarding denial of parole); *Sentence Administration Act 2003* (WA) s 115A (review by Board of deny, defer, suspend or cancel parole).

³⁰³ Although not appellable, the Board's decisions are subject to judicial review pursuant to Order 56 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) ('Supreme Court Rules'). This is discussed in Chapter 3 at [3.122] – [3.134].

³⁰⁴ Adult Parole Board of Victoria (2011), above n 47, 27.

that the Board had thought was not completed).³⁰⁵ If the General Manager considers that there is reason for a review, the case is placed on the agenda for the Board to consider in the same manner as any other case. The Board advises that it will not necessarily be differently constituted for the review, 'although it is likely to be so – owing more to the vagaries of the roster for Board members [than] for any other reason'.³⁰⁶

- 4.121 There are no statistics available on the number of reviews and their outcomes, and the process is not documented in detail in any Adult Parole Board publications.³⁰⁷ There is also nothing in the Members' Manual about review of parole decisions by the Board. The Council is advised that there is a small amount of information on reviews for prisoners in the Adult Parole Board's 'Fact Sheet 1: General Guide to Parole'.³⁰⁸ However, as discussed above, the Adult Parole Board's fact sheets are not easily accessible.
- 4.122 This lack of publicly available information is likely to give the impression that the review process offered by the Board is less than effective and genuine.
- 4.123 The Council is of the view that it is a matter for the Board to screen review applications, rather than the General Manager. The Council is also of the view that the Adult Parole Board should publish review statistics in its annual report. The Adult Parole Board should issue a practice note on the review process (or include information on the review process in its Members' Manual) and improve the information provided to prisoners on review.

Recommendation 12

Review of decisions

- a. The Adult Parole Board should ensure that all decisions about review applications are taken by the Board differently constituted, rather than by the General Manager.
- b. The Adult Parole Board should issue a practice note or include a section on the review process in its Members' Manual.
- c. The Board should ensure that prisoners are informed of the review process, for example, by developing a review application sheet that can be distributed with notices of parole decisions. A separate fact sheet on the review process is also advisable.
- d. The Adult Parole Board should publish review statistics in its annual report, including the number of reviews requested, the number rejected for consideration (and the reason/s for rejection), the number of reviews completed by the Board and the outcomes of these reviews.

³⁰⁵ Email from the Adult Parole Board of Victoria to Sentencing Advisory Council, 20 October 2011.

³⁰⁶ Ibid.

³⁰⁷ A rough estimate obtained from the General Manager puts the number of reviews at approximately two per week, with one successful, one not: Meeting with Adult Parole Board (21 October 2011).

³⁰⁸ Ibid.

- 4.124 Should the government decide to introduce statutory criteria and repeal section 69(2), this would probably mean that the government would also need to legislate for a right to appeal from Board decisions. One option would be to establish an independent parole review council that offers an effective and genuine means of administrative review – along the lines of the New South Wales Serious Offenders Review Council (SORC).
- 4.125 In New South Wales, the Serious Offenders Review Council – an independent statutory authority set up under the New South Wales parole legislation – has jurisdiction to review prison segregation decisions at the request of serious offenders.³⁰⁹ The Serious Offenders Review Council is obliged to hear all such applications, and typically reviews between 35 and 50 segregation decisions each year.³¹⁰ Although the Serious Offenders Review Council only overturns a small number of these decisions, a large number of orders are revoked by prison officials shortly after a prisoner lodges an application for review (30% to 40% of cases), presumably because prison officers believe the decisions will not stand up to scrutiny.³¹¹ Matthew Groves comments:

Despite its huge prison population, NSW has witnessed almost no court challenges to segregation decisions ... it is almost certainly the case that the inclusion of clear review procedures has lessened the level of complaints about the use of administrative segregation and the willingness of prisoners to challenge such decisions in the courts. Any challenge would almost certainly fail if a prisoner had not exercised the right of administrative review ... The other more likely reason that segregation decisions have remained out of the courts [in NSW] is the independence of the review body. The Serious Offenders Review Council is clearly separate from the prison officials who make segregation decisions.³¹²

Corrections Victoria and procedural fairness

- 4.126 The *Corrections Act 1986* (Vic) makes clear that it is only the Adult Parole Board – as defined in section 61(2) – that is exempt from the requirements of natural justice. Those who assist in the Board's processes, such as administrative officers, enforcement personnel and advisers to the Board make no decisions and are therefore not bound by the rules of procedural fairness. However, it is possible that Corrections Victoria officials who make decisions relating to breach of parole (not involving further offending)³¹³ would be subject in principle to the rules of natural justice.³¹⁴ For this to be the case, the decisions that Corrections Victoria officials make would need to be deemed 'decisions' according to administrative law.

³⁰⁹ Serious offenders are defined as those serving sentences for murder and/or life imprisonment, or a non-parole period of at least 12 years, or those who are deemed to require management as a serious offender by a court, Parole Authority or Commissioner: *Crimes (Administration of Sentences) Act 1999* (NSW) s 3(1) (definition of 'serious offender'), 195 (establishment of the SORC).

³¹⁰ Groves (2011), above n 99, 45.

³¹¹ Ibid.

³¹² Ibid.

³¹³ See discussion in Chapter 5, [5.67]–[5.77].

³¹⁴ Groves (2011), above n 99, 19. This is because natural justice applies to public officials who have decision-making power and can thereby adversely affect the interests of others: see, for example, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 311 (McHugh J).

Chapter 5

Information sharing for the proper management of parolees

Introduction

- 5.1 The terms of reference ask the Council to consider 'whether the existing legislative and administrative framework facilitates adequate information sharing between relevant agencies for the proper management of parolees'.
- 5.2 The relevant agencies responsible for the management of parolees are the Adult Parole Board, Corrections Victoria and Victoria Police. Achieving the purpose of parole – which is to promote public safety by supervising and supporting the release and integration of prisoners into the community, thereby minimising their risk of reoffending (in terms of both frequency and seriousness) while on parole and after sentence completion³¹⁵ – relies to a high degree on the effective exchange of information between these three agencies.
- 5.3 Despite the limitations to the Council's review,³¹⁶ it is clear to the Council that there is no overarching coordinating body or framework for the management of parolees in Victoria; nor is there any inter-agency information-sharing framework to ensure the effective sharing of information between the three agencies. Rather, each of the agencies has its own internal administrative guidelines and work instructions. There are also several bilateral agreements or memoranda of understanding relating to information sharing between the agencies.³¹⁷
- 5.4 The Adult Parole Board has guidelines and work instructions set out in its Members' Manual and Secretariat Manual (which is divided into a Registry Manual and an Operations Manual).

³¹⁵ See Chapter 3, [3.16].

³¹⁶ See Chapter 1, [1.46].

³¹⁷ The Council had access to a number of these agreements.

- 5.5 Corrections Victoria has detailed instructions for case managers in its Deputy Commissioner's Instructions (DCIs).
- 5.6 There are brief references to parole in various Victoria Police manuals and guides; however, many of Victoria Police's relevant procedures are not documented and/or were not readily accessible to the Council.
- 5.7 A Quarterly Practice Committee, comprising representatives from the Adult Parole Board and Corrections Victoria, provides a forum for those two agencies to discuss issues as they arise. Victoria Police is not represented on this committee.
- 5.8 From early 2011 and continuing to date, all three agencies have conducted various internal reviews and initiated some operational improvements, in recognition of weaknesses in their information-sharing arrangements. The shifting nature of the arrangements has made it difficult for the Council to document them, particularly as many of the changes have not yet been formally documented by the agencies themselves.
- 5.9 The Council held a series of individual meetings with agency representatives. The Council also conducted an inter-agency information-sharing workshop, which was attended by representatives from all three agencies. Participants in this workshop acknowledged that information sharing is a legitimate issue in parole. The Adult Parole Board in particular saw value in addressing gaps in information exchange and better clarifying the roles and responsibilities of the agencies.³¹⁸
- 5.10 This chapter focuses on the extent to which the various existing legislative provisions and administrative arrangements inhibit or promote the effective sharing of information between the agencies. In the first section of the chapter, the Council describes and analyses current information-sharing arrangements under each of the three basic elements of the management of parolees:
- the preparation for and granting of parole;
 - the supervision and management of parolees; and
 - the responses to actual or suspected breaches of parole.
- 5.11 Throughout this discussion, the Council examines various process barriers to good information sharing, for example, work procedures that affect whether particular information is provided or not, prohibitions against or restrictions on certain types of information sharing and the provision of untimely or inaccurate information.
- 5.12 In the second section of the chapter, the Council looks at some further potential barriers to effective information sharing in the parole context.

³¹⁸ Inter-agency Information-Sharing Workshop (4 October 2011).

Process-related barriers

Information relating to the preparation for and granting of parole

- 5.13 Chapter 3 discusses the wide range of information that the Board must consider when deciding whether to grant parole. The various types of information are set out in Table I (page 27).
- 5.14 The material considered by the Board comes from a range of sources. Corrections Victoria generates much of the material, but other material comes from the sentencing court. It can also come from practitioners such as psychologists or psychiatrists, victims of the offender, as well as offenders themselves and their families.
- 5.15 Corrections Victoria is a key source of information for the Board.
- 5.16 The DCIs provide guidance to Community Correctional Services staff on how to assess prisoners for parole and how to prepare various reports for the Board.³¹⁹ Further detailed information and instructions about conducting risk and criminogenic needs assessments of prisoners using the Victorian Intervention Screening Assessment Tool (VISAT) are contained in a VISAT Administration Manual.³²⁰
- 5.17 The existence of these detailed instructions promotes the effectiveness of this information by providing a mechanism to ensure that information is prepared in a timely and consistent manner. The Quarterly Practice Committee involving Corrections Victoria and the Adult Parole Board provides an avenue for communication to address any systemic issues about the form and timeliness of the information.
- 5.18 The information in reports from Corrections Victoria is currently provided to the Board only. As discussed in Chapter 4, such information is not available to the prisoner (or others, such as victims). This means that the prisoner is not in a position to examine the information and to challenge any inaccuracies in it. Recommendation 7 seeks to provide, as far as practicable, some scope for the accuracy of information that is before the Board to be scrutinised and tested by the prisoner.
- 5.19 Much of the information provided to the Board, however, would not be released to the prisoner under Recommendation 7. The high volume of cases and limited time available to the Board mean that the Board is likely to place considerable reliance on the information contained in reports before it. The inquisitorial nature of the Board's processes makes it vitally important that the Board itself tests the information by questioning the authors of those reports. Recommendation 8 addresses this.
- 5.20 Some information, such as information about the nature and circumstances of the offence for which the offender was imprisoned, comes from the sentencing court. It is possible to have a high degree of confidence in the accuracy of this information, because it is the product of an adversarial court process in which the offender has had the opportunity to scrutinise the information and challenge its accuracy. Such information is also subject to appeal processes to rectify any inaccuracy.
- 5.21 Other information considered by the Board can come from a range of sources and may include:
- reports from a psychologist or psychiatrist who is treating the offender;
 - submissions from a victim of the offender, or the family of such a victim; or
 - submissions from the offender's own family.

³¹⁹ The relevant DCI on parole assessment is: Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.2: Parole Assessment and Advice', (2011) 1 ('Correctional Management Standard A1').

³²⁰ Corrections Victoria (2009), above n 120.

- 5.22 This information is not available to the offender. As such, the offender is not in a position to examine the information and to challenge its accuracy or credibility.
- 5.23 As with the information provided by Corrections Victoria discussed above, this makes it important that the Board satisfies itself of the accuracy of the information.

Information relating to the supervision and management of parolees

- 5.24 Corrections Victoria has the primary responsibility to ensure that the parolee complies with any parole conditions.
- 5.25 Police also have an important role. The most obvious one is in relation to monitoring parolee compliance with the condition to not commit further offences; however, police are also potentially in a position to monitor compliance with some parole conditions. For example, a parolee may be subject to a condition to abstain from alcohol, and police may come into contact with the parolee while the latter is drunk in a public place.
- 5.26 In order for Corrections Victoria and Victoria Police to fulfil these roles, they need to have access to information that the person is on parole and information about the conditions of parole.

Transmission of information to Corrections Victoria

- 5.27 Once the Board makes a parole order, Adult Parole Board staff enter the decision into the E-Justice IT system.³²¹ E-Justice automatically transfers the information to Corrections Victoria's Prisoner Information Management System (PIMS).³²² The transfer is manually checked and confirmed by two staff members of the Adult Parole Board.³²³ Corrections Victoria staff also have full access to parole order and conditions information via their independent access to E-Justice.
- 5.28 PIMS is the system used by prison staff, whereas Community Correctional Services staff use E-Justice. Originally, E-Justice was to be rolled out to prisons as well, but this did not happen, which has resulted in the continued operation of PIMS. The information in PIMS is accessible by staff of both the Adult Parole Board and Corrections Victoria.
- 5.29 One piece of information that is not transferred to Corrections Victoria by the Adult Parole Board is the classification of a parolee as a high-profile offender ('red dot cases'). The Adult Parole Board's Secretariat Manual defines 'red dot cases' as high-profile cases that draw ongoing media attention or involve offenders with severe mental health issues, and directs that classification is to be carried out by the Chair and General Manager.³²⁴ A 'red dot' classification is not entered into E-Justice or PIMS, as it is considered an 'internal APB process'.³²⁵

³²¹ E-Justice is part of the Criminal Justice Enhancement Program (CJEP). The Adult Parole Board began using E-Justice in May 2006. The CJEP systems are referred to collectively as the Integrated Justice System (IJS) suite of applications. The CJEP systems reside in a complex set of networks in Victoria Police and the Department of Justice. IJS also includes secure links between the Department of Justice, Victoria Police, the Office of Public Prosecutions, Corrections Victoria and private prison providers, to enable the sharing of information. Law Enforcement Assistance Program (LEAP) data, which are owned by Victoria Police, are available to be viewed by Department of Justice staff through the E-Justice applications.

³²² The prisons do not use E-Justice, rather only the Prisoner Information Management System (PIMS). PIMS came into existence in the 1970s. The Adult Parole Board stores and manages its information in both systems, as does Community Correctional Services. The Adult Parole Board of Victoria's annual report for 2010–11 states that PIMS 'still remains the database of record': Adult Parole Board of Victoria (2011), above n 47, 11.

³²³ Adult Parole Board of Victoria, 'Secretariat Manual – Operations Manual' (n.d.).

³²⁴ Ibid.

³²⁵ Meeting with Adult Parole Board (22 November 2011).

Transmission of information to Victoria Police

- 5.30 The Law Enforcement Assistance Program (LEAP) is a dynamic database designed and used primarily for operational policing purposes. LEAP has been available to police in the field via mobile data terminals in vehicles since approximately March 2011. Members on foot and bicycles are in radio contact with other members who can access LEAP for them. Thus, since early 2011, police members have had access to parole information in the field.³²⁶
- 5.31 Since May 2011, Victoria Police has made some changes to operating procedures around information sharing.³²⁷ A LEAP 'parole interest flag' is now displayed on a parolee's summary screen and also on the 'Attendance and Custody' page.³²⁸ Prior to this, it was not immediately obvious to members using LEAP that a particular person was a parolee.
- 5.32 In its submission, Victoria Police told the Council that 'special conditions' attached to a parole order should be available in LEAP from late August 2011; however, as at November 2011, no special conditions are yet available in LEAP.³²⁹ The Council was told that there is a 'prompt' in LEAP to email Operation Repeat Offender Parole Enforcement (Operation ROPE), a unit of Victoria Police that is responsible for coordinating information about parolees and locating parolees whose parole has been cancelled,³³⁰ for further details.³³¹ Corrections Victoria told the Council that police are advised about the 'red special conditions'³³² only, as other conditions may not be relevant to their work and there could be privacy issues in disclosing other conditions.³³³ Victoria Police advised, however, that the Adult Parole Board would not generally provide these details to police unless specifically requested, due to, for example, an investigation.³³⁴
- 5.33 A further change is that new data about parolees are uploaded to LEAP once every business day. The upload of the complete list of parolees (which overwrites the existing list in LEAP) is performed by staff in the LEAP management unit.
- 5.34 When a person is brought into a police station, police can see on their LEAP summary page if the person is a parolee. The police record the person's attendance at the station using a new application on E-Justice. This application identifies parolees and automatically notifies their Corrections Victoria case workers. Every five days, a report is sent containing a list of parolees who have been in attendance at a police station, the reason for attendance and any action taken.
- 5.35 Victoria Police has access to only the 'Custody' and 'Attendance' modules within E-Justice. Members cannot use these modules to check if a person is on parole.³³⁵

³²⁶ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³²⁷ Submission 11 (Victoria Police).

³²⁸ Although there is a link between E-Justice and LEAP, this is currently limited to the display of the 'parole interest flag' in LEAP. Police cannot access other parole information on E-Justice: Meeting with Adult Parole Board (22 November 2011).

³²⁹ Victoria Police advised the Council that there had been a delay due to formatting issues, and that the 'red conditions' were expected to be available in December 2011: Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³³⁰ Ibid. Victoria Police advised that Operation ROPE is also a central 'reporting point' for Victoria Police to pass information on to Corrections Victoria regarding possible breaches (either further offending or 'behavioural issues').

³³¹ Meeting with Adult Parole Board (22 November 2011).

³³² See [2.42] in Chapter 2 for a description of the 'red conditions'. See also Appendix 2.

³³³ Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011.

³³⁴ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³³⁵ Ibid.

- 5.36 Victoria Police has a memorandum of understanding with the Adult Parole Board under which Victoria Police and the Adult Parole Board agree to 'exchange all relevant information that is or may be useful to the other party at the earliest opportunity'. This is subject to legislative confidentiality and the privacy constraints in section 91 of the *Corrections Act 1986* (Vic) and sections 127A(1A)–(1B) of the *Police Regulation Act 1958* (Vic).
- 5.37 Section 91 provides that, except to the extent necessary to perform official duties, an officer (including any community corrections officer and any member of the public service) must not disclose information gained due to the officer's position or contained in material prepared by the officer under the *Corrections Act 1986* (Vic), unless the officer has the authority of the minister, Secretary of the Department of Justice or Regional Corrections Manager.³³⁶ Victoria Police commented in its submission that under ministerial authorisation, Corrections Victoria staff have access to some information from police databases.³³⁷
- 5.38 Police may seek information about parolees directly from the Adult Parole Board in certain circumstances, for instance, when undertaking covert investigations or attempting to locate a parolee for interview. The Adult Parole Board has requested that all such requests are sent via Operation ROPE.³³⁸ Corrections Victoria advised the Council that requests by Victoria Police members to both the Adult Parole Board and Community Correctional Services for information about parolees cannot always be met, due to privacy constraints.³³⁹ A Community Correctional Services representative told the Council that its officers were sometimes unsure about which information they could (and should) provide to Victoria Police.³⁴⁰

Prohibition against sharing other information held by the Adult Parole Board

- 5.39 In some cases, information obtained by the Board for the purpose of deciding whether to release an offender on parole may be relevant to the supervision and management of the parolee. Corrections Victoria has the information it provides to the Board, such as parole assessment reports. However, there may be information in victims' submissions, submissions by offenders or their families or reports from treating psychologists, psychiatrists or other specialists that is not available to Corrections Victoria and that could be relevant to the way that offenders are supervised.
- 5.40 The Adult Parole Board is prevented from sharing such information with Corrections Victoria by the confidentiality provision in section 30 of the *Corrections Act 1986* (Vic). Some of the information classified by section 30 as confidential includes:
- information given to the Board that is not disclosed in a decision of the Board or in any reasons given by the Board for a decision;
 - information relating to the personal affairs of a prisoner; and
 - information concerning the investigation of a prisoner's breach or possible breach of the law.³⁴¹

Section 30 is discussed later in this chapter.

³³⁶ *Corrections Act 1986* (Vic) s 91(1). Information may be disclosed to a court, the Minister, the Secretary, a regional manager, the Ombudsman's office or by the authority of the Minister, Secretary or regional manager.

³³⁷ Submission 11 (Victoria Police). Community Correctional Services staff have access to the criminal histories section of LEAP. Such access was approved by the then Minister for Corrections, Andre Haermeyer, on 10 December 2004: Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011.

³³⁸ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³³⁹ Meeting with Corrections Victoria (5 September 2011).

³⁴⁰ *Ibid.*

³⁴¹ *Corrections Act 1986* (Vic) s 30(1) (definition of 'confidential information').

Administrative arrangements for the supervision and management of parolees

- 5.41 In supervising the parolee, community corrections officers are guided by the conditions on the order and by the guidelines set out in DCI 5.5, 'Offender Management – Parole Orders'.³⁴² DCI 5.5 was issued in its current form on 1 June 2011. DCIs were preceded by 'Director's Instructions'.³⁴³
- 5.42 The stated purpose of DCI 5.5 is:
- To ensure that each offender is managed in a manner that:
- Ensures order compliance.
 - Encourages them to accept responsibility for their actions and attitudes and develop a law-abiding lifestyle.
 - Is responsive to any special needs of the individual offender.
 - Ensures they are not punished over and above the sentence imposed.³⁴⁴
- 5.43 DCI 5.5 highlights that community corrections officers supervise parolees 'commensurate with [the parolee's] assessed risk/need'.
- 5.44 The DCIs provide for progress reports to be prepared by Community Correctional Services for the Adult Parole Board.³⁴⁵ Progress reports are only prepared at the request of the Board.³⁴⁶ The Board may also request a Community Correctional Services officer to attend a Board meeting/interview in person in order to provide assistance to the Board.³⁴⁷ Progress reports include material on compliance with parole conditions, employment and development of family and social networks and any concerns relating to the offender's risk of reoffending, such as association with other known criminals, suspected drug or alcohol use or any breakdown or difficulties in family or social support networks. These reports also include any recommendations as to changes of conditions. In the case of poor progress or non-compliance with conditions, Community Correctional Services may make a recommendation that the Board warns the parolee or cancels parole.

Serious violent offenders on parole: new procedures for supervision and management

- 5.45 An important component of the current DCI 5.5 not previously stated in guidelines is a set of procedures for the supervision of serious violent offenders on parole. 'Serious violent offenders' are defined as those who have been sentenced for the violent offences of murder, attempted murder, manslaughter, domestic homicide, defensive homicide, child homicide, arson causing death, kidnapping and intentionally causing serious injury (the latter where accompanied by two or more other – specified – offences).³⁴⁸

³⁴² Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders', (2011). This DCI states that it is to be read in conjunction with DCI 5.7: see Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.7: Offender Management – Court Orders', (2011) ('Correctional Standard B2 – Offender Management').

³⁴³ The Council was advised by Corrections Victoria that the content of the old Director's Instructions (issued in 2009) regarding parole supervision and breach was 'very much the same' as that of the current Deputy Commissioner's Instructions, with some 'periodic amendments': Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011. One exception is the new set of guidelines for the supervision and management of 'serious violent offenders' on parole, as discussed at [5.45]–[5.47].

³⁴⁴ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders', (2011), 1.

³⁴⁵ Ibid 8 ('Breach of Parole').

³⁴⁶ Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011.

³⁴⁷ Under *Corrections Act 1986* (Vic) s 73, corrections officers are subject to the direction of the Board.

³⁴⁸ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 5–6 ('Supervision of Serious Violent Offenders on Parole').

- 5.46 The set of procedures requires that Community Correctional Services staff:
- flag such offenders as 'high profile' on E-Justice and that they be managed by a leading community corrections officer.
 - manage such offenders under a high-risk supervision regime, regardless of the VISAT risk of reoffending. The high-risk supervision regime involves more frequent supervision (progressing from weekly supervision to monthly supervision) than for moderate or low-risk offenders.³⁴⁹
 - conduct a review of the case by a panel of specified senior staff (including a clinician) within six weeks of release and at three-month intervals.
 - review VISAT to ensure that the reoffending risk assessment is accurate, and if the offender is not assessed as high risk, determine whether an 'override' is appropriate given the seriousness of offending and information contained in VISAT.
 - examine whether the offender has completed appropriate programs in prison:
 - if the offender has completed appropriate programs, the panel must assist the case manager with case management strategies.
 - if the offender has not completed programs, the clinician must identify appropriate programs and arrange for an assessment to be conducted. The Board should be notified if the appropriate condition is not already on the parole order.³⁵⁰
- 5.47 Corrections Victoria's procedures around serious violent offenders have no connection to the Board's 'red dot' classification process. Nor does either agency inform the other (or Victoria Police) of its classification. Although Victoria Police obviously has access to parolees' criminal histories and can therefore see when parolees have committed serious violent offences, it may be useful for police members to be alerted to Corrections Victoria's 'high profile offender' classification (for example, by a flag in LEAP). Police will then be aware that a particular parolee is being managed under a high-risk supervision regime.

Information relating to breach of parole

Sharing information relating to breaches by actual or alleged further offending

- 5.48 The first standard condition of parole is to not commit any further offence. The purpose of parole is to promote public safety. Therefore, the most significant issues relating to breach arise where an offender is charged with or found guilty of offences while on parole.
- 5.49 When police charge a person with an offence, the details are entered into LEAP. This is linked to E-Justice, which causes an automatic notification to be sent to Community Correctional Services which, as outlined above, is obliged to prepare a report for the Adult Parole Board detailing the further offences.
- 5.50 The parolee may then be bailed.³⁵¹ Generally police prefer a 'fresh warrant for arrest', that is, one that is not linked to parole, as an arrest linked to parole cancellation 'puts the offender in the custody of Corrections Victoria, which in turn requires Victoria Police to apply to the Court to interview the parolee under s 464B of the *Crimes Act 1958*' about the further offence(s).³⁵²

³⁴⁹ Ibid 6; Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.7: Offender Management – Court Orders' (2011), 4.

³⁵⁰ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 6.

³⁵¹ Submission 11 (Victoria Police).

³⁵² Ibid.

- 5.51 Victoria Police comments: 'The reality is that parolees [whose parole has been cancelled] are generally wanted for other offences'.³⁵³ Victoria Police gave the Council examples of situations where the section 464B procedure must be followed. The first is when a parolee is arrested under the authority of a parole warrant and police find drugs or other evidence in the parolee's possession. The parolee cannot be interviewed about this evidence until police have applied to the court for leave to interview the person under section 464B. Another situation where a section 464B application must be made is where a parolee for whom a parole warrant has been issued has committed a further offence and police wish to search the parolee's home address for evidence. Such a search cannot be carried out under the authority of the parole warrant.
- 5.52 Victoria Police describes the section 464B procedure as 'time consuming for all parties', including Corrections Victoria and the courts, and has requested that the problem be addressed.³⁵⁴

Recommendation 13

Review of section 464B of the *Crimes Act 1958* (Vic)

The government should review the impact of section 464B of the *Crimes Act 1958* (Vic) on Victoria Police's procedures for dealing with parolees who are in breach of parole, and make any amendments necessary to streamline the process.

- 5.53 Once an offender is charged by police, DCI 5.5 contains brief guidelines to be followed by community corrections officers, as in such cases Community Correctional Services has no discretion:
- A case manager must prepare a further offences report for 'senior officer approval' and submission to the Adult Parole Board within two weeks of the breaching incident.
 - If the case manager becomes aware that a parolee has committed a serious offence, the case manager must forward a special report to the Adult Parole Board within 48 hours.
- 5.54 Upon receiving a breach report from Community Correctional Services, Adult Parole Board registry staff list the matter for a Board meeting. Emergency cases are discussed at the next available meeting. If there is potential danger to the community or to the parolee then the matter is transferred to the full-time Board member, who will conduct a special meeting (via teleconference with other Board members). If an order for cancellation is made, the Adult Parole Board contacts Victoria Police to have a warrant issued. The warrant can be executed within 24 hours by Operation ROPE or local police. This is a new process where the Adult Parole Board sends information directly to Victoria Police central records and emails Operation ROPE. This has reduced the time between notification of a cancellation decision by the Board and the execution of a warrant to arrest. After a successful three-month trial with police, the new arrangements have been made permanent.³⁵⁵
- 5.55 Breaches by serious violent offenders (as discussed above) are the subject of special reports from Community Correctional Services.³⁵⁶ Adult Parole Board staff are then required to bring these cases to the attention of the Chair of the Board.

³⁵³ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³⁵⁴ Ibid.

³⁵⁵ Meeting with Adult Parole Board (22 November 2011).

³⁵⁶ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 8. Such reports must provide a 'comprehensive overview of the offender's compliance/attitude, with a definitive recommendation'.

- 5.56 The factors that the Board considers are examined in Chapter 3. As noted in that chapter, in many cases the Board will not cancel parole immediately but will decide to monitor the case pending the resolution of the charges.
- 5.57 The issue of alleged offending by parolees is complex, involving considerations of community safety, the risk of pre-empting court findings and the principle of innocence until proven guilty. In consultations, Adult Parole Board representatives expressed some uncertainty about the appropriateness of the Board attempting to assess the strength of a pending case against a parolee when deciding whether to cancel parole.
- 5.58 Adult Parole Board representatives also noted that there were practical obstacles to attempting to assess the strength of cases against parolees, as there is not always sufficient information available to the Board about alleged offending by parolees. For instance, the Board may not know precisely which charges are still pending (some may have been withdrawn) or whether it is a strong or weak case. An example given was an aggravated burglary charge that ended up as a trespass conviction. It is the responsibility of community corrections officers to contact police or access the Magistrates' Court's Courtlink database and obtain the correct information; however, not all officers complete this step. This leads to inaccurate information in the breach reports, on which the Board relies.³⁵⁷
- 5.59 Community corrections officers told the Council that they have trouble obtaining information from informants³⁵⁸ (presumably about the detail of the further offending, as any charges laid are automatically available on E-Justice). Police may be reluctant to disclose details as this may compromise their investigation.³⁵⁹
- 5.60 If the Board decides not to cancel parole immediately, it will notify Community Correctional Services. The case manager must then monitor the outcome of the further offence(s) and, after the case is heard, prepare a result report for 'senior officer approval' and submission to the Adult Parole Board. The case remains open until the Board advises that a decision has been made.
- 5.61 The Council has some concerns about the likely timelag between a parolee being charged with a new offence and the Adult Parole Board being informed of the outcome of the case via a result report. DCI 5.5 does not appear to provide for a specified time limit within which a result report must be provided.³⁶⁰ The Council understands that, under the previous Director's Instructions, this occurred within six weeks.³⁶¹ The Council suggests that Corrections Victoria ensure that a time limit for the result report is specified in the body of the DCI.
- 5.62 In its 2009 report *Sentencing, Parole Cancellation and Confiscation Orders*, the Council notes that Corrections Victoria's access to case outcome information and the provision of this information to the Adult Parole Board depend on the sentence imposed. In cases where the offender receives an immediate custodial sentence, Corrections Victoria receives an immediate notification of the outcome. However, if the sentence is non-custodial, no notification is provided to Corrections Victoria, particularly if the offender was on bail before sentence. In such cases, the Adult Parole Board may not be notified of the outcome within six weeks.³⁶²

³⁵⁷ Meeting with Adult Parole Board (22 November 2011).

³⁵⁸ Inter-agency Information-Sharing Workshop (4 October 2011).

³⁵⁹ Ibid.

³⁶⁰ In the 'Supplementary Information' section of the DCI, time limits (eight days after the court case) are specified for result reports in only two instances: where the court matter has been adjourned and where the offender fails to appear: Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 25. It seems likely that the failure to refer to a time limit for result reports more generally is an oversight.

³⁶¹ In consultations on a previous project, the Adult Parole Board told the Council that these result reports are provided within six weeks of the date of hearing: Sentencing Advisory Council (2009), above n 58, 57.

³⁶² Ibid.

5.63 In its report, the Council found that of the 117 cases of post-sentence parole cancellation, parole was cancelled within 28 days of sentence in 54.7% of cases and 29 days or more after sentence in 45.3% of cases. Although the Council considers that a mandatory requirement for parole cancellation to occur prior to sentence in every case is not appropriate, it has previously made a recommendation designed to improve the flow of information to Corrections Victoria and the Adult Parole Board.³⁶³

5.64 This recommendation is as follows:

In appropriate cases where an offender is convicted of offences committed while the offender was on parole, to reduce the frequency of parole cancellation occurring after sentencing for the offences:

- (a) The Office of Public Prosecutions and defence practitioners should ensure that the sentencing court is informed where possible that the offences of which the offender has been convicted were committed while the offender was on parole.
- (b) Upon conviction of an offender for offences committed on parole, the sentencing court is encouraged to provide information to the Adult Parole Board regarding the fact of conviction.
- (c) The sentencing court *may*, if it considers it to be appropriate, adjourn the sentencing hearing for up to one month after conviction of the offences committed on parole to allow the Adult Parole Board to act on this information and consider cancelling the offender's parole.
- (d) The Adult Parole Board is encouraged to notify the sentencing court regarding the cancellation of parole following conviction of the further offences so that the court may have regard to the parole cancellation in sentencing the offender.³⁶⁴

5.65 When questioned about the steps taken to date to implement this recommendation, Adult Parole Board representatives advised the Council that since the recommendation, the Adult Parole Board has been receiving 'more requests' for parole status updates from the Office of Public Prosecutions, which cannot access this information from E-Justice. In response, the Adult Parole Board provides a certificate pursuant to section 68(2) of the *Corrections Act 1986 (Vic)*. Adult Parole Board representatives advised that, in relation to the second bullet point, judges' associates advise the Adult Parole Board of convictions.³⁶⁵

5.66 The Council also asked Corrections Victoria about the results of this recommendation and was told: Anecdotal evidence suggests that the APB has had an increase in the number of parole cancellations when the offender is in custody on remand as they are unable to comply with the conditions of their [parole] order. The APB has not noted any increase in notifications from the court when they have convicted an offender for an alleged breaching offence and the [c]ourt has suspended imposing a sentence until the Board has made a determination [on cancellation of parole].³⁶⁶

³⁶³ Ibid.

³⁶⁴ Ibid 69 ('Recommendation 2') (emphasis in original).

³⁶⁵ Meeting with Adult Parole Board (22 November 2011).

³⁶⁶ Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011.

Sharing information relating to other types of breach

Information sharing between Corrections Victoria and other agencies

- 5.67 The Deputy Commissioner's Instructions (DCIs) also provide guidance to community corrections officers on how to deal with failures to comply with conditions, that is, breaches other than by further criminal offending. The relevant provisions are set out in two sets of instructions: DCI 5.5 and DCI 5.15.³⁶⁷ This is somewhat impractical, as it is necessary to jump from one DCI to the other at times in order to obtain a full set of instructions. Further, although DCI 5.5 is confined to parole, DCI 5.15 covers non-compliance with both parole orders and a variety of other (community-based) orders.
- 5.68 The section in DCI 5.5 on breach begins by instructing community corrections officers that the Adult Parole Board 'must be notified immediately of any incidents which may affect the integrity of the parole system and/or may raise community concern'.³⁶⁸ However, there is no elaboration on what types of incidents may fit within this description, and nothing that expressly relates this instruction to a clear statement of the purpose of parole, leaving substantial discretion to community corrections officers.
- 5.69 The Quarterly Practice Committee provides a formal avenue for communication between the Adult Parole Board and Corrections Victoria about a consistent understanding of – and approach to – the sorts of incidents that should result in immediate notification to the Adult Parole Board.
- 5.70 As explained in Chapter 3, under the DCIs, not all failures to comply with conditions are treated as breaches that must be reported to the Adult Parole Board:
- [In situations of a parolee's] continued non-compliance with some or all of their parole, or if an offender ceases contact with the CCS, a case manager must: Prepare a Breach Report for Senior Officer approval and submission to APB within two weeks of the breaching incident [and] ... [e]nsure that if the breaching incident is within the last two weeks before the parole order expires, the APB need to be notified urgently via phone and/or email. This will ensure they have the opportunity to act prior to their jurisdictional powers expiring.³⁶⁹
- The instructions provide for up to four unacceptable instances of non-compliance by a 'high' risk offender prior to a breach report being submitted to the Adult Parole Board. For a 'medium to low' risk offender, the instructions provide for up to six such instances before a breach report is submitted to the Adult Parole Board.³⁷⁰
- 5.71 DCI 5.15 provides that case managers 'must be satisfied that there is sufficient evidence available to prove the allegations, prior to seeking an Authority to Breach against an offender' from a senior officer. DCI 5.15 then refers the reader back to DCI 5.5 for the principles for initiating breach action.

³⁶⁷ DCI 5.5 covers both 'non-compliance' breaches and breaches in the form of further offending. DCI 5.15 covers only 'non-compliance' breach behaviour: Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (20-11); Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.15: Non-Compliance' (2011). In practice, DCI 5.5 is read in conjunction with DCI 5.15.

³⁶⁸ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.5: Offender Management – Parole Orders' (2011), 8.

³⁶⁹ Ibid.

³⁷⁰ Ibid 7.

- 5.72 A table in Part 5 of DCI 5.5 sets out the procedure for managing non-compliance with parole conditions (unacceptable absences) based on the parolee's assessed level of risk ('high' and 'moderate to low'). Steps to be taken according to varying levels of non-compliance range from preparing a 'compliance plan', to 'formal warning' and 'breach report to APB'.
- 5.73 'Acceptable non-compliance' and 'non-acceptable non-compliance' are defined in DCI 5.15.³⁷¹ Acceptable non-compliance 'usually involves, but is not restricted to, circumstances surrounding employment, education, health, and carer responsibilities'. Unacceptable non-compliance is when an offender does not provide a reasonable explanation or fails to provide the necessary documentation at the next scheduled appointment or within three days thereafter. Claims to have 'missed the bus', 'helped a friend' or 'slept in' are specified as unacceptable.³⁷²
- 5.74 DCI 5.15 notes two circumstances where an offender will not be given the opportunity to continue on a parole order while breach action is being initiated and adjudicated: where offenders present as a 'management problem' and where offenders 'threaten staff'. DCI 5.15 does not specify what exactly is meant by either of these circumstances, nor the steps that should be taken in the event of either, but presumably an urgent cancellation of parole decision would be sought from the Board. The Board is very responsive in these situations and can cancel parole on the same day if necessary. An example would be a parolee who is at risk of self-harm and/or represents a serious danger to the community and no longer has accommodation.³⁷³
- 5.75 The effect of the DCIs is that community corrections officers act as initial decision-makers in breaches of parole that do not involve further offending. Community corrections officers make 'judgment calls' about which breaches do not warrant any further action, which warrant action within Community Correctional Services (such as a 'compliance plan') and which need to be reported to the Adult Parole Board.
- 5.76 The DCIs and VISAT are not substitutes for the exercise of professional judgment, but rather are guides to its exercise. The risk tool (VISAT) used by Community Correctional Services is limited in that it cannot reliably identify individuals who will reoffend, and case managers need to look beyond formal risk assessment. Senior Community Correctional Services managers coach and supervise staff in making sound decisions about breach behaviour. The judgment call as to whether to notify the Adult Parole Board of breach behaviour and possibly recommend cancellation requires experience.
- 5.77 Community corrections officers appear to operate in a culture in which high value is placed on the wellbeing and rehabilitation of the offender. Proper supervision and support of parolees are of course integral to the success of parole, but it is vital that community safety considerations assume equal importance in Community Correctional Services culture. Undue emphasis on parolee rights and support (for example, by giving a breaching parolee many 'chances' before referring the matter to the Adult Parole Board³⁷⁴) may be inconsistent with the general principle relating to breach of parole decision-making,³⁷⁵ which places community safety as the 'paramount consideration'.

³⁷¹ Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.15: Non-Compliance' (2011), 9. The DCI actually refers to 'acceptable compliance' and 'non-acceptable compliance' but the Council has assumed that this is a typographical error.

³⁷² Ibid. DCI 5.15 is stated to cover 'key practices for managing non-compliance and applies to all supervised Court and Parole orders': Corrections Victoria, Community Correctional Services, 'Deputy Commissioner's Instruction 5.15: Non-Compliance' (2011), 1.

³⁷³ Meeting with Corrections Victoria (29 September 2011).

³⁷⁴ There is no direct evidence that this is occurring in practice.

³⁷⁵ See Recommendation 3, Chapter 3, above.

- 5.78 In consultations with the Council, representatives stated that the Adult Parole Board does not want to be 'swamped' by breach notifications from Corrections Victoria.³⁷⁶ Representatives told the Council that they did not want a system in which Community Correctional Services case managers are too risk averse to make decisions, and rather simply refer matters to the Adult Parole Board.³⁷⁷ On the other hand, representatives noted that the Board has at times been deprived of important information, due to errors by Community Correctional Services case managers.³⁷⁸
- 5.79 It is clear that the Adult Parole Board is comfortable with Corrections Victoria assuming some of the Board's decision-making function around breach of parole. However, the fact that the Adult Parole Board has had little input in determining the breach decision-making procedures to be followed by Community Correctional Services (in the form of the DCIs) is concerning. The Quarterly Practice Committee (constituted by the Adult Parole Board and Corrections Victoria) provides the Adult Parole Board with the means to review the DCIs and sign off on any amendments;³⁷⁹ however, this does not assure the Board of a direct role in deciding the content of the procedures.
- 5.80 The Council considers that since it is the Adult Parole Board, rather than Corrections Victoria, that is the body with jurisdiction to make parole decisions, the Adult Parole Board should take the lead role in determining the content of any breach decision-making procedures that are to be exercised by Community Correctional Services. The Board and Corrections Victoria could consider co-issuing a new DCI on breach of parole.
- 5.81 Although the Council considers the DCIs relating to breach of parole to be generally logical in their content, they do lack detail in some respects (as discussed above). Further, it is not user-friendly for the guidance on breach of parole to be spread across two DCIs (5.5 and 5.15). It would be preferable for all guidance relating to breach to be contained in the one DCI. The general principle for reporting breaches to the Adult Parole Board should be clearly linked to the (recommended) principle regarding decision-making on breach of parole.³⁸⁰

Recommendation 14

One DCI for breach, with the Adult Parole Board taking an active role in deciding content

The Adult Parole Board should take an active role in determining the content of Corrections Victoria's Deputy Commissioner's Instructions (DCIs) relating to procedures – in particular decision-making – around breach of parole.

There should be only one DCI relating to breach of parole. This DCI should set out a 'general rule' for the reporting of breaches by Community Correctional Services to the Adult Parole Board, and this general rule should be clearly linked to the principle for breach of parole decision-making, as set out in Recommendation 3 above.

³⁷⁶ Inter-agency Information-Sharing Workshop (4 October 2011).

³⁷⁷ Ibid.

³⁷⁸ Meeting with Adult Parole Board (22 November 2011).

³⁷⁹ Ibid.

³⁸⁰ See Recommendation 3, Chapter 3, above.

Information sharing between Victoria Police and other agencies

- 5.82 Victoria Police can play a vital role in relation to breach of parole cases prior to the laying of formal charges against a parolee for further offences. Police can also play an important role in relation to the breach of conditions that are not necessarily related to further offending. For example, a parolee may be subject to conditions limiting contact with children, and the police may be called to investigate if the parolee is found loitering near a school or playground.
- 5.83 The *Victoria Police Manual* (VPM), which is the main operating manual for police functions, duties and procedures, contains very limited information about parole. One part of the *Victoria Police Manual* provides that members must notify the 'relevant body' (not defined) if they detect a breach of parole.³⁸¹ A separate part of the *Victoria Police Manual* provides that when a member detects a breach of parole, they must submit a report of the circumstances to the Office of Correctional Services (for adult parole) and consult with the Office of Correctional Services prior to commencing proceedings.³⁸² Victoria Police advised the Council that it has recently issued a new 'Crime Department Instruction' about parole, which contains information about Operation ROPE, LEAP, the standard conditions of parole and information on reporting breaches of parole. The process of inserting the Crime Department Instruction into the *Victoria Police Manual* is currently underway.³⁸³
- 5.84 As noted above, LEAP was recently changed to make information about parole available to police in the field. The changes to LEAP also involved adding a tick box in the 'field contact report' screen, to enable members to record if they consider that the person who they come into contact with is in breach of a parole condition.
- 5.85 Under new procedures, when a member in the field identifies the person as a parolee, a brief description of the contact is sent to Operation ROPE. Operation ROPE enters the contact details, including details of any 'behavioural breach' or offence,³⁸⁴ into a purpose-built Access database.
- 5.86 The informant's report and a summary are then sent to a generic Corrections Victoria email address to inform Corrections Victoria.³⁸⁵ As detailed above, Corrections Victoria is then responsible for notifying the Adult Parole Board of any relevant breaches of parole. Operation ROPE provides information about parolees' behaviour directly to the Adult Parole Board in 'urgent' situations only, for example, a serious breach that impacts the community.³⁸⁶
- 5.87 At this stage, Corrections Victoria does not provide Victoria Police with any feedback regarding any action they have taken in relation to the parolee.
- 5.88 Police attend the Adult Parole Board on hearing days and are advised of the outcomes on the day.³⁸⁷

³⁸¹ Victoria Police, 'Operational Policing, Policy Rules (VPMP)', *Victoria Police Manual* (2011), 6 [8] ('VPMP Court Processes').

³⁸² Victoria Police, 'Operational Policing, Procedures and Guidelines (VPMG)', *Victoria Police Manual* (2011), 4 [7.1] ('VPMG Sentencing Orders').

³⁸³ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³⁸⁴ Submission 11 (Victoria Police). Such details may include who the parolee is associating with and where, presentation to police (for example if the parolee is under the influence of alcohol or drugs) and also information on offences that the parolee may be charged with on summons: Email from Corrections Victoria to Sentencing Advisory Council, 20 September 2011.

³⁸⁵ Submission 11 (Victoria Police). The Council was advised that the Adult Parole Board also has access to this inbox: Email from Corrections Victoria to Sentencing Advisory Council, 20 September 2011.

³⁸⁶ Email from Victoria Police to Sentencing Advisory Council, 2 December 2011.

³⁸⁷ Submission 11 (Victoria Police).

Summary of key issues

- 5.89 Key points about the information-sharing arrangements currently in place for the management of parolees in Victoria are as follows:
- There is no overarching inter-agency coordination of the parole system in Victoria.
 - There is no coordination or oversight of information-sharing arrangements between the Adult Parole Board, Corrections Victoria and Victoria Police.
 - The information-sharing requirements for the effective management of parolees are complex, and the sheer amount of information is (under the present system) difficult to manage.
 - Corrections Victoria has significant discretion in breach decision-making that relates to 'behavioural' breaches (as opposed to breaches in the form of further offending), whereby Corrections Victoria is essentially the 'gatekeeper' to the Adult Parole Board.
 - There is a possible tension between community corrections officers' role of 'supporting' the parolee's rehabilitation and integration back into the community and their role of 'enforcing' the conditions of parole.
 - There are 'gaps' in the flow of information, with all three agencies complaining of not being kept adequately 'in the loop' at various stages of the breach process.

The Council's view

Establishment of inter-agency parole coordination committee

- 5.90 There is no body or group that oversees the functioning of the parole system as a whole. This absence, combined with the lack (until recently) of an agreed, articulated purpose of parole and principles of parole decision-making, has resulted in uncertainty about agency roles and respective accountabilities. This in turn can result in breakdowns of communication and risks to community safety.
- 5.91 The Council commends the agencies on their recent efforts to improve their information-sharing arrangements. However, changes have been made by individual agencies on an ad hoc basis rather than in a coordinated manner that involves consultation with the other agencies. For example, the Council has documented recent changes made by Victoria Police to operating procedures. There are proposals on foot within Victoria Police to amend the *Victoria Police Manual* procedures and guidelines to document these procedural changes; however, at the time of writing, this had not yet occurred. Nor have consequential changes to procedures at the Adult Parole Board and Corrections Victoria been documented.³⁸⁸
- 5.92 It is not clear which mechanisms are in place for the communication of changes within any one agency to the other parole agencies, and there does not appear to be any coordinated approach to implementing and recording consequential changes in the other agencies' procedures. There is inadequate (and in some cases no) documentation of the existing procedures of each of the agencies, particularly as they relate to inter-agency cooperation.
- 5.93 As recent incidents involving parolees have highlighted, there are very high risks involved in the administration of the parole system. A reliable risk-management framework that operates across the agencies involved is a vital component of any inter-agency system. The Council notes that there is currently no overarching parole risk management structure in place.³⁸⁹

³⁸⁸ Inter-agency Information-Sharing Workshop (4 October 2011).

³⁸⁹ Within the time constraints of this reference, a review of the risk-management practices of each agency or those of parole systems in other jurisdictions was not possible.

- 5.94 Given the complexity of the parole system – involving as it does the three agencies of the Adult Parole Board, Corrections Victoria and Victoria Police – the Council considers it highly desirable to establish a high-level committee to coordinate parole activities across the agencies. The Adult Parole Board, Corrections Victoria and Victoria Police should all be represented on this committee.
- 5.95 The Council has purposefully left open the details as to how this committee should operate,³⁹⁰ although it has suggested some main aims and objectives, as well as recommended a number of important reviews that the committee should implement without delay. For example, the Council has recommended that the committee review the various manuals and procedure documents for each of the agencies to ensure that documents are compatible with the purpose of parole and principles of parole decision-making, and compatible with each other.

Recommendation 15

Inter-agency parole committee

- a. The responsible ministers should establish a committee to coordinate parole activities across the three agencies – the Adult Parole Board, Corrections Victoria and Victoria Police.
- b. The terms of reference and/or aims and objectives of this committee should include the following:
 - to oversee a coordinated approach to the management of parolees in Victoria;
 - to provide clarity and consistency around the respective functions and accountabilities of the Adult Parole Board, Corrections Victoria – Community Correctional Services and Victoria Police;
 - to ensure that the agreed purpose of parole is incorporated in all agency manuals/guides and that mechanisms are in place to ensure that agency practices and procedures are at all times consistent with this purpose;
 - to oversee the development and implementation of a risk-management framework across all three agencies;
 - to oversee the implementation of appropriate systems across the agencies, for example, change management and quality management processes; and
 - to provide the three agencies with a forum in which to exchange information about their procedures and/or parole decision-making practices and discuss issues that may arise.

Recommendation 16

Review of agencies' operating manuals

The proposed inter-agency parole coordination committee should, as one of its first tasks, oversee a review of the three agencies' manuals and operating procedures (as they relate to parole), with the view to making them consistent with each other and with the overall purpose of parole and principles of parole decision-making.

³⁹⁰ During consultations, the three agencies expressed the view that the actual implementation details (regarding the parole coordination framework) should be left to them to develop among themselves: Inter-agency Information-Sharing Workshop (4 October 2011). See Appendix I for a list of attendees.

- 5.96 In consultations with the Council, the agencies expressed concern about privacy constraints on information sharing and data exchange. Some agency representatives did not appear to have a clear or agreed picture as to what exactly these constraints are.
- 5.97 It was considered beyond the scope of this report to review how existing privacy legislation affects data exchange between the agencies carrying out their respective parole functions. However, the Council believes that a review is necessary. Such a review should aim to clarify exactly the privacy constraints that are in place and how they affect the information flow between agencies during the management of parole. Depending on the outcome of the review, legislative change may be necessary to facilitate appropriate information exchange. In the meantime, the proposed inter-agency parole coordination committee should establish priorities for data exchange.

Recommendation 17

Review of privacy laws relevant to parole

The government should review – in consultation with the proposed inter-agency parole coordination committee – privacy laws applicable to the parole system to determine whether legislative changes are necessary to allow for the adequate flow of information between the Adult Parole Board, Corrections Victoria and Victoria Police.

Development of an information-sharing framework

- 5.98 The Council's research and consultations on the information-sharing part of this reference revealed – unsurprisingly, given the lack of an overarching parole coordination structure – that there is no system-wide coordination of information sharing. Existing arrangements range from documented procedures, for example, in the form of Corrections Victoria's Deputy Commissioner's Instructions (DCIs), to informal arrangements. In consultations, the agencies noted the complexity of the information-sharing requirements surrounding the management of parolees, with one agency representative describing the challenge as one of trying to manage the 'tentacles of an octopus'.³⁹¹ Privacy law constraints and confusion about how constraints apply in the area of parole add to the complexity.³⁹²
- 5.99 The inadequacy of the current administrative structures means that information sharing among the three key parole agencies is far from seamless. This situation has the potential to detract from the agencies' ability to achieve the purpose of parole. Accurate and timely information sharing – particularly as it relates to breach of parole – is a vital element in the proper management of parolees. Both the timing and the content of information supplied to parole decision-makers are important. For instance, delays in advising the Adult Parole Board on the outcome of a criminal case against a parolee may mean that parole is not cancelled as soon as it should be, with concomitant risk to community safety. Insufficiently comprehensive or incomplete information provided to Corrections Victoria or to the Board about non-compliance (and past non-compliance) with conditions of parole inhibits good decision-making.
- 5.100 Although the existence of an inter-agency parole coordination committee should improve information-sharing practices among the agencies, the Council believes that the proposed committee should develop an information-sharing framework or agreement, in order to ensure appropriate coordination of information flow.³⁹³ Again, the Council leaves actual implementation details to the agencies to decide. The Council appreciates that the implementation of such recommendations may necessitate some additional funding for agencies.

Recommendation 18

Information-sharing framework

- a. Information sharing across the three main parole agencies must occur in a coordinated manner. For this to happen, the inter-agency parole coordination committee should oversee the development of an inter-agency information-sharing framework/agreement. A first step towards a framework will be a review of current information-sharing arrangements between the agencies.
- b. Any information-sharing framework or agreement should specify that all inter-agency agreements and/or procedures must be properly documented and periodically reviewed.

³⁹¹ Participant in the Inter-agency Information-Sharing Workshop (4 October 2011). See Appendix I for a list of attendees.

³⁹² This issue is discussed in more detail at [5.101]–[5.110].

³⁹³ This is consistent with the underpinning or 'enabling' factors from the federal government's Information Interoperability Framework: Department of Finance and Administration, *Australian Government Information Interoperability Framework: Sharing Information Across Boundaries* (2006) 4.

Other barriers to effective information sharing in the parole system

Barriers relating to privacy legislation and formal administrative arrangements

- 5.101 The various privacy laws relevant to the exchange of information between the three main parole agencies are briefly discussed earlier in this chapter. The following looks at the restrictions on the Adult Parole Board's ability to convey information to other people and organisations.
- 5.102 There are more than 18 different agencies with which the Adult Parole Board regularly shares information.³⁹⁴ The General Manager and secretariat staff of the Adult Parole Board are frequently requested to give information and advice to a range of interested parties including victims, families of offenders and service providers. The scale and volume of these requests are substantial and, according to Adult Parole Board representatives, becoming onerous.
- 5.103 Examples of such requests are:
- general requests by victims, family members or other persons about conditions of parole release and compliance with conditions;
 - requests for information about parolees from Victoria Police officers direct to the Board;
 - requests from prisoners for reasons for decisions or requests for reports held by the Adult Parole Board; and
 - requests supported by court processes including subpoena, whether made by or on behalf of the relevant prisoner or a third party.
- 5.104 In responding to information requests, the Adult Parole Board must comply with the legislative requirements that restrict the release of confidential and other sensitive information. Some of the relevant legislation includes the *Corrections Act 1986* (Vic) (section 30), the *Information Privacy Act 2000* (Vic) and the *Health Records Act 2001* (Vic).
- 5.105 The Adult Parole Board is not subject to the provisions of the *Freedom of Information Act 1982* (Vic), and therefore members of the public have no entitlement under that Act to any information from the Adult Parole Board. Furthermore, as discussed in Chapter 4, section 69(2) of the *Corrections Act 1986* (Vic) provides that the Adult Parole Board is not required to comply with the principles of natural justice. Therefore the Adult Parole Board is not presently required to meet a request from a prisoner, victim or other interested parties in relation to reasons for decisions or in relation to reports held.
- 5.106 The relevant provision in the *Corrections Act 1986* (Vic) restricting the use of confidential information is section 30(2). It provides:
- A person who holds or who has held a position must not, except to the extent necessary to perform official duties powers or functions of that position, record, disclose, communicate or make use of confidential information.³⁹⁵

³⁹⁴ Email from the Adult Parole Board of Victoria to Sentencing Advisory Council, 5 October 2011.

³⁹⁵ *Corrections Act 1986* (Vic) s 30(2). 'Position' is defined in section 30(1) to include (a) a position as an officer within the meaning of Part 5; (b) a delegate of the Secretary or a Governor; (c) a person authorised to exercise the functions or powers of a prison officer or a medical officer; and (d) a position of being a person authorised under section 9A to exercise functions or powers. Other subcategories have been defined in section 30(1); however, these are the relevant ones for the purposes of this report.

- 5.107 'Confidential information' is defined in section 30(1) and includes information given to the Board that is not disclosed in a decision of the Board or in reasons given by the Board for a decision, information concerning the investigation of a breach or possible breach of the law by a prisoner, and information relating to the personal affairs of a prisoner.³⁹⁶ Victim submissions or submissions from the offender, offender's family and other interested parties could fall within this definition, as could, for example, psychological or psychiatric reports about prisoners/parolees.
- 5.108 The General Manager of the Adult Parole Board, administrative staff and community corrections officers are all required to comply with the confidentiality requirements set out in the *Corrections Act 1986* (Vic). In consultations, the General Manager of the Adult Parole Board noted that the Adult Parole Board's understanding of section 30(2) is that it can only release information that allows it to perform its duties, not information, for example, that Community Correctional Services or Victoria Police may need to perform their duties.
- 5.109 The Act allows confidential information to be communicated in certain circumstances, including during the giving of evidence to a criminal court or where the person has obtained the written authority of the minister or the person to whom the confidential information relates.³⁹⁷
- 5.110 A detailed review of privacy legislation affecting information sharing between the three agencies was not possible within the time constraints of this project. The Council has recommended that the government carry out such a review.³⁹⁸

Information technology limitations

- 5.111 The information technology arrangements supporting the parole system are highly complicated and cumbersome.³⁹⁹ There are three databases used for parole: E-Justice, PIMS and LEAP.⁴⁰⁰ E-Justice was intended to replace PIMS; however, that has not yet occurred and the two systems operate in parallel. The Adult Parole Board and Corrections Victoria have full access to E-Justice and PIMS.⁴⁰¹
- 5.112 At the conclusion of Board meetings, secretariat staff enter decisions into E-Justice. The meeting date and location are then entered into PIMS, and the transfer from E-Justice is manually checked and confirmed in PIMS by two staff members, to minimise the possibility of error.⁴⁰² This is obviously an ungainly process.
- 5.113 Victoria Police has only partial access to E-Justice, and Operation ROPE has in addition to that partial access to PIMS.
- 5.114 As LEAP does not display the conditions of parole, a police officer who comes into contact with a parolee and wants to know the special conditions attached to that parolee's order would need to contact Operation ROPE or alternatively the Adult Parole Board or Corrections Victoria to obtain these important details. A further issue is that police in the field do not have access to LEAP on their mobile devices, although work is apparently underway to make LEAP available in police

³⁹⁶ There are other subcategories set out in *Corrections Act 1986* (Vic) s 30(1); however, these are the relevant ones for the purposes of this report.

³⁹⁷ *Corrections Act 1986* (Vic) s 30(3).

³⁹⁸ See Recommendation 17, above.

³⁹⁹ The Council does not purport to have completed a detailed investigation of the current IT arrangements.

⁴⁰⁰ See [5.27].

⁴⁰¹ Community Correctional Services staff also have access to the criminal histories section of LEAP. Such access was approved by the then Minister for Corrections, Andre Haermeyer, on 10 December 2004: Email from Corrections Victoria to Sentencing Advisory Council, 24 November 2011.

⁴⁰² Meeting with Adult Parole Board (22 November 2011).

vehicles. In a time-pressed environment, this is hardly adequate, and there is clearly potential for the lack of accessible information to undermine police officers' ability to act appropriately on suspected breaches of parole.

- 5.115 Where the IT systems are incompatible or inadequate to the task at hand, the agencies make use of improvised solutions or 'workarounds'. One example of such improvisation is the 'daily' (manual) email report from Operation ROPE to Corrections Victoria about parolees who have been charged with a new offence. This may not occur daily due to other operational priorities, such as executing warrants. There is another system in place for breaches of conditions not involving further offending, and where the parolee attends a police station. Since May 2011 a parole flag alerts the police officer to the fact that the person is on parole. The officer will then enter details about the attendance into an E-Justice screen, and a new procedure automatically notifies the Corrections Victoria case worker that the parolee was in attendance at a police station, the reasons for attendance and any actions taken by the police. Obviously, such automatic notification is preferable to manual emails.
- 5.116 All three agencies commented on difficulties they have in using E-Justice, LEAP and PIMS.⁴⁰³ One participant in the Council's information-sharing workshop commented: 'We have the data but not necessarily the messaging'. Victoria Police noted in its submission that the 'main forms of information sharing constraints relating to the management of parolees who have breached their conditions are linked to historical, technological and resource constraints'.⁴⁰⁴
- 5.117 There was consensus at the information-sharing workshop that IT issues are a significant impediment to the proper management of parolees. Participants thought that there should be more effective IT systems, which allow access by all three agencies.
- 5.118 The Council is not in a position to make any recommendations around the IT systems used by the three agencies in the management of parole. However, the inadequacies evident in the current IT arrangements and the concomitant risk they pose to the effective management of parolees lend further support to the need for some sort of parole coordination body. Such risk must be actively managed.

Differences in organisational culture and values

- 5.119 A detailed examination of organisation culture and values is beyond the scope of the Council's review. However, the Council did find some evidence of a clash of cultures between Corrections Victoria and Victoria Police, with police having a more enforcement-oriented attitude than Community Correctional Services, the culture of which is to value the importance of supporting offenders. The issue is encapsulated in comments from Community Correctional Services representatives to the Council throughout the consultations to the effect that there seems to be a lack of understanding by at least some police officers as to how parole works and how police officers can best work with Corrections Victoria.
- 5.120 Any such culture clashes have the capacity to disrupt the flow of information between agencies. There may be a role for education and training in communicating the purpose, principle and practical functions of parole and how Victoria Police and Corrections Victoria can work together to achieve the best outcome for the offender and therefore the community.
- 5.121 The Council has recommended the establishment of an inter-agency parole coordination committee,⁴⁰⁵ to be comprised of members from the Adult Parole Board, Corrections Victoria and Victoria Police. This should assist in providing a more effective communication and feedback loop between the agencies and better clarity of roles and responsibilities.

⁴⁰³ Inter-agency Information-Sharing Workshop (4 October 2011).

⁴⁰⁴ Submission 11 (Victoria Police).

⁴⁰⁵ See Recommendation 15.

Human failings

5.122 A detailed examination of human failings within the parole system is beyond the scope of this review. Human failings can include failures to follow procedures due to oversight, a lack of training or high caseload. Hazel Kemshall has observed that research into complex systems has identified that one of the threats to effective risk management is that '[w]orkers tend to routinise complex tasks over time, particularly in the face of high volume and professional stress'.⁴⁰⁶ Further, she notes that human failings are often the result of poor systems:

It is important to recognise that many risk failures, while often attributed to the actions of individual workers, can have their roots in the systemic faults inherent in complex systems, and in essence failures have been created or 'incubated' within the system itself.⁴⁰⁷

5.123 Under an integrated, well coordinated parole system that has all the necessary frameworks in place at the inter-agency level – for example, information sharing, risk management and quality management – human error and human failings generally will be minimised.

Further recommendations

Improving the Adult Parole Board's capacity to manage data

5.124 The Council notes the Adult Parole Board's current lack of data collection and analysis capability. For example, the absence of data about 'time to count'⁴⁰⁸ is discussed at [2.50]–[2.52].

5.125 During consultations, the Adult Parole Board indicated that changes are currently underway that will result in it being a 'paperless office'; however, Adult Parole Board representatives revealed an aversion to being 'swamped' with data. This represents a lost opportunity.

5.126 One of the federal government's information management principles set out in its Information Interoperability Framework is that information should be treated as an 'asset' and 'strategic resource'.⁴⁰⁹ There is enormous potential for data to assist the Board's decision-making function and indeed to improve practices across all three agencies. The Council recognises that additional resourcing will be required in order to facilitate this.

⁴⁰⁶ Hazel Kemshall, 'MAPP, Parole and the Management of High-risk Offenders in the Community' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (2007) 202, 207 (citations omitted).

⁴⁰⁷ *Ibid* 208 (citations omitted).

⁴⁰⁸ If parole is cancelled, the Act states that any period during which the parole order was in force 'is not to be regarded as time served in respect of the prison sentence'. However, the Board may direct that 'some or all of the period during which a parole order that has been cancelled ... is to be regarded as time served'. *Corrections Act 1986* (Vic) ss 77(b), (7A).

⁴⁰⁹ Department of Finance and Administration (2006), above n 393, 4.

Recommendation 19

Adult Parole Board to collect and analyse data

- a. As part of its move to a 'paperless office', the Adult Parole Board should ensure that appropriate systems are in place to allow for the collection of comprehensive parole data. Access to comprehensive data is vital for effective risk assessment, informed and consistent decision-making and accountability purposes. The Adult Parole Board should collect and analyse data including:
 - as much information as possible about each case (such as date of offence, age of offender at time of offence, gender, Indigenous status, Culturally and Linguistically Diverse (CALD) status, health/mental health status, principal proven offence, sentence, programs completed while in prison);
 - whether parole was granted at the earliest possible date or alternatively deferred or refused (and reasons for such deferral or refusal);
 - all parole conditions;
 - information about all breaches of parole referred to the Adult Parole Board, including types of breaches (further offending or otherwise), length of time on parole, description of the relevant behaviour/offence and the Board's decision (for example, no action/warning/cancellation); and
 - how often and in what circumstances 'time to count' is granted.
- b. Funding should be provided to the Adult Parole Board to appoint a data analyst to collect, analyse and report on the data.
- c. After the first year of data collection, the Adult Parole Board should analyse the data and provide a report to the Corrections Minister.

Improving the Adult Parole Board's capacity to communicate with victims, interested parties and agencies

- 5.127 The collaborative building of relationships with other agencies – although beneficial – can have a flow-on effect of increased requests for information from the Adult Parole Board. The Council's research on procedural fairness in the context of parole (as discussed in Chapter 4) revealed that the Adult Parole Board is weak in its communication function. The Council has made recommendations to assist with remedying this situation.
- 5.128 Information exchange with victims at the parole granting stage is also discussed earlier in the report.⁴¹⁰ Victims are informed of the date of the parole hearing at which the Board will consider granting parole, and given the opportunity to make written submissions. Specific information can be provided to victims throughout the parole process, but only if they are on the Victims' Register.⁴¹¹
- 5.129 Community Correctional Services relies on Victoria Police to inform it of situations where a parolee's breach or other behaviour has come to police attention. For example, geographic restrictions are sometimes a condition of a parole order. Police may be called (for example, by a victim) if a parolee is observed within a restricted area.

⁴¹⁰ See Chapter 4, [4.90]–[4.91].

⁴¹¹ *Corrections Act 1986* (Vic) s 30A(2).

- 5.130 Victims on the Victims' Register are formally advised by the Adult Parole Board in the event of cancellation of parole.⁴¹² However, at the victims' roundtable meetings held by the Council, participants indicated that they wanted more communication from and interaction with the Adult Parole Board, for example, more information about matters such as the offender's place of residence and parole cancellations.⁴¹³ Some victims complained about 'pro forma' letters from the Adult Parole Board, which they found impersonal.⁴¹⁴ As noted in Chapter 4, a thorough examination of victims' needs in the parole system is beyond the scope of this report, and the Council suggests that the government conduct further research into the issue.
- 5.131 In addition to the improvements around transparency of Board procedures (as recommended in Chapter 4), the Council believes that the Adult Parole Board would benefit from having an information and liaison officer on its staff. An information and liaison officer could liaise with other agencies about day-to-day matters, answer queries from victims and other interested individuals, ensure that the Adult Parole Board's printed and online public resources are up-to-date and accessible, and assist with educative functions.
- 5.132 The Council recognises that the Adult Parole Board's capacity to implement this recommendation may depend on additional funding.

Recommendation 20

Information and liaison officer

Funding should be provided to the Adult Parole Board to employ an information and liaison officer to liaise with other agencies, answer queries from victims and others, ensure that all printed and online resources are up-to-date and accessible and assist with the Adult Parole Board's educative functions.

Reporting on implementation of recommendations

- 5.133 Finally, the Council believes that for accountability purposes, it would be beneficial for the Corrections Minister to request a report from the Adult Parole Board⁴¹⁵ setting out the steps taken to implement the recommendations in this report.⁴¹⁶

Recommendation 21

Minister to request report from Adult Parole Board

The Corrections Minister should request – pursuant to section 72(5) of the *Corrections Act 1986* (Vic) – a report from the Adult Parole Board detailing the steps taken to implement the recommendations contained in this report that relate directly to the Adult Parole Board. The request should occur six months after publication of the Council's report.

⁴¹² Meeting with Adult Parole Board (22 November 2011).

⁴¹³ The Council notes that confidentiality requirements currently prevent the Board from giving detailed information to victims.

⁴¹⁴ Roundtable Meeting with Individual Victims of Crime (8 September 2011); Roundtable Meeting with Victims' Support Groups (22 August 2011).

⁴¹⁵ This is pursuant to the minister's power to do so under *Corrections Act 1986* (Vic) s 72(5).

⁴¹⁶ This is presuming of course that the minister agrees with the Council's recommendations.

Appendix 1

Consultation – meetings and submissions

Roundtables

Date	Meetings
8 August 2011	Roundtable meeting with legal professionals and representatives of other professional groups: Youth Parole Board, Victoria Legal Aid, Office of Public Prosecutions, Victorian Association for the Care and Resettlement of Offenders, Robert Stary Lawyers, Law Institute of Victoria, Criminal Bar Association, Victims Support Agency (Department of Justice), Victorian Aboriginal Legal Service, County Court of Victoria, Victorian Equal Opportunity and Human Rights Commission, Brosnan Centre (Jesuit Social Services).
22 August 2011	Roundtable meeting with representatives of victims' support groups: Working Against Culpable Driving, Office of Public Prosecutions (victim support), Victims Support Agency (Department of Justice), Victorian Crime Victims Support Association, Victorian Homicide Victims' Support Group.
8 September 2011	Roundtable meeting with individual victims of crime: organised with the assistance of and co-facilitated by, the Victims Support Agency (Department of Justice).

Submissions

No.	Date received	Person/organisation
1	12 August 2011	M. Graham
2	30 August 2011	J. Astbury
3	2 September 2011	Law Institute of Victoria
4	2 September 2011	Human Rights Law Centre
5	2 September 2011	Australian Community Support Organisation
6	2 September 2011	Anonymous
7	5 September 2011	Jesuit Social Services
8	5 September 2011	Forensicare. Victorian Institute of Forensic Mental Health
9	6 September 2011	Victorian Association for the Care and Resettlement of Offenders
10	8 September 2011	Anonymous
11	9 September 2011	Victoria Police
12	9 September 2011	Victoria Legal Aid
13	12 September 2011	Victorian Aboriginal Legal Service
14	29 September 2011	Federation of Community Legal Centres
15	27 October 2011	Corp family

Meetings: Adult Parole Board

Date	Meeting
9 June 2011	Meeting with Justice Whelan, David Provan, Michael Hepworth
15 July 2011	Meeting with David Provan
12 August 2011	Meeting with Matthew Downey
19 August 2011	Meeting with Matthew Downey
22 August 2011	Meeting with David Provan, Michael Hepworth
26 August 2011	Meeting with Matthew Downey
30 August 2011	Meeting with Matthew Downey
2 September 2011	Meeting with Matthew Downey
9 September 2011	Meeting with Matthew Downey
16 September 2011	Meeting with Matthew Downey
23 September 2011	Meeting with Matthew Downey
30 September 2011	Meeting with Matthew Downey
4 October 2011	Meeting with Matthew Downey
4 October 2011	Meeting with Justice Whelan, David Provan, Matthew Downey
14 October 2011	Meeting with Matthew Downey
21 October 2011	Meeting with David Provan, Michael Hepworth, Matthew Downey
28 October 2011	Meeting with Matthew Downey
3 November 2011	Meeting with Matthew Downey
11 November 2011	Meeting with Anthony Vitale
22 November 2011	Meeting with David Provan, Michael Hepworth, Pauline Bailey

Meetings: Corrections Victoria

Date	Meeting
25 August 2011	Meeting with Jennifer Cameron
5 September 2011	Meeting with Jennifer Cameron, Georgina Cairns, Michelle Seddon, Maria Groh, Michelle Wood
27 September 2011	Meeting with Andrea Lynch, Jennifer Cameron
29 September 2011	Meeting with Andrea Lynch – telephone

Meetings: Victoria Police

Date	Meetings
24 August 2011	Meeting with John Feeny, Kishani Nadesan
14 September 2011	Meeting with John Feeny, Kishani Nadesan
12 October 2011	Meeting with Kishani Nadesan

Inter-agency information-sharing workshop

Date	Attendees
4 October 2011	Workshop attended by Justice Whelan, David Provan, Michael Hepworth, Anthony Vitale and Matthew Downey of the Adult Parole Board; Shaymaa Elkadi, Andrea Lynch and Jennifer Cameron of Corrections Victoria; John Feeny and Kishani Nadesan of Victoria Police.

Meetings: Other agencies

Date	Meetings
21 July 2011	Elizabeth Hall, Suzanne Whiting (Victims Support Agency)
10 August 2011	Elizabeth Hall (Victims Support Agency)
17 August 2011	Johnny King, Roger Pugh, Daniel Clements, Colleen Edwards, Sarah Covill, John Appelton (Brosnan Centre)
2 September 2011	Jill Prior, Louise Hicks (Victorian Aboriginal Legal Service)
6 September 2011	Elizabeth Hall, Matt Hammond, Amanda Smillie (Victims Support Agency)
27 October 2011	Clare Morton, Elizabeth Hall, Amanda Smillie (Victims Support Agency)

Appendix 2

Standard and special parole conditions – Victoria

Standard conditions

1.	That you do not break any law.
2.	That you notify a community corrections officer of any change of address or employment within 48 hours of the change.
3.	That you do not leave the State of Victoria without the written permission of the Regional Manager.
4.	That you carry out the lawful instructions of community corrections officers.
5.	That you are under the supervision of a community corrections officer.
6.	That you report as and when directed by the community corrections officer.
7.	That you make yourself available for interview by the community corrections officer at such time and place as directed by the community corrections officer.
8.	That you report at least twice a week to the supervising community corrections officer.
9.	That you be employed or undertake an approved educational or training programme.
10.	That if you are not employed, or in an approved educational or training programme you undertake unpaid community work as directed by the Regional Manager.

Special conditions

Note: Red conditions are given in bold italics.

That you undergo assessment & treatment for alcohol or drug addiction or submit to medical, psychological or psychiatric assessment & treatment as directed by the Centre Manager.
That you undergo on a regular basis.
That you submit to testing for alcohol or drug use as directed by the Centre Manager.
That you submit to on a regular basis.
<i>That you abstain from alcohol.</i>
That you attend Community Forensic Mental Health Service for assessment, as required, and undergo such treatment as directed by the Director, Victorian Institute of Forensic Mental Health or his nominee.
That you attend Personal Development Programs as directed by the Centre Manager.
That you participate in the Relapse Prevention Program as directed by the Centre Manager.
<i>That you have no contact supervised or unsupervised with children without the written permission of the Centre Manager.</i>
<i>That you have no contact supervised or unsupervised with children without the written permission of the Community Corrections Officer.</i>
<i>That you have no contact supervised or unsupervised with children, without an adult present, as approved by the Community Corrections Officer.</i>
<i>That you have no contact supervised or unsupervised with children under the age of 16 years or young persons under the age of 18 years without the written permission of the Community Corrections Officer.</i>
<i>That you have no contact supervised or unsupervised with children.</i>
<i>That you have no contact whatsoever either directly or indirectly with the victim (name if necessary) or any member of the victim's family (if necessary).</i>
<i>That you have no contact whatsoever either directly or indirectly with the victim (name if necessary) or any member of the victim's family (if necessary) except in accordance with an order made by a court pursuant to Family Law or related legislation.</i>
That you reside at until otherwise determined by the Centre Manager.
That you reside at until otherwise determined by the Adult Parole Board.
That you reside as directed by the Centre Manager.
That you reside in accommodation provided by the Australian Community Support Organisation until otherwise directed by the Community Corrections Officer in consultation with ACSO.
<i>That you do not enter the City of</i>
That you report before the Board for interview as and when directed by the Board.
That you participate in the Sexual Offender Supervision Program as directed by the Adult Parole Board.
That you participate in the Sexual Offender Supervision Program as directed by the Centre Manager.
That you participate in the Sexual Offender Supervision Program as directed by the Community Corrections Officer.

That you participate in programs as directed by the Community Corrections Officer in consultation with COATS. ^a
That you be assessed by COATS and participate in programs as directed by the Community Corrections Officer in consultation with COATS.
That you comply with any form of electronic monitoring, and any other form of monitoring, as directed by the Centre Manager.
<i>That without a reasonable excuse, you do not enter or loiter near any school or children’s playground or child care area.</i>
<i>That you do not join, affiliate with, attend on the premises of, or attend at the activities carried on by any club or organisation in respect of which there are reasonable grounds for believing there is either child membership or child participation.</i>
<i>That you do not, without a reasonable excuse, be within 500 metres of a school, between 8am to 9:30am and 2:30pm to 4pm on school days or be in an area within 300 metres of a school at any time, nor enter school premises at any time.</i>
<i>That you do not visit public parks without written permission from the supervising Community Corrections Officer.</i>
<i>That you adhere to the curfew between 8pm and 7am, except with the written permission of the supervising Community Corrections Officer.</i>
<i>That you have no contact with any convicted sexual offender.</i>
<i>That you do not use or access the internet.</i>
That you be assessed for and participate as directed in the Making Choices Program.
That you be assessed for and participate as directed in the OBP’s ^b Maintaining Change Program.
That you participate in a Complex Care Assessment, as directed by your Community Corrections Officer.
That you be assessed and if found suitable, participate in the OBP Intensive Case Management Consultation Package for geographically remote offenders.
<i>That you</i>
That you are assessed for, and if assessed as suitable, that you participate in the ADAPT ^c Program, as directed by your Community Corrections Officer.

^a Community Offenders Advice and Treatment Service.
^b Offending Behaviour Program.
^c Alcohol-Driven Aggression Psychoeducational Treatment.

Appendix 3 Comparative table

Nature of parole board's jurisdiction									
	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	
1	Adult Parole Board has discretion in relation to all prisoners who have a non-parole period (NPP).	Parole is automatic for sentences of imprisonment of less than 3 years, although Parole Authority can revoke. Parole Authority has discretion for sentences longer than 3 years.	Court sets parole release for sentences less than 3 years, although parole board can revoke. Regional Parole Board has discretion for parole for sentences 3–8 years. Queensland Parole Board has discretion for sentences longer than 8 years.	Parole is automatic for certain prisoners sentenced to less than 5 years. Parole Authority has discretion for sentences longer than 5 years or for offenders excluded from automatic parole (e.g. imprisoned for sex offences, personal violence offences, arson).	Prisoners Review Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	Parole Board has discretion in relation to all prisoners who have a non-parole period.	
Nature and source of guidance									
	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	
2	Internal Developed by Adult Parole Board and set out in annual report and unpublished Members' Manual.	Legislative Set out in <i>Crimes (Administration of Sentences) Act 1999</i> s 135.	Mixture of ministerial guidelines and legislative Guidelines made under <i>Corrective Services Act 2006</i> s 227. The <i>Corrective Services Act 2006</i> governs cancellation of parole.	Legislative Set out in <i>Correctional Services Act 1982</i> s 67.	Legislative Set out in <i>Sentence Administration Act 2003</i> s 5A, 5B and 20(2).	Legislative Set out in <i>Corrections Act 1997</i> s 72(4).	Legislative Set out in <i>Crimes (Sentence Administration) Act 2005</i> s 120.	Internal Powers set out in <i>Parole of Prisoners Act 1979</i> . Guidelines (published in annual report), which emphasise that each case is considered on its merits, and that the factors listed are a guide only.	

Threshold test or overriding principle

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
3	None.	The Parole Authority must not make a parole order for an offender unless it is satisfied, on the balance of probabilities, that the release of the offender is appropriate in the public interest (s 135(1)).	Principles for Board decision-making. Highest priority should always be the safety of the community (Guideline 1.2). The Parole Board should consider whether there is an unacceptable risk to the community if the offender is released to parole and whether the risk to the community would be greater if the offender does not spend a period of time on parole (1.3).	The paramount consideration of the Parole Board when determining an application under this section for the release of a prisoner on parole must be the safety of the community (s 67(3)(a)).	The Prisoners Review Board or any other person performing functions under this Act must regard the safety of the community as the paramount consideration (s 5B).	None.	The Parole Board may make a parole order for an offender only if it considers that parole is appropriate for the offender, having regard to the principle that the public interest is of primary importance (s 120(1)).	None.

Factors for consideration in granting parole								
	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
4	Nature and circumstances of the offence(s).	The nature and circumstances of the offence to which the offender's sentence relates (s 135(2)(c)).		Where the prisoner was imprisoned for an offence or offences involving violence, the circumstances and gravity of the offence, or offences, for which the prisoner was sentenced to imprisonment (but the Parole Board may not substitute its view of these matters for the view expressed by the court in passing sentence) (s 67(4)(c)).	The circumstances of the commission of, and the seriousness of, an offence for which the prisoner is in custody (s 5A(b)).			Nature and circumstances of the offence(s).
5	Prior criminal history.	The offender's criminal history (s 135(2)(e)).	The prisoner's prior criminal history and any patterns of offending (2.1(c)).				The offender's antecedents (s 120(2)(b)).	The prisoner's criminal history and patterns of offending.
6	Comments made by the sentencing court.	Any relevant comments made by the sentencing court (s 135(2)(d)).	The recommendation for parole, parole eligibility date or any recommendations or comments of the sentencing court (2.1(a)).	Any relevant remarks made by the court in passing sentence (s 67(4)(a)).	Any remarks by a court that has sentenced the prisoner to imprisonment that are relevant to any of the matters mentioned in paragraph (a) or (b) (s 5A(c)).	Any remarks made by the court in passing sentence (s 72(4)(d)).	Any relevant recommendation, observation and comment made by the sentencing court (s 120(2)(a)).	Comments made by the sentencing judge when imposing sentence.

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
7	Previous history of supervision in the community.		The prisoner's compliance with any other previous grant of community-based release, resettlement leave program, community service or work program (2.1(f)).	The behaviour of the prisoner during any previous release on parole (s 64(4)(e)).	The behaviour of the prisoner when subject to any release order made previously (s 5A(h)).	The behaviour of the prisoner during any previous release on parole (s 72(4)(h)); the behaviour of the prisoner while subject to any order of a court (s 72(4)(i)).		Previous history of supervision in the community.
8	Assessment of the potential risk to the community if the offender is released from custody.		The likelihood of the prisoner committing further offences (2.1 (d)). Whether there are any other circumstances that are likely to increase the risk the prisoner presents to the community (2.1 (g)) (see also (h) below).		The degree of risk (having regard to any likelihood of the prisoner committing an offence when subject to an early release order and the likely nature and seriousness of any such offence) that the release of the prisoner would appear to present to the personal safety of people in the community or of any individual in the community (s 5A(a)); the likelihood of the prisoner committing an offence when subject to an early release order (s 5A(i)).	The likelihood of the prisoner reoffending (s 74(4)(a)); the protection of the public (s 72(4)(b)).	The likelihood that, if released on parole, the offender will commit further offences (s 120(2)(i)).	The possibility of the offender reoffending while on parole and the likely nature of the reoffending. The risk of harm to the community and the victim.

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
9	Release plans and whether suitable accommodation is available.		Whether the prisoner has access to supports or services that may reduce the risk the prisoner presents to the community (2.1 (h)).	The probable circumstances of the prisoner after release from prison or home detention (s 67(4)(g)).		The probable circumstances of the prisoner after release from prison (s 72(4)(k)).		Release plans including accommodation and employment.
10	Assessments and recommendations made by appropriate professionals, including psychiatrists, psychologists, and community corrections officers.	Any report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Probation and Parole Service, as referred to in section 135A(h) and any other report in relation to the granting of parole to the offender that has been prepared by or on behalf of the Review Council, the Commissioner or any other authority of the state (s 135(2)(i)).	Any submissions made to the Parole Board by an eligible person (2.1 (e)). Any medical, psychological, behavioural or risk assessment report relating to the prisoner (2.1 (i)).	Any reports tendered to the Parole Board— (i) on the social background, or the medical, psychological or psychiatric condition, of the prisoner; (ii) from community corrections officers or other officers or employees of the Department (s 67(4)(f)).		Any reports tendered to the Parole Board on the social background of the prisoner, the medical, psychological or psychiatric condition of the prisoner or any other matter relating to the prisoner, including in the case of a prisoner who is forensic patient any report of the Chief Forensic Psychiatrist (s 72(4)(j)).	Any report required by regulation in relation to the granting of parole to the offender (s 120(2)(e)); any other report prepared by or for the Territory in relation to the granting of parole to the offender (s 120(2)(f)).	Reports, assessments and recommendations made by a variety of professionals, including medical practitioners, psychiatrists, psychologists, custodial staff and/or community corrections officers.

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
11	Submissions made by the offender, the offender's family, friends and potential employers, or any other relevant individual.							Submissions made by the prisoner, the prisoner's family, friends and any potential employers or other relevant individuals; submissions made by the legal representatives of the prisoner.
12	Written submissions made by the victim(s) or by persons related to the victim(s).	The likely effect on any victim of the offender, and on any such victim's family, of the offender being released on parole (s 135(2)(g)).		If, in relation to an offence for which the prisoner was imprisoned, there is a registered victim – the impact that the release of the prisoner on parole is likely to have on the registered victim and the registered victim's family (s 67(4)(ca)).	Issues for any victim of an offence for which the prisoner is in custody if the prisoner is released, including any matter raised in a victim's submission (s 5A(d)).	Any statement provided under subsection (2B) by a victim, or, if subsection (2AB) applies, the parent or guardian of the victim, of an offence for which the prisoner has been sentenced to imprisonment (s 72(4)(ka)).	Any submission made, and concern expressed, to the Parole Board by a victim of the offender (s 120(2)(c)). The likely effect of the offender being paroled on any victim of the offender, and on the victim's family, and, in particular, any concern, of which the board is aware, expressed by or for the victim, or the victim's family, about the need for protection from violence or harassment by the offender (s 120(2)(d)).	The victim's safety, welfare and whereabouts. Representations made by the victim or by persons related to the victim.

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
13	Conduct of the offender while in custody and whether any positive drug tests have been recorded.		The prisoner's cooperation with authorities both in securing the conviction of others and preservation of good order within the corrections system (2.1(b)).	The behaviour of the prisoner while in prison or on home detention (s 67(4)(d)).	The behaviour of the prisoner when in custody insofar as it may be relevant to determining how the prisoner is likely to behave if released (s 5A(e)).	The behaviour of the prisoner while in prison and, if the prisoner has been in a secure mental health unit, while in that secure mental health unit (s 72(4)(g)).	The offender's conduct while serving the offender's sentence of imprisonment (s 120(2)(g)).	Institutional reports in relation to the prisoner's behaviour while in prison.
14	Willingness to participate in relevant programs and courses while in custody.		Recommended rehabilitation programs or interventions and the prisoner's progress in addressing the recommendation (2.1(j)).		Whether the prisoner has participated in programs available to the prisoner when in custody, and if not the reasons for not doing so (s 5A(f)); the prisoner's performance when participating in a program mentioned in paragraph (f) (s 5A(g)).		The offender's participation in activities while serving the sentence of imprisonment (s 120(2)(h)).	Rehabilitation courses undertaken by the prisoner. Education courses undertaken by the prisoner.
15		The need to protect the safety of the community (s135(2)(a)).						
16		The need to maintain public confidence in the administration of justice (s 135(2)(b)).						

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
17		The likelihood of the offender being able to adapt to normal lawful community life (s 135(2)(f)).						
18		If the Drug Court has notified the Parole Authority that it has declined to make a compulsory drug treatment order in relation to an offender's sentence on the ground referred to in section 18D(1)(b)(vi) of the <i>Drug Court Act 1998</i> , the circumstances of that decision to decline to make the order (s 135(2)(ia)).						
19		Such guidelines as are in force under section 185A (s 135(2)(j)).						

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
20				The likelihood of the prisoner complying with the conditions of parole (s 67(4)(b)).	The likelihood of the prisoner complying with the standard obligations and any additional requirements of any early release order (s 5A(i)).	The likelihood of the prisoner complying with the conditions (s 72(4)(e)).	The likelihood that, if released on parole, the offender will comply with any condition to which the parole order would be subject (s 120(2)(j)).	Whether the prisoner can be adequately supervised in the community under the standard conditions of parole or whether further conditions of parole should be imposed.
21						The rehabilitation of the prisoner (s 72(4)(c)).	Whether parole is likely to assist the offender to adjust to lawful community life (s 120(2)(k)).	
22								The security rating of the prisoner within the prison.
23		Such other matters as the Parole Authority considers relevant (s 135(2)(k)).		Any other matters that the Parole Board thinks are relevant (s 67(4)(h)).	Any other consideration that is or may be relevant to whether the prisoner should be released (s 5A(k)).	Any other matters that the Parole Board thinks are relevant (s 72(4)(l)).	Any special circumstances in relation to the application (s 120(2)(l)); anything else prescribed by regulation (s 120(2)(m)); Subsection (2) [the list of criteria] does not limit the matters the board may consider (s 120(3)).	Any other matters that the Parole Board thinks are relevant.

Cancellation or revocation of parole									
	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory	
24	Power provided by s 77. No statutory criteria. Some factors for consideration set out in Members' Manual (but only relate to situations where parolee has reoffended and charges are outstanding).	Parole Authority may revoke (170(1)). Statutory criteria below.	Parole Board may amend, suspend or cancel a parole order (<i>Corrective Services Act 2006</i> , s 205). Statutory criteria below.	Cancellation is automatic on Parole Board finding breach of designated conditions (s 73) or on imprisonment for offence while on parole (s 74A). Parole Board has power to cancel for breach of non-designated conditions (s 74) or to impose community service for breach of non-designated condition (s 74AA). No statutory criteria or published guidelines.	Powers provided by ss 43 and 44 of the <i>Sentence Administration Act 2003</i> . No statutory criteria or published guidelines.	Power provided by s 79. No statutory criteria.	Parole Board has power provided by s 156. No statutory criteria.	Power provided by s 5. No statutory criteria or published internal guidelines.	
25	Compliance with conditions.	If it is satisfied that the offender has failed to comply with the offender's obligations under the order (s 170(1)(a)).	Reasonable belief that the prisoner has failed to comply with the parole order (s 205(2)(a)(i)).						
26	Nature of the original/ outstanding offences.								

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
27		In the case of an offender who has been granted parole on the grounds that the offender is in imminent danger of dying or is incapacitated to the extent that the offender no longer has the physical ability to do harm to any person, as referred to in section 154A(3), if it is satisfied that those grounds no longer exist (s 170(1)(a1)).	If the Parole Board receives information that, had it been received before the parole order was made, would have resulted in the Parole Board that made the order making a different parole order or not making a parole order (s 205(2)(b)).					
28		If the offender fails to appear before the Parole Authority when called on to do so (s 170(1)(b)).						
29			Poses a serious risk of harm to someone else (s 205(2)(a)(ii)).					

	Victoria	New South Wales	Queensland	South Australia	Western Australia	Tasmania	Australian Capital Territory	Northern Territory
30			Reasonable belief that the prisoner is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas (s 205(2)(a)(iv)).					
31			If the prisoner is charged with committing an offence (s 205(2)(c) – suspend or amend only).					
32			Poses an unacceptable risk of committing an offence (s 205(2)(a)(iii)).					
33	Whether or not offender has been remanded in custody pending the hearing of the outstanding offences.							
34	Time spent on parole; time left before parole expires; various other factors.							

Additional systems

Commonwealth of Australia

Governed by *Crimes Act 1914* (Cth), section 19AL.

For sentences of imprisonment between 3 and 10 years, release on parole is automatic.

For sentences longer than 10 years, the Attorney-General must:

- a. direct that the person be released from prison on parole:
 - i. at the end of the non-parole period; or
 - ii. if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period; or
- b. direct that the person is not to be released on parole at, or at any time before, the end of the non-parole period.

Canada

Governed by *Corrections and Conditional Release Act*, SC 1992.

Section 101 states the following.

The principles that shall guide the Board and the provincial parole boards in achieving the purpose of conditional release are:

- a. that the protection of society be the paramount consideration in the determination of any case;
- b. that parole boards take into consideration all available information that is relevant to a case, including the stated reasons and recommendations of the sentencing judge, any other information from the trial or the sentencing hearing, information and assessments provided by correctional authorities, and information obtained from victims and the offender;
- c. that parole boards enhance their effectiveness and openness through the timely exchange of relevant information with other components of the criminal justice system and through communication of their policies and programs to offenders, victims and the general public;
- d. that parole boards make the least restrictive determination consistent with the protection of society;
- e. that parole boards adopt and be guided by appropriate policies and that their members be provided with the training necessary to implement those policies; and
- f. that offenders be provided with relevant information, reasons for decisions and access to the review of decisions in order to ensure a fair and understandable conditional release process.

England and Wales

Governed by *Criminal Justice Act 2003* (UK).

Release is automatic for determinate sentence prisoners serving more than 12 months, sentenced on or after 4 April 2005.

The Parole Board only has jurisdiction over prisoners serving life sentences and Indeterminate Sentences for Public Protection and those who received Extended Sentences for Public Protection.

References

Bibliography

- Adult Parole Board of Victoria, 'Members' Manual 2011' (n.p., 2011).
- Adult Parole Board of Victoria, 'Secretariat Manual – Operations Manual' (n.p., n.d.).
- Adult Parole Board of Victoria, *Annual Report 2009–2010* (2010).
- Adult Parole Board of Victoria, *Annual Report 2010–2011* (2011).
- The Allen Consulting Group, *Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulation Regulatory Impact Statement: Report to the Department of Justice* (2009) <[www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/\\$File/DOJ%20RegulatoryImpactStatement.pdf](http://www.vcec.vic.gov.au/CA256EAF001C7B21/WebObj/DOJRegulatoryImpactStatement/$File/DOJ%20RegulatoryImpactStatement.pdf)>.
- Aronson, Mark, Bruce Douglas Dyer and Matthew Groves, *Judicial Review of Administrative Action* (4th ed., Lawbook, 2009).
- Attrill, Gill and Glenda Liell, 'Offenders' Views on Risk Assessment' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (Willan Publishers, 2007).
- Australian Government Information Management Office, Department of Finance and Administration, *Australian Government Interoperability Framework: Sharing Information Across Boundaries* (2006).
- Australian Institute of Health and Welfare, *The Health of Australia's Prisoners 2010*, cat. no. PHE 149 (2010).
- Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006).
- Broadhurst, Rod, 'Evaluating Imprisonment and Parole: Survival Rates or Failure Rates?' in Sandra McKillop (ed.), *Keeping People Out of Prison* (Australian Institute of Criminology, 1991).
- Corrections Victoria – Community Correctional Services, 'Deputy Commissioner's Instructions' (n.p., 2011).
- Corrections Victoria, 'VISAT Administration Manual' (n.p., 2009).
- Department of Finance and Administration, *Australian Government Information Interoperability Framework: Sharing Information Across Boundaries* (Australian Government Information Management Office, 2006).
- Department of Justice (Vic), *Victims Support Agency* (Department of Justice, 2010) <<http://www.justice.vic.gov.au/wps/wcm/connect/DOJ+Internet/Home/About+Us/Our+Organisation/Business+Area+Profiles/JUSTICE+-+Victims+Support+Agency>>.
- Department of Justice, *Corrections Victoria Research Strategy and Agenda 2009–2012* (Department of Justice, 2009) <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/resources/4/4/44d65f00404a9f1494a5fff5f2791d4a/Corrections_Research_Agenda_2009.pdf>.
- Department of Justice, *Bridging the Gap: A Release Transition Support Program for Victorian Prisoners, Final Evaluation Report* (Department of Justice, 2003) <<http://www.justice.vic.gov.au/wps/wcm/connect/justlib/DOJ+Internet/Home/Prisons/Research+and+Statistics/JUSTICE+-+Bridging+The+Gap+Final+Evaluation+Report+%28PDF%29>>.
- Department of Justice – Corrections Victoria, *Victorian Prisoner Health Study, Report* (Department of Justice, 2003).
- Dyrenfurth, Eric and Mealy, Emma, 'State Tax Privative Clauses after Kirk: Opening the Gates to Review' (2011) 85 (10) *Law Institute Journal* 52.
- Ellis, Tom and Marshall, Peter, 'Does Parole Work? A Post-Release Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners' (2000) 33 (3) *Australian and New Zealand Journal of Criminology* 300.

Freiberg, Arie, *Pathways to Justice: Sentencing Review 2002*, Report (2002).

Gilmour, John, 'Kirk: Newton's Apple Fell' (2011) 34(2) *Australian Bar Review* 155.

Groves, Matthew, 'Advice to Sentencing Advisory Council' (n.p., 2011).

Holland, Shasta, Kim Pointon and Stuart Ross, *Who Returns to Prison? Patterns of Recidivism among Prisoners Released from Custody in Victoria in 2002–03*, Corrections Research Paper Series no. 1 (Department of Justice, 2007).

Jones, Craig, Jiuzhao Hua, Neil Donnelly, Judy McHutchison and Kyleigh Heggie, 'Risk of Re-Offending Among Parolees', *Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 91 (NSW Bureau of Crime Statistics and Research, 2006).

Kemshall, Hazel, 'MAPPA, Parole and the Management of High-risk Offenders in the Community' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (2007).

Miller, Marc and Norval Morris, 'Predictions of Dangerousness: An Argument for Limited Use' (1988) 3(4) *Violence and Victims* 263.

Naylor, Bronwyn and Johannes Schmidt, 'Do Prisoners Have a Right to Fairness Before the Parole Board?' (2010) 32 *Sydney Law Review* 437.

New South Wales Law Reform Commission, *Sentencing*, Report no. 79 (1996).

New Zealand Parole Board, *Decisions of Public Interest* (New Zealand Parole Board, 2012) <<http://www.paroleboard.govt.nz/decisions-statistics-and-publications/decisions-of-public-interest.html>>.

Nicholson, Justice R D, 'Balancing Privacy and Natural Justice in Informal Tribunals: The Case of Guardianship Boards' (1995) 6 *Public Law Review* 307.

Office of the Auditor General (WA), *The Management of Offenders on Parole*, Report no. 11 (Office of the Auditor General, 2011).

Padfield, Nicola (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (William Publishers, 2007).

Payne, Jason, *Recidivism in Australia: Findings and Future Research*, Research and Public Policy Series no. 80 (Australian Institute of Criminology, 2007).

Provan, David, *Fifty Years of the Adult Parole System in Victoria 1957 to 2007* (Adult Parole Board of Victoria, 2007).

Queensland Corrective Services, *Ministerial Guidelines to the Queensland Parole Board* (Queensland Corrective Services, 2011) <http://www.correctiveservices.qld.gov.au/About_Us/Community_Corrections_Board/ministerial_guidelines_to_the_parole_board_aug2011.pdf>.

Ross, Stuart and Tricia Guarnieri, *Recidivism Rates in a Custodial Population: The Influence of Criminal History, Offence and Gender Factors*, Criminology Research Grant 35/89 (1996).

Scrutiny of Acts and Regulations Committee, *Review of the Charter of Human Rights and Responsibilities Act 2006: Transcript of Public Hearings, Adult Parole Board* (22 July 2011) Parliament of Victoria <www.parliament.vic.gov.au/images/stories/committees/sarc/charter_review/transcripts/Adult_Parole_Board_22-07-11.rtf> at 18 November 2011.

Sentencing Advisory Council, *High-Risk Offenders: Post-Sentence Supervision and Detention*, Final Report (Sentencing Advisory Council, 2007).

Sentencing Advisory Council, *Sentencing, Parole Cancellation and Confiscation Orders*, Report (Sentencing Advisory Council, 2009).

Shute, Stephen, 'Parole and Risk Assessment' in Nicola Padfield (ed.), *Who To Release? Parole, Fairness and Criminal Justice* (Willan Publishers, 2007) 21, 27.

Victoria Police, *Victoria Police Manual* (Victoria Police, 2011).

Wade, William, *Administrative Law* (6th ed., Clarendon Press, 1988).

Case law

- Abebe v Commonwealth* (1999) 197 CLR 510
- Al Qatrani v Parole Authority of New South Wales* [2007] NSWSC 1270 (9 November 2007)
- Annetts v McCann* (1990) 170 CLR 321
- Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321
- Bugmy v The Queen* (1990) 169 CLR 525
- Clifford v The Queen* [2011] VSCA 199 (30 June 2011)
- Gypsy Jokers Motorcycle Inc v Commissioner of Police* [2008] HCA 4 (7 February 2008)
- Haidy v DPP* [2004] VSC 247 (22 April 2004)
- Hussain v Minister for Foreign Affairs* [2008] FCAFC 128 (5 July 2008)
- Kioa v West* (1985) 159 CLR 550
- Kirk v Industrial Relations Commission; Kirk Group Holdings Pty Ltd v WorkCover Authority of New South Wales (Inspector Childs)* [2010] HCA 1 (3 February 2010)
- Kotzmann v Adult Parole Board of Victoria* [2008] VSC 356 (15 September 2008)
- Ludeman v The Queen; Thomas v The Queen; French v The Queen* [2010] VSCA 333 (10 December 2010)
- Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273
- Murray v NSW State Parole Authority* [2008] NSWSC 962 (17 September 2008)
- National Companies and Securities Commission v News Corporation Ltd* (1984) 156 CLR 296
- Pillay v Minister for Immigration and Multicultural Affairs* [2000] FCA 112 (16 February 2000)
- Power v The Queen* (1974) 131 CLR 623
- R v Commonwealth Conciliation and Arbitration Commission; Ex parte Angliss Group* (1969) 122 CLR 546
- R v Currey* [1975] VR 647
- R v Krasnov* [1995] VSC 198 (21 September 1995)
- R v Merritt* [2008] VSCA 238 (4 December 2008)
- R v Morgan* (1980) 7 A Crim R 146
- R v Portolesi* [1973] 1 NSWLR 105
- R v Sener* [1998] 3 VR 749
- R v VZ* [1998] VSCA 32 (3 September 1998)
- Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82
- Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252
- Seiffert v The Prisoners Review Board* [2011] WASCA 148 (8 July 2011)

Legislation

Administrative Decisions (Judicial Review) Act 1989 (ACT)
Administrative Law Act 1978 (Vic)
Bail Act 1977 (Vic)
Charter of Human Rights and Responsibilities Act 2006 (Vic)
Children, Youth and Families Act 2005 (Vic)
Commonwealth of Australia Constitution Act 1990 (Imp)
Community Welfare Services Act 1978 (Vic)
Correctional Services Act 1982 (SA)
Corrections Act 1986 (Vic)
Corrections Act 1997 (Tas)
Corrections Regulations 2009 (Vic)
Corrections and Conditional Release Act, SC 1992 (Canada)
Corrective Services Act 2006 (Qld)
Crimes Act 1914 (Cth)
Crimes Act 1958 (Vic)
Crimes (Administration of Sentences) Act 1999 (NSW)
Crimes (Sentence Administration) Act 2005 (ACT)
Criminal Justice Act 2003 (UK)
Drug Court Act 1998 (NSW)
Freedom of Information Act 1982 (Vic)
Health Records Act 2001 (Vic)
Human Rights Act 2004 (ACT)
Indeterminate Sentences Act 1907 (Vic)
Information Privacy Act 2000 (Vic)
Ombudsman Act 1973 (Vic)
Parole Act 2002 (NZ)
Parole of Prisoners Act 1979 (NT)
Penal Reform Act 1956 (Vic)
Penal Reform Bill 1955 (Vic)
Police Regulation Act 1958 (Vic)
Public Administration Act 2004 (Vic)
Sentence Administration Act 2003 (WA)
Sentencing Act 1991 (Vic)
Serious Sex Offenders (Detention and Supervision) Act 2009 (Vic)
Serious Sex Offenders Monitoring Act 2005 (Vic)
Social Welfare Act 1973 (Vic)
Supreme Court (General Civil Procedure) Rules 2005 (Vic)