



Victorian Aboriginal Legal Service Co-operative Limited (VALS)

Review of Victoria's Adult Parole Framework

Submission to the Sentencing Advisory Council

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About the Victorian Aboriginal Legal Service Co-operative Limited

The Victorian Aboriginal Legal Service Co-operative Limited (VALS) was established as a community controlled Co-operative Society in 1973 to address the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. VALS plays an important role in providing referrals, advice, duty work or case work assistance to Aboriginal and Torres Strait Islander peoples in the State of Victoria. Solicitors at VALS specialise in one of three areas of law, being criminal law, family law and civil law. VALS maintains a strong client service focus which is achieved through the role of Client Service Officer (CSO). CSOs act as a bridge between the legal system and the Aboriginal and Torres Strait Islander community.

VALS is actively involved in community education, research and advocacy around law reform and policy development. VALS strives to:

- a) Promote social justice for Aboriginal and Torres Strait Islander peoples;
- b) Promote the right of Aboriginal and Torres Strait Islander peoples to empowerment, identity and culture;
- c) Ensure that Aboriginal and Torres Strait Islander peoples enjoy their rights, are aware of their responsibilities under the law and have access to appropriate advice, assistance and representation;
- d) Reduce the disproportionate involvement of Aboriginal and Torres Strait Islander peoples in the criminal justice system; and
- e) Promote the review of legislation and other practices which discriminate against Aboriginal and Torres Strait Islander peoples.

For further information about VALS, please see our website: www.vals.org.au



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1. INTRODUCTION

VALS welcomes the opportunity to provide comment to the Sentencing Advisory Council's ('the Council') review of Victoria's adult parole system. Parole plays a critical part in addressing the over-representation of Aboriginal and Torres Strait Islander peoples in the criminal justice system. Parole has the ability to provide supported release to prisoners to aid in their reintegration to community. If done successfully, parole can reduce the likelihood of reoffending and stop the revolving door for Aboriginal and Torres Strait Islander people and the criminal justice system.

VALS believes that it is important to be involved in reforming the framework in which the Adult Parole Board ('the Board') operates to create opportunities for successful reintegration of prisoners in a way that is transparent, equitable and accountable. The significance of effective parole systems cannot be underestimated in light of recent research that found ex-prisoners are dying in their first year of release at 10 times the rate of those in custody, many of which are drug related.¹ VALS is unaware if this data applies to immediate release or paroled prisoners (or both), however it reminds us that prisoners are a profoundly marginalised population who benefit from support and supervision once they leave prison. Access to supports and supervision through parole should therefore be treated with critical importance.

VALS acknowledges the vital the Board play in the justice system however we strongly believe that there are elements of the Boards functions, and the statutory framework under which it operates, that could be improved. The operation of parole boards has become an issue of national concern for Aboriginal and Torres Strait Islander Legal Services across the country for a number of reasons, chief among them the fact that many parole boards are not bound by natural justice or procedural fairness. VALS is concerned at the failure of the Victorian parole system to afford procedural fairness to those who come before it pursuant to section 69(2) of the *Corrections Act 1986* which states that in exercising its functions, the Board is not bound by the rules of natural justice.

The norms of procedural fairness reach well beyond the confines of courtrooms and other judicial proceedings and are arguably widely regarded within the Australian community as indispensable to justice.² Therefore in this submission VALS will argue for the removal of the expressed exclusion of natural justice in the *Corrections Act 1986*. We further argue that the introduction of procedural fairness will aid the functioning of the Board; encourage positive participation of prisoners with the parole process; increase community confidence in the decisions of the Board; and increase levels of prisoner acceptance of parole decisions. VALS will also argue that the purposes of parole will be better

¹ Brunette Institute, 'Ex-prisoners dying at a rate 10 times those in custody' (2010) Media Release, 17 July.

²² Chief Justice Robert S French, 'Procedural Fairness – Indispensable to Justice?' *Sir Anthony Mason Lecture, The University of Melbourne Law School, Law Students' Society* (7 October 2010).

served through the Board's utilisation of procedural fairness and compliance with human rights obligations.

The introduction of procedural fairness to parole proceedings is additionally important in Victoria as the Board is not subject to freedom of information legislation, is not subject to review by the Ombudsman and is currently exempt from compliance with the *Charter of Human Rights and Responsibilities 2006* (Vic) ('the Charter').

The comments and recommendations in this submission do not aim to impinge on the Board's ability to be actively involved in release preparations or ability to make timely parole decisions. Instead, VALS wishes to advocate for change to the Board that brings its functions in step with contemporary understandings and standards of fair, balanced, transparent and accountable decision-making.

The Terms of Reference direct consideration to information sharing for the proper management of parolees. Procedural fairness by its very nature will improve information sharing with other parties to the Board, and the Board to other parties. Other jurisdictions such as South Australia, New South Wales and Queensland provide examples of parole where procedures are governed by or contain elements of procedural fairness and we will briefly touch on these examples.

We also endeavour to address further Terms of Reference however note the extremely short timeframe that the Council has been afforded to report to the Attorney-General on this issue and the subsequent limited time VALS has had to prepare a detailed and informed submission. Investigation into reforms for Victoria's adult parole system is a complex task, and in considering potential statutory criteria to guide decision-making in parole matters, a highly technical task. For reasons of limited time coupled with highly complex and technical Terms of Reference, VALS suggests the Council make interim recommendations at this stage of reporting and suggest further investigation in this area.

2. A CASE FOR FAIRNESS

2.1. POLICY CONTEXT

In November 2009, the Standing Committee of Attorneys-General endorsed the National Indigenous Law and Justice Framework 2009-2015 (NILJF) that aims to eliminate Aboriginal and Torres Strait Islander disadvantage in law and justice. The Framework, to which all Australian jurisdictions are signatory, states that 'Aboriginal and Torres Strait Islander and Torres Strait Islander peoples have a right to procedural fairness.'³ VALS recommends that the Victorian Government amend the *Corrections Act 1986* (and any other Victorian legislation that excludes procedural fairness or natural justice) to maintain its endorsement of the NILJF and demonstrate a commitment to transparency and accountability in the delivery of equitable justice.

The NILJF recognises the relationship between the exclusion of procedural fairness and discriminatory outcomes. The first goal of the NILJF is to improve all Australian justice systems so that they comprehensively deliver on the justice needs of Aboriginal and Torres Strait Islander peoples in a fair and equitable manner. The NILJF notes that in achieving this goal, it is 'important that governments ensure that Aboriginal and Torres Strait Islander peoples realise their right to positive participation in the justice system'.⁴ To ensure that procedural fairness exists across the criminal justice system the NILJF requires the review of procedural fairness guidelines in the criminal justice system and identify key issues affecting Aboriginal and Torres Strait Islander peoples for implementation and review.

Also relevant is the Victorian Aboriginal Justice Agreement Phase 2 (AJA2). The AJA2 is a strategic document that has two main aims:

1. Minimise Koori over-representation in the criminal justice system by improving the accessibility, utilisation and efficacy of justice-related services in partnership with the Koori community, and;

³ Standing Committee of Attorneys-General Working Group on Indigenous Justice, 'National Indigenous Law and Justice Framework 2009-2015' (2009) p.9 at:

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(8AB0BDE05570AAD0EF9C283AA8F533E3\)~IPS+-National+Indigenous+Law+and+Justice+Framework+-+FINAL+-+PDF+version.PDF/\\$file/IPS+-National+Indigenous+Law+and+Justice+Framework+-+FINAL+-+PDF+version.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(8AB0BDE05570AAD0EF9C283AA8F533E3)~IPS+-National+Indigenous+Law+and+Justice+Framework+-+FINAL+-+PDF+version.PDF/$file/IPS+-National+Indigenous+Law+and+Justice+Framework+-+FINAL+-+PDF+version.PDF)

⁴ *Ibid*, p. 12.

2. Have a Koori community that has the same access to human, civil and legal rights as the broader Victorian community, living free from discrimination and experiencing the same justice outcomes through the elimination of inequalities in the justice system.⁵

AJA2 aims of accessibility, utilisation, efficacy and elimination of inequalities in justice outcomes contain strong, arguably direct, parallels with procedural fairness. Under the aims of the AJA2 there are objectives, strategies and initiatives. They include:

- Stronger alternatives to prison;
- Reduce re-offending;
- Reduce victimisation;
- Responsive and inclusive services; and
- Stronger community justice responses.⁶

One of the intermediary indicators under the monitoring framework of the AJA2 include the proportion of Koori prisoners released on parole and the proportion of those who return to prison. VALS therefore argues that the aims and objectives of the AJA2 should be considered when rethinking the framework the Board operates within. We also argue that the clear links between procedural fairness, described in detail below, and the aims and objectives of the AJA2 highlight the critical importance of procedural fairness in reducing the over-representation of Aboriginal and Torres Strait Islander peoples with the criminal justice system.

2.2. PROCEDURAL FAIRNESS

The Victorian legislative framework does not provide for fair and equitable decision-making through the appropriate sharing and engagement with information by all parties to a matter concerning an individual's parole. Procedural fairness is concerned with the procedures employed by a decision-maker. Procedural fairness ensures a decision-maker who follows a fair procedure is more likely to reach a fair and accurate decision.

There is a presumption in law that the rules of natural justice/procedural fairness must be observed in exercising statutory power that may affect the rights, interests or legitimate expectations of individuals. It is also considered good practice to observe these rules whether or not the decision-making power being exercised is statutory.⁷

⁵ Victorian Government, 'Victorian Aboriginal Justice Agreement Phase 2' (2006).

⁶ *Ibid.*

⁷ NSW Ombudsman, 'Natural justice/procedural fairness' *Public Sector Agencies fact sheet No 14* (2010) at http://www.ombo.nsw.gov.au/publication/PDF/factsheets/FS_PS14_NaturalJustice_Nov10.pdf

Procedural fairness rights are deeply rooted in law and are considered as normative markers for decision-making⁸ and are a fundamental proposition in criminal proceedings. Circumstances in which the requirement to provide procedural fairness is explicitly or specifically excluded by Acts of Parliament are rare. The Victorian Acts relating to the operation of the Adult Parole Board are an example of such rarity.

Procedural fairness principles include:

- The right to be informed of and understand the case against you;
- The right to be heard;
- The right to respond to the case against you;
- The right to have a decision effecting you made without bias;
- The right to be informed of, and understand, a decision in a case against you; and
- The right to appeal a decision in a case against you.

Procedural fairness ensures good practice and is instrumental to sound decision-making. In acting in accordance with procedural fairness, the Board can benefit in providing a means of checking facts and identifying issues and expose weakness.

While natural justice is, at law, a safeguard applying to the individual whose rights or interests are being affected, an investigator or decision-maker should not regard such obligations as a burden or impediment to an investigation or decision-making process. Natural justice can be an integral element of a professional decision-making or investigative process – one that benefits the investigator or decision-maker as well as the person whose rights or interests may be affected.⁹

The right to be informed of, and understand the case against you

Procedural fairness prescribes that a person should be provided with details of any relevant and significant information that the decision-maker has and be given an opportunity to respond.¹⁰

Prisoners in Victoria currently do not have the right to view or receive copies of reports submitted

⁸ Chief Justice Robert S French (2010) *Ibid.*

⁹ NSW Ombudsman (2010) *op cit*, 2.

¹⁰ *Id. Confidential information:*

Sometimes a decision-maker will possess adverse information that is subject to some form of confidentiality. Whilst the obligation to maintain confidentiality might mean that copies of confidential documents or names of persons supplying information should not be disclosed, the hearing rule will generally require that the substance or essence of the information be provided.⁸ Alternatively, the confidential information could be provided to the person's legal representative, on an appropriate undertaking to act in their client's interest, but without disclosing the information to the client. The public interest in protecting confidentiality will override the requirement to accord procedural fairness only in rare circumstances.

about them to the Board. Specifically, reports from Corrections, Community Corrections and victim submission are not disclosed to the prisoner. Prisoners therefore do not have the opportunity to prepare an informed response in relation to the content of these reports and other materials before the Board.

The Board must not release the victim submission to the prisoner while the parole order is being determined unless: a) the release of the submission is, in the opinion of the Board, essential in the interest of fairness and justice; and b) the Board has asked the victim whether they consent to the submission being released to the prisoner. VALS agrees that the victim must be consulted before releasing their statement to the prisoner. The NILJF states that in order to ensure that Aboriginal and Torres Strait Islander people feel safe and are safe within their communities, culturally competent responses to the management and rehabilitation of perpetrators and offenders must be developed for perpetrators and offenders returning to their communities after a period of exclusion (3.1.2d). The NILJF calls for the establishment of mechanisms to ensure that victims are consulted in planning for the reintegration of offenders (3.1.2e).

We argue that providing prisoners with victim statements should be attempted in the majority of cases and notes the common use of Victim Impact Statements in other Victorian proceedings. This is important not only in the interest of being informed of the case against you, but can also have play a part in the rehabilitation and reintegration of the offender. The prisoner having access to the victim's statement also draws some interesting parallels with notions of restorative justice, which we unfortunately do not have time to explore in the current submission.

The right to be heard and respond to a case against you

Any person who decides any matter without hearing both sides, though that person may have rightly decided, has not done justice.¹¹

Procedural fairness requires that a person, whose interests are to be affected by a decision-maker, whether adjudicative or administrative, receive a fair and unbiased hearing before a decision is made.¹² A basic principle of procedural fairness is the hearing rule. The hearing rule requires a decision-maker inform a person of a case against them or their interests and give them an

¹¹ NSW Ombudsman (2010) op cit.

¹² Victorian Government Solicitor's Office, 'Procedural Fairness – The Hearing Rule' (2007) at <http://www.vgso.vic.gov.au/resource-centre/publications/procedural-fairness-hearing-rule>

opportunity to be heard.¹³ Put simply, hearing the ‘other side’ or all sides of the story is central to good decision-making.

The more significant the decision in terms of the effect that decision has on a person’s interests, the greater care the decision-maker must take to provide that person with an opportunity to be heard. The Board’s decision involving a person’s liberty and access to supported release have extremely high personal interest, and therefore the Board should be compelled to provide potential parolees with an opportunity to be heard. The Board is not so compelled, as they are currently subject to a contrary statute.

Highlighted by Advocacy Solicitor Ruth Barson of the North Australian Aboriginal Justice Agency (NAAJA), parole proceedings are the second ‘gate-keeper’ when determining an accused’s liberty:

There is a marked contrast between the upholding of rights during a criminal trial, and the complete abolishment of procedural fairness rights, when the same person comes before the Parole Board, seeking to have their liberty conditionally reinstated.¹⁴

VALS argues that prisoners at parole hearings should be afforded the same procedural fairness granted in criminal proceedings. In both proceedings, decisions impacting on an individual’s rights to liberty are at stake and therefore compel the employment of procedural fairness.

In Victoria there is no right to appear in person before the Board. VALS is aware that the Board conducts “paper meetings” in addition to face-to-face interviews and that the frequency of the latter is increasing. VALS understands that the Board endeavours to interview most prisoners however do not think it possible to interview all prisoners eligible for parole. While this may be a product of a resourcing issue in addition to the high number of hearings before the Board, VALS considers the absence of the right of the prisoner to appear before the Board to be highly problematic. This is particularly the case due to the failure of Board to provide relevant materials and reports to the prisoner. In this circumstance, the prisoner does not have adequate insight into the case against them and therefore cannot understand nor respond to the case against them on paper or otherwise.

The right to appear before the Board is central to the notion of positive engagement whereby the prisoner is involved in the decision-making process and is therefore more likely to help arrive at an informed and well tailored plan for conditional release, or alternatively be more accepting of the

¹³ *Id.*

¹⁴ Ruth Barson, ‘The Case for a Fair Parole Hearing’ *Law Society Northern Territory Balance Magazine* (August 2011).

decision of the Board if they decide not to grant parole. The right to appear before the Board is in line with the AJA2 as it is an inclusive process. Furthermore, the Victorian Government Solicitors Office notes that an oral hearing may be necessary where a person is at some sort of disadvantage in preparing written submissions.¹⁵ This is arguably the case for many of VALS clients and the broader prison population who likely have literacy and other factors that put them at disadvantage.

As the non-parole period fulfils the punishment aspect of a sentence, the focus after this period should no longer be related to punitive measures but instead to rehabilitation and reintegration. VALS argues that prisoners having access to a Board hearing is central to rehabilitation and reintegration efforts, and to deny the right of such access can in itself be considered punitive.

The right to be informed of, and understand, a decision in a case against you

The current parole system in Victoria does not provide the right to prisoners to receive detailed reasons for the decision of the Board. We suggest that providing reasons for a Board's decision will increase confidence in the parole system and increase understanding and acceptance of parole decisions. Failing this leaves room for perceptions of unfairness in the eyes of the prisoner, their families and the community.

In providing reasons for a rejection of a parole application, Boards in some jurisdictions also provide the offender with an earliest possible date at which they can reapply for parole and suggestions for actions that the offender might take in the meantime to increase their chances of having parole granted in the future. This sort of information sharing could act as a significant incentive for offenders to engage in prison programs and activities.

The right to appeal a decision in a case against you

Procedural fairness provides the right of a person to receive all relevant information before preparing their reply. This must include a description of the decision, the criteria for making that decision and information on which any such decision was based. Victoria's parole system has no formal process of appeal. We note that if a prisoner is dissatisfied by a decision by the Board, they may challenge the decision by means of judicial review in *limited circumstances*. There is a lack of information around what 'limited circumstances' are and the accessibility of the process through which application for review is achieved. VALS would be interested in SAC providing detail into this area as it currently operates.

¹⁵ *Id.*

Allowing the right of appeal for prisoners to Board decisions would encourage thorough decision-making, ensure that proper procedure is followed and promote accountability by allowing redress of mistakes.¹⁶ VALS is hoping that the current Inquiry will explore a possible framework for how appeals to Board decisions could be formalised in Victoria.

Recommendation 1: The Victorian Government amend the *Corrections Act 1986* to remove section 69(2) to codify its commitment to the National Indigenous Law and Justice Framework and afford Aboriginal and Torres Strait Islander their right to procedural fairness.

Recommendation 2: Prior to the hearing, the prisoner be provided access to and copies of reports and materials that will be before the Board for the purposes of decision-making.

Recommendation 3: The APB consider the providing of a victim statement to the prisoner to be in the interest of fairness and justice in all cases subject to consent of the victim.

Recommendation 4: SAC investigate prisoner access to victim statements in the context of Restorative Justice.

Recommendation 5: Prisoners be afforded the right to appear before the Board.

Recommendation 6: The APB provide prisoners with details reasons for their decisions and make recommendations to the prisoner as to their earliest possible reapplication date and actions that can be taken before that date to improve the likelihood of future parole being granted.

Recommendation 7: SAC explore potential frameworks that could support a formal process of appeal for APB decisions in Victoria.

2.3. PROCEDURAL FAIRNESS IN ACTION

VALS is aware of arguments against the application of procedural fairness in the functions of parole boards. We find the vast majority of issues sighted with this concern to be relatively easy to overcome.

New South Wales's parole legislation, Part 6 of the *Crimes (Administration of Sentences) Act 1999*, allows for a transparent and accountable parole process. Sections 140 and 147 allow prisoners and victims to make submissions to the Board in writing, in person or through a representative. This can occur prior to or at the hearing which occurs in open court. In preparing for these submission options, prisoners are provided with the full disclosure of material that is before the Board.

¹⁶ Ruth Barson (2011) *op cit*.

New South Wales Legal Aid Prisoner Legal Service, the Aboriginal Legal Service NSW/ACT and private practice provide representatives to appear for prisoners who are challenging a recommendation to refuse parole.

Procedural fairness is afforded in parole systems in other jurisdictions also. For example:

- In Queensland an application for judicial review can be made on the basis of a breach of the rules of natural justice under the *Judicial Review Act 1991*, s20(s)(a). Furthermore, prisoners in Queensland must be provided with written reasons for refusal to grant parole. If the reasons provided are not sufficient, they can be obtained through s32(2)(b) of said Act. Reasons must set out the findings of material questions of fact and refer to the evidence or other material on which findings were based, pursuant to *Acts Interpretation Act 1954* s27B. This information could also be accessed pursuant to the *Right to Information Act 2009*.
- The requirements of the South Australian Corrective Services Act generally comply with requirements for procedural fairness. While prisoners do not have a right to appear before the Board, a legal representative may appear before the Board on the prisoner's behalf. Within 30 days of refusing an application the Board must notify the prisoner in writing reasons for refusal including any matters that may assist the prisoner in making any further application for parole. The Board is also subject to the judicial review jurisdiction of the Supreme Court of South Australia.

2.4. HUMAN RIGHTS

Common law principles, along with domestic and international human rights principles, require that prisoners receive a fair hearing.

Arguments based on administrative inconvenience cannot outweigh fundamental rights to a fair hearing...the Victorian and ACT legislation impose an obligation on 'public authorities' to act in a way which is compatible with human rights. Relevant rights within the parole context include the right to liberty and freedom of movement and the right to privacy and reputation. Rights of families and children may also be engaged.¹⁷

¹⁷ Naylor and Schmidt (2010) *op cit*, pp454-456.

The ongoing exclusion of the Board from the operation of the Charter has been strongly criticised by bodies such as the Federation of Community Legal Centres Victoria (FCLC)¹⁸, the Human Rights Law Centre (HRLC)¹⁹ and the Victorian Equal Opportunity and Human Rights Commission (VEOHRC) who note the following:

...insufficient information has been provided publically to explain why the challenge for the Boards is so different to that experienced by many other public authorities as to justify their continuing exemption for the Charter.²⁰

Requiring the Boards to provide procedural fairness and a right of appeal of Board decisions would improve observance of offenders' human rights...²¹

...all other 'public authorities' have to grapple with the requirements of compliance with the Charter...parole decision-making should comply with increasingly influential human rights principles.²²

VALS acknowledges that Dr Deborah Hann was appointed to a Senior Project Manager position last year to implement changes to current practices in order for the Board to demonstrate greater compliance with the Charter. VALS is aware that some work was done by Dr Hann in the Youth Parole Board jurisdiction with the aim to run a pilot in this area and that this initiative has been cancelled. VALS would be interested in the current Inquiry clarifying what progress or findings were made through this role in relation to the Adult Parole Board in moving towards improved compliance with the Charter.

Recommendation 8: the current Inquiry clarify the nature, findings and progress of the work undertaken through the Senior Project Manager position in relation to the Adult Parole Boards improved compatibility and compliance with the *Charter of Human Rights and Responsibilities Act 2006* (Vic).

Recommendation 9: SAC make recommendations relating to the need for the APB to progress its functions towards compliance with the *Charter of Human Rights and Responsibilities 2006* (Vic).

¹⁸ Federation of Community Legal Centres Victoria, 'Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009: Regulatory Impact Statement Submission' (2009).

¹⁹ Human Rights Law Resource Centre, 'Submission to the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 (Vic) (2009).

²⁰ Victorian Equal Opportunity and Human Rights Commission, 'Emerging Change: The 2008 Report on the Operation of the Charter of Human Rights and Responsibilities,' (2009), 6.

²¹ Human Rights Law Resource Centre (2009) *ibid*.

²² Naylor and Schmidt (2010) *op cit*, pp. 457-458.

2.5. ADMINISTRATIVE BURDEN & A LAWYER'S PICNIC?

VALS acknowledges that the ability of the Board to regulate its own procedure under section 66(6) of *the Corrections Act 1986* subject to the Regulations is said to allow flexibility and management of significant caseloads in a small amount of time.²³ Procedural fairness principles and practices are necessarily flexible and could therefore be utilised to the benefit and effectiveness of the Board by streamlining decision-making.

As noted in research by NAAJA, there are checks and balances that decision-making bodies can utilise to ensure that proceedings before them are meritorious and expedient.²⁴ The tendency of some to consider procedural fairness as a 'species of ethical ornamentation' or a 'moral luxury which is a drag on efficient decision-making' is reflected in statutory provisions that exclude procedural fairness from certain classes of decision-making.²⁵ Chief Justice Robert S French suggests that such provisions, as found in the *Corrections Act 1986*, raise the following question:

Does such legislation contemplate a tolerable level of bias or apparent bias or unfair refusal to hear from a person affected by a decision? That raises the related question: Is procedural fairness indispensable to justice?²⁶

Chief Justice French suggests that procedural fairness does not require the judicialisation of administrative processes. Instead, procedural fairness is practical and flexible in application as evidenced by its compatible universal application to official decisions affecting individual interests.

There is little evidence that procedural fairness leads to an unworkable system where fair procedures are actively resourced. One example is for prisoners serving a sentence of three years or less (s51 NSW Act) or 5 years or less (s 66(1) of *Correctional services Act 1982* (SA)) are automatically released once they reach their non-parole period. These systems mean the parole board only engages with prisoners serving sentences of more than three (NSW) or five (SA) years. Similarly, in New Zealand, prisoners with sentences of 2 years or shorter are automatically released after serving half their sentence.²⁷ And in Canada, all prisoners are eligible for conditional release.²⁸

In arguing the benefits of supported release of prisoners through parole, VALS is unsure whether automatic release is desirable in all cases depending on length of sentence. An alternative might be

²³ Allen Consulting Group, 'Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009: Regulatory Impact Statement' (2009).

²⁴ Barton (2011) *op cit*.

²⁵ French (2010) *op cit*, p2.

²⁶ *Ibid*, p.3.

²⁷ Naylor and Schmidt (2010) *op cit*.

²⁸ *Id*.

for those serving a sentence of a particular length have automatic approval for parole and the Board be involved in the release plan and conditions applied to the release.

Concerns around an increase strain on resources and influx of litigation (in the case of legal representation at hearings and the availability of appeal mechanisms) have been put to rest in other jurisdictions. In New Zealand, for example, only 4.2 per cent of decisions to deny parole were review in 2008-2009.²⁹ Similar concerns have been addressed in New South Wales through limiting appeal criteria. The New South Wales Act restricts appeal grounds to the prisoner or the State alleging that the Board's decision was made on the basis of misleading, false or irrelevant information. Furthermore, a hearing can only be held if parole has been refused.

Furthermore, judges, magistrates and tribunal members already have the power to: regulate proceedings before them; separate vexatious litigants from meritorious litigants; and limit oral and written submissions. Also, before certain litigants access a court or tribunal, it is a requirement of legal aid services that clients meet a merit test.

Recommendation 10: SAC consider automatic parole for prisoners serving sentences between 3-5 years.

Recommendation 11: In considering the introduction of an appeal process, SAC consider limiting the grounds of appeal for parole decisions on the basis of failing to provide procedural fairness and/or parole decisions allegedly made on the basis of misleading, false or irrelevant information.

²⁹ New Zealand Parole Board, 'Annual Report 2008/2009' (2009) : calculated for statistics in the report, in Bronwyn Naylor and Johannes Schmidt, 'Do Prisoners have a Right to Fairness before the Parole Board?' *Sydney Law Review* (2010) 32:437-469.

3. PURPOSES OF PAROLE

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

The criteria that the Board applies in making decisions must be considered in relation to its purposes. We argue that positive engagement of prisoners in the parole process leads to informed and therefore effective decisions regarding parole plans and conditions. This in turn leads to the increased likelihood of community safety being maintained by way of reducing recidivism.

Parole also acts as an incentive to eligible prisoners to undertake activities in order to make progress during their non-parole period in order to be considered for conditional release. In addition, incentive for prisoners to access parole is a means of managing the costs of incarceration.

Goal 2 of NILJF is to reduce the over-representation of Aboriginal and Torres Strait Islander offenders, defendants and victims in the criminal justice system. In order to achieve this, the NILJF looks to achieve progressive reductions in the rate of recidivism for Aboriginal and Torres Strait Islander peoples. A strategy to achieve this is to increase the availability, scope and effectiveness of transition support programs for offenders through culturally competent throughcare programs to successfully reintegrate prisoners into the community.

3.1. PAROLE AND COMMUNITY SAFETY

Recent research shows that positive criminal justice outcomes as an indicator of Aboriginal and Torres Strait Islander disadvantage are deteriorating.³⁰ Rehabilitation and reintegration is as important now as it ever was for VALS' clients and the broader Aboriginal and Torres Strait Islander population exiting prison. Parole is one of many stages within the criminal justice system where outcomes for offenders and the community can be improved.

VALS notes the essential central focus on community safety in parole decisions. We argue that this focus should be balanced with the recognition that supported and supervised release on parole can act in the interests of community safety. At the end of a custodial sentence, direct release into the community involves no formal supervision or reporting requirements and has limited supports. We acknowledge that pre-release planning can occur in these circumstances, however the management and monitoring function is greatly reduced or absent.

³⁰ Steering Committee for the Review of Government Services, 'Overcoming Indigenous Disadvantage: Key Indicators 2011) (2011).

A prisoner serving their full sentence without parole may be considered as a higher level of punishment for, or deterrence from, offending. Research tells us, however, that: a) prison is an ineffective method of individual or broader deterrence; and b) does not influence rates of recidivism.³¹ Furthermore, when considering comments made by the judge or magistrate when imposing a sentence, it is important to note that the non-parole period is intended to fulfil the punishment and deterrence functions of sentencing. Therefore prior to and following the expiry of the non-parole period, neither deterrence nor punishment should be the focus for the Board in making its decisions. Criteria utilised by the Board in making decisions should therefore not operate in a punitive framework.

Tabloid headlines and the lack of media reporting on successfully completed parole orders can create a public perception that people frequently reoffend on parole. The majority of parole orders in Victoria, however, are completed successfully. In 2009-2010, 1064 parole orders were completed successfully and 536 were cancelled - mostly for failure to comply with conditions of parole.³² It is important to note that parole failure is most commonly due to breach of conditions rather than reoffending. Of the 539 parole orders cancelled in Victoria 2009-2010, 388 were due to failure to comply with conditions of parole and 151 were due to further conviction and sentence.

3.2. PAROLE AS AN INCENTIVE

Parole has the potential to act as an incentive for not only good behaviour while in prison, but can also act as a motivator towards participation in prison based programs and activities that will improve chances of parole as well as successful conditional release.

The ability of parole to act as an incentive to Aboriginal and Torres Strait Islander prisoners is limited by the availability of culturally appropriate programs and services in prisons. Research from the Australian Institute of Criminology concerning the reintegration of Aboriginal and Torres Strait Islander prisoners found that:

- Aboriginal and Torres Strait Islander offenders are readmitted to prison sooner and more frequently than non-Aboriginal and Torres Strait Islander offenders;
- Aboriginal and Torres Strait Islander prisoners are nearly twice as likely to have been readmitted to prison within two years; and

³¹ ³¹ Sentencing Advisory Council, 'Sentencing Matters: Does Imprisonment Deter? A Review of the Evidence' (2011).

- Half of Aboriginal and Torres Strait Islander prisoners remained in prison until the expiry of their sentence which made post-release support challenging.³³

Reasons that were found to contribute to these findings include:

- Identified need for programs and services to be adapted to meet Aboriginal and Torres Strait Islander cultural-specific needs as they saw the lack of these programs as a major barrier to participation and reintegration;
- Failure for support services to equip Aboriginal and Torres Strait Islander men to deal with risk factors they confront, where the factors that contribute to their offending while they are in the community remain when they return; and
- Lack of program participation among Aboriginal and Torres Strait Islander prisoners linked to program delivery techniques that attempt to cater to cultural specificity at the expense of program integrity.

The ability of parole to act as an incentive to prisoners can also be limited by the lack of opportunity to actively participate in the parole process. Access to face-to-face hearings can overcome issues of literacy or limited understanding of processes involving the justice system. Face-to-face parole hearings can also mitigate negative effects of limited availability of assistance in preparing parole-release plans or other materials to be presented to the Board. Furthermore, adequate levels of understanding of the process of parole decision-making and the consequences of decisions made by the Board (whether granting or denying parole) cannot always be achieved without the presence of an advocate, legal advice or representation. This is discussed elsewhere in this submission.

³³ Matthew Wills, 'Reintegration of Indigenous prisoners: Key findings' *Australian Institute of Criminology: Trends & Issues* (2008).

4. DECISION-MAKING CRITERIA

*When deciding whether to release an offender on parole or home detention, the Board considers the interests of the community, the rights of the victim, the intentions of the sentencing authority and the needs of the offender.*³⁴

4.1. CRIMINAL HISTORY

Factors considered by the Board relating to criminal history include:

- a. The nature and the circumstances of the offence(s);
- b. Comments made by the judge at time of sentencing;
- c. Criminal history; and
- d. Previous history of supervision in the community.

Criminal history has relevance in considering the appropriateness of parole in attempting to preserve community safety, however should not be considered for this purpose alone. The factors can also be used as guide in preparing a tailored release plan. Considerations concerning criminal history should therefore, where appropriate, act not only as a consideration against the granting of parole, but can function as a guide to the sorts of things that parole can cater to and create structure around in providing a thorough parole release plan with an improved likelihood of success.

4.2. RISK ASSESSMENT

In making its decision, the Board considers the potential risk to the community and to the offender. VALS supports the current actions of the Board in proactively seeking information to best equip themselves with information from a variety of sources. VALS believes, however, that there is room for improvement in this area.

Risk assessment is a complex task and one that is hard to perform accurately. There has been some evolution towards more sophisticated methods of risk assessment that identify factors specific to certain groups, such as Aboriginal and Torres Strait Islander peoples, as well as certain offence types. VALS believes that Aboriginal and Torres Strait Islander-specific considerations when measuring or mitigating risk are somewhat safeguarded through the presence of Aboriginal community members such as Jim Berg who currently sits on the Board. VALS is interested if these

³⁴ Victorian Department of Justice, 'Adult Parole Board of Victoria' (2010) at <http://www.justice.vic.gov.au/wps/wcm/connect/justlib/doj+internet/home/about+us/our+organisation/business+area+profiles/justice+-+adult+parole+board+of+vicoria>

factors will necessarily be considered in the absence an Aboriginal and Torres Strait Islander community member, especially considering the Board’s exemption from the Charter which would likely to direct the Board to take account of cultural factors specifically relevant to Aboriginal and Torres Strait Islander peoples. VALS is therefore interested in potential ways in which such considerations can be built into the functions of the Board to ensure against the absence of Aboriginal and/or Torres Strait Islander presence on the Board.

An increased focus on risk has been criticised in the United Kingdom where a Home Office Research Study concluded that the increased emphasis on risk had led to a substantial reduction in the proportion of prisoners being granted parole and refusal of parole for prisoners who would not been likely to reoffend.³⁵ This research also found that very few prisoners saw the refusal of parole as an incentive to approach their remaining time in prison more positively. This was ultimately found to foster negative attitudes and undermine efforts made to engage prisoners to change their patterns of criminal behaviour.

Conversely, the guiding principle in the Canadian legislation requires parole boards to make the least restrictive determination consistent with the protection of community safety.³⁶ Other principles under the Canadian model emphasise transparency, communication, exchange of relevant information with other parts of the criminal justice system, communication of policies and programs offenders (as well as victims and the public) in addition to providing offenders with information regarding reasons for decisions and access to review of decisions to ensure a fair and understandable process.³⁷

In light of the above, VALS is advocating assessments of prisoners that does not solely focus on risk, but also pays significant attention to the needs and strengths of the offender. This acts to take account of protective factors that have been identified in research as reducing the risk of reoffending.³⁸

Recommendation 12: Risk assessments be accompanied by assessments of protective factors as they relate to needs and strengths of the prisoner to inform content of parole conditions and related supports.

³⁵ Roger Hood and Stephen Shute, ‘The parole System at Work: A Study of Risk Based Decision-Making’ *Research Study No 202, Home office* (2000) in Naylor and Schmidt (2010) *op cit*.

³⁶ Naylor and Schmidt (2010) *Ibid*.

³⁷ *Id*.

³⁸ See, Victorian Aboriginal Legal Service Co-operative Limited, ‘Submission to the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs in response to *Inquiry into the high level of involvement of Indigenous juveniles and young adults in the criminal justice system*’ (2010).

Recommendation 13: SAC explore ways in which risk assessment currently takes into account factors specific to certain groups, such as Aboriginal and Torres Strait Islander peoples.

Recommendation 14: SAC provide options that would better enable methods of risk assessment that take into consideration specific groups, such as Aboriginal and Torres Strait Islander peoples, that can be built into the functions of the Board.

Recommendation 15: SAC address the possibility of having a dedicated position on the Board for a member of the Aboriginal and Torres Strait Islander community.

4.3. ASSESSMENT AND RECOMMENDATIONS AND CONDUCT IN CUSTODY

While the Board considers reports, assessments and recommendations from practitioners such as psychologists and psychiatrists, they also receive reports from custodial staff and Community Corrections Officers. This is so the Board can take into account:

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

VALS acknowledges that the internal disciplinary processes of Corrections in dealing with unwanted behaviour within the prison system exist for efficiency reasons amongst others. We do not wish to comment on the operation of Corrections in this function, however suggest that the findings of hearings from within Corrections be given weight by the Board in proportion to the level of independence and access to review that Corrections hearings embody.

As mentioned earlier, the willingness of the offender to participate in programs and courses in custody may be affected by their nature and availability. Therefore in assessing a prisoners participation in programs and courses it should be noted that lack of participation may not be attributed to the offenders "willingness" but may be in fact a result of the program or course not being available to them (i.e. at their prison or they are unable to access it through other means due to their security rating etc) or the program or course is not culturally appropriate in terms of content or in the way in which it is delivered.

The varying reliability of the above information in the absence of the explanation of the prisoner highlights the benefits of procedural fairness in the Board exercising its functions. For instance, for clarification around the circumstances of misconduct in prison and the level of participation in programs and courses, it is highly beneficial to have the offender presented with material before

the Board before the hearing, allow the prisoner to have a face-to-face hearing with the board in order to correct points of fact, explain circumstances relating to facts, and having the opportunity to answer the facts of the case against them.

The provision of this kind of information sharing is paramount not only to fair, balanced, informed and equitable decision-making, but also aids in the incentive for prisoners through positive engagement with the process and increases the likelihood that conditions attached to parole are well informed, tailored and holistic.

4.4. PREPARATION AND PLANNING FOR RELEASE

VALS is aware that a small number of eligible prisoners have access to specialised case management their transitional support programs such as the Koori Transitional Support Program - Konnect, the Women's Integrated Support Program (WISP) and LinkOut for men. VALS is highly supportive of Konnect – a program that was formed in 2008 and designed to minimise Koori over-representation in the criminal justice system. Stemming from the AJA2, Konnect is currently delivered by the Brosnan Centre. VALS refers the Inquiry to the expertise of Konnect and the Brosnan Centre on the benefits and limitations they experience in the current functioning of the Board as it relates to preparation and planning for release.

VALS understands that Konnect is only available to certain categories of prisoners and therefore is not available to all who could benefit from its services. Konnect also has a limited number of caseworkers which also limits the reach of holistic and culturally competent practices in this area. There are factors at play in this regard in terms of the program's relative new beginnings and funding restrictions which are obviously out of the direct influence of the Boards functions. The Board can, however, take note of those individuals who do not have access to case management assistance and act flexibly to achieve ends that may have otherwise been aided by Konnect and other transition support programs.

For example, the Victoria Association for the Care and Resettlement of Offenders (VACRO) support the Board having the capacity to grant parole with release plans that include the completion of programs in community settings.³⁹ They suggest, and VALS agrees, that for some offenders, completion of programs in a community setting can be in some cases preferable to the completion of programs in prison. As one VACRO Transitional Support Worker notes:

³⁹ Victorian Association for the Care and Resettlement of Offenders, 'VACRO submission to the Sentencing Advisory Council: Parole in Victoria' (2011).

Where people can't complete a program while they are inside, it would be really good for motivation if there was the flexibility to be able to complete the program in the community...for example, where prisoners are doing cognitive skills training to learn how to make better choices, it may be even more beneficial to do this sort of learning in a community setting, where they are confronted with actually having to make choices that matter.⁴⁰

This idea is supported by Australian Institute of Criminology research that suggests that efforts towards reintegration must be supported at the community level.⁴¹ They argue that correctional approaches must engage family, community members and respected persons within the context of much broader improvements to relieve disadvantage.

This potential initiative also fulfils the aims and objectives of the AJA2 as it has the potential to provide an alternative to prison; reduce reoffending; and create room for stronger community justice responses.

Recommendation 16: SAC investigate the option of the Board having capacity to grant parole with release plans to include the completion of programs in community settings.

4.5. SUBMISSIONS AND REPRESENTATIONS FROM INTERESTED PARTIES

In making decisions, the Board considers:

- a. Submissions made by the offender, the offender's family, friends and potential employers or any other relevant individuals;
- b. Representations made by the victim or by persons related to the victim; and
- c. Representations made by the offender or others with an interest in the case.

Considering the potential for a high level of information sharing from a number of parties in parole proceedings, it would be beneficial if individuals coming before the Board were guaranteed access to an advocate who could at the very least provide advice and clarification, and ideally provide ongoing support to individuals during the hearing and following a decision.

VALS notes that prisoners are allowed a support person with the prior approval of the Chairperson of the Board which may include an Aboriginal Wellbeing/Indigenous Liaison Officer. VALS is interested to know: how many prisoners are aware of the option to have a support person present in parole proceedings; how many prisoners apply to the Chairperson for prior approval of a support

⁴⁰ *Id*, p.14.

⁴¹ Matthew Wills (2008) *op cit*.

person and how often the Chairperson grants/denies this request; how often Aboriginal Wellbeing/Indigenous Liaison Officers act in this role; and what are the most common alternative type of support are present.

Aboriginal and Torres Strait Islander Legal Services in some jurisdictions have funding to employ Prisoner Support Workers/Prisoner Throughcare Workers. While these roles vary from one jurisdiction to another, they are generally available to: help prisoners with preparing parole release plans; act a general support to the offender in understanding the system; and in some cases act as a sort of cultural translator.

VALS does not have ongoing funding for a dedicated role of this type. It may therefore be the case that the most appropriate person to provide support and advice to individuals in parole proceedings is their solicitor. Legal representatives do not have standing to appear at parole board hearings in Victoria. VALS believes this blanket provision to be overly restrictive and unbeneficial to the Board in their interactions with the offender and does not aid the collection of information for consideration in making a decision. The circumstances of VALS' clients are arguable understood by VALS solicitors better than most. VALS does not believe there is sound reason that VALS solicitors be excluded form parole hearings in an advice and/or support capacity by virtue of their legal qualification.

The Victorian Government Solicitors Office notes that whether a person has a right to legal representation depends on their capacity to represent themselves, i.e. their level of education, ability to effectively communicate, and the complexity or seriousness of the factual and legal issues involved.⁴² VALS would argue one or more of these factors come into play in the majority, if not all, cases before the Board.

Recommendation 17: SAC provide data, or make a recommendation regarding the collection of data, regarding:

- a. The level of awareness amongst prisoners eligible for parole of the option to have a support person present in parole proceedings;
- b. How prisoners must apply for the presence of a support person in parole hearings;
- c. How many prisoners seek prior approval from the Chairperson of the Board to have a support person present;
- d. The frequency at which the Chairperson of the Board grants/denies requests for the presence of support persons and on what basis; and

⁴² *Id.*

e. How often Aboriginal Wellbeing/Indigenous Liaison Officers present in this role and what is the most common type of support person present.

Recommendation 18: The exclusion of legal representatives from Adult Parole Board Hearings be removed from relevant Acts and Regulations.

4.6. OTHER AREAS FOR CONSIDERATION

VALS notes the acknowledgement by the Board of the significant issue of limited housing for parolees and the effect that this can have on the ability of the Board to grant parole.⁴³ VALS wishes to reiterate the concerns of the Board and signal the need for a sophisticated system of support for people that would not for their lack of housing be granted parole. Limiting access to parole due to the unavailability of housing raises serious concerns around the right to liberty and against arbitrary detention. Furthermore, the absence of appropriate housing dramatically impacts on the likelihood of successful completion of parole if parole is in fact granted.

Denial of access to supported and monitored release by virtue of circumstances out of an individual's control needlessly punishes the prisoner. VALS acknowledges the limitations of the Board's functions in this area, however we encourage the current Inquiry to explore potential ways in which refusal of parole decisions can be limited or better managed when hinged on housing considerations.

VALS also notes the Board's acknowledgement around prisoners and parolees with mental health issues, intellectual disabilities, and those who function at a low intellectual level or who have an acquired brain injury.⁴⁴ We refer the current Inquiry to the Parliament of Victoria Law Reform Committee's current Inquiry on access to and interaction with the justice system by people with an intellectual disability, acquired brain injury or cognitive disability. VALS intends to make a formal submission to this Inquiry that may make specific comment on the terms of reference as they relate to the parole system. We encourage that SAC and Victorian Government consider the submissions and findings of said Inquiry.

Research shows the high number of people suffering from mental illness and intellectual disability who are caught up in the criminal justice system and consequently end up in prison. For example, people with a mental illness are overrepresented in Victorian prisons with 40% of prisoners experiencing serious mental illness and the proportion increases when other types of mental and

⁴³ Adult Parole Board of Victoria, '2009-2010 Annual Report' (2010).

⁴⁴ *Id.*

psychiatric disabilities, such as personality disorders, are also considered.⁴⁵ Research also rates major mental illnesses, such as schizophrenia and depression, as being between three and five times higher in the offender population than in the general community.⁴⁶

There is an extremely strong case to be made concerning adequate support and representation for these individuals who require high level advocacy for those experiencing mental illness, cognitive and/or intellectual disability.

Recommendation 19: SAC explore potential ways in which parole decisions hinged on housing considerations can be managed to limit the likelihood of arbitrary decisions to refuse parole.

Recommendation 20: Access to representatives for support, advocacy and advice in prior to and during parole hearings be made available for prisoners who experience mental illness, cognitive and intellectual disability, acquired brain injury, and the like.

⁴⁵ Deloitte Consulting (2003) in Victorian Aboriginal Legal Service Co-operative Limited, 'Response to the Magistrates' Court Amendment (Mental Health List) Bill 2009' (2009)

⁴⁶ Ogloff et al. (2007) in Victorian Aboriginal Legal Service Co-operative Limited (2009) *Id.*

5. DECISION-MAKING IN RELATION TO BREACHES OF PAROLE

One area that VALS is particularly concerned with is the procedure, protocols and information sharing that occurs when an individual on parole commits an alleged offence and is taken into custody. This situation is relevant to the administrative functions that surround the Board and the appropriateness and efficiency of information sharing. VALS believes the function of Community Corrections and the Board in breach parole situations to be a particularly grey area and thinks the current Inquiry is a good opportunity for clarification and recommendations for increased transparency of this process.

While on parole, the offender is still considered to be under sentence. VALS is interested in SAC investigating the concept of 'street time' where parolees have the time they were on parole prior to breaching counted as time served. Currently in Victoria, time that a person spends on parole may not be counted as time served. While VALS has not currently have capacity to research this concept in depth, it appears that Western Australia, Queensland and New South Wales apply this idea. VALS is interested in how this concept operates in practice and its benefits (or otherwise) when a person breaches parole and a decision comes before the Board.

Recommendation 21: SAC provide clarification around procedures and protocols for information sharing and notification of interested parties where a parolee commits an alleged offence and is taken into custody.

Recommendation 22: SAC investigate the operation of parole boards in jurisdictions that cater to the concept of 'street time', where parolees have the time spent on parole prior to breaching counted as time served.

6. ADVANTAGES & DISADVANTAGES OF STATING THE BOARD'S CRITERIA IN LEGISLATION

The general attraction of formalising the Board's assessment criteria into legislation is for the purposes of transparency. VALS supports this idea in principle but is cautious that we have not had adequate time to consider the potential consequences of this proposal. If Victoria was to formalise the Board's assessment criteria into legislation, there should be consultation about the appropriateness and effectiveness of the assessment criteria that the Board currently employs in decision-making. Also, in any formalisation of assessment criteria there needs to be an adequate level of flexibility maintained in order to provide tailored decisions that allow for the unique circumstances of each case before the Board to be considered.

In any formalisation of criteria on which parole decisions are made, careful consideration also needs to be given to protecting the discretion of Community Corrections and the Board when conditions of parole are breached. We note that currently not all breach of parole conditions result in Community Corrections instigating review of parole or the Board cancelling parole. This discretion should be maintained, however some guidelines in this area would be helpful.

Recommendation 23: Further investigation and consultations occur to consider the suitability of APB assessment criteria for potential formalisation into legislation.

Recommendation 24: Formalisation of criteria on which parole decisions are made protect the discretion of Community Corrections in deciding whether to report breaches of parole conditions.