Submission to the
Review of Victoria’s Adult Parole Framework

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About the Human Rights Law Centre
The Human Rights Law Centre is an independent, non-profit, non-government organisation which protects and promotes human rights.

We contribute to the protection of human dignity, the alleviation of disadvantage, and the attainment of equality through a strategic combination of research, advocacy, litigation and education.

The HRLC is a registered charity and has been endorsed by the Australian Taxation Office as a public benefit institution. All donations are tax deductible.

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1. Introduction and Executive Summary

1.1 About this Submission

1. This submission is made by the Human Rights Law Centre (HRLC) to the Sentencing Advisory Council’s review of Victoria’s Adult Parole Framework. The purpose of the review is to ensure that the parole system best serves the Victorian community, including promoting public safety and reducing reoffending.

2. This submission focuses on addressing some of the concerns associated with providing statutory criteria to guide the release and management of sentenced prisoners on parole in Victoria and identifies relevant human rights principles that should be used to guide decisions.

1.2 Executive Summary

3. The HRLC considers that the criteria and decision-making processes used by the Adult Parole Board (APB) to assess prisoners’ eligibility for parole should be enshrined in legislation. In the HRLC’s view, the rationale for resisting incorporating such guidelines in legislation — that it would result in inflexible criteria that would ultimately mean that less prisoners are released on parole — is misguided. Appropriate statutory drafting would ensure that the APB’s policies and practices remain appropriately flexible and can be tailored and adapted to suit individual needs and circumstances.

4. Rather than restricting the APB’s current flexibility to exercise discretion in its decision-making, codifying decision-making processes is an opportunity to maintain such flexibility while improving and enhancing the processes and outcomes of the APB’s decision-making. For the reasons identified throughout this submission, the HRLC considers that, rather than undermining the APB’s decision making processes, encoding parole eligibility criteria and decision-making processes in legislation would:

   (a) improve the decision making processes of the APB;
   (b) improve outcomes for the community through better and more robust decision-making;
   (c) enhance the confidence in the APB’s decision making and thereby lead to an improved parole system; and
   (d) ultimately, result in improved outcomes and better opportunities for the rehabilitation of offenders and their reintegration into society.

5. These important outcomes could be achieved through careful drafting of relevant legislative provisions that incorporate the APB’s current practices and guidelines.
2. Background and Context

6. The APB plays an important role in the criminal justice system. Making decisions about whether offenders should be granted parole is an important step in their rehabilitation and re-integration into the general community. The APB’s assessment of prisoners’ eligibility for parole is currently guided by a large range of factors, which include:

(a) the interests of the community;
(b) the rights of the victim;
(c) the intentions of the sentencing authority; and
(d) the needs of the offender.¹

7. Guidelines are used to assist the Board’s decision-making but they are not publicised by the APB as they are not considered determinative and each case is purportedly decided on its own merits.

8. Some stakeholder groups have argued that the APB’s current case management approach provides the flexibility and responsiveness that is said to promote rehabilitation, and that encoding assessment guidelines would impose a more stringent decision making process that would undermine the Board’s use of discretion.

9. Currently, the APB is expressly exempted from the rules of natural justice and from being required to comply with the Charter of Human Rights and Responsibilities Act 2006 (Charter).

3. Relevant Human Rights

10. The APB’s functions regularly require it to make important decisions regarding the human rights of prisoners and parolees, and the safety of the community. The decisions made by the APB have wide ranging impact on the human rights of offenders and indeed the human rights of members of the broader community.

11. Relevant human rights that may apply to the APB’s decision-making processes include:

(a) the right to liberty and security of person (section 21 of the Charter);
(b) the right to freedom of movement (section 12 of the Charter);
(c) the right to privacy and reputation (section 13 of the Charter);

(d) the right not to be subject to compulsory medical treatment (section 10 of the Charter); and
(e) rights belonging to those in the general community, including the right to life (section 9 of the Charter).

12. Compliance with the Charter may require the APB to adopt policies and procedures relating to its decision making that are compatible with human rights and, in particular, the right to a fair hearing, including:

(a) considering human rights in their decisions;
(b) affording procedural fairness to prisoners and parolees;
(c) legal representation for prisoners and parolees;
(d) access to information for prisoners and parolees;
(e) rights of appeal; and
(f) criteria for making decisions.

13. Despite the concerns expressed by some stakeholders, the HRLC considers that ensuring that the APB’s policies and procedures have proper regard to the above principles will actually enhance the ability of the APB to operate flexibly and to customise its decisions to individual cases.

14. The benefits of improved decision-making in accordance with human rights standards are outlined below, particularly with reference to the experience of jurisdictions that do apply human rights standards to parole boards, including other Australian jurisdictions, the United Kingdom, New Zealand and Canada.

3.1 Procedural Fairness

15. The HRLC considers that the assertion that affording procedural fairness would undermine the trust between offenders and the Boards is misguided. Rather, it is precisely because of the potential impact on human rights, and the reliance and dependence that offenders have on the APB’s processes, that such decision making should be subject to procedural fairness considerations. Fair procedures lead to better decision-making, and a more legitimate process.

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2 For an extensive analysis of whether procedures of parole boards should comply with procedural fairness, see Bronwyn Naylor and Johannes Schmidt, ‘Do Prisoners have a Right to Fairness before the Parole Board?’ (2010) 32 Sydney Law Review 437.
16. Principles of procedural fairness are fundamental and include:

(a) the right to be heard;
(b) the right to be treated without bias;
(c) the right to be informed of allegations being made against prisoners or parolees;
(d) the right to be provided with an opportunity to respond to any allegations made against prisoners or parolees; and
(e) the right to information regarding the status of a complaint.

17. The experience from other jurisdictions strongly indicates that subjecting the processes of parole boards to procedural fairness obligations results in:

(a) boards being more likely to reach a fair and correct decision;
(b) greater protection of human rights – both of the offender's human rights and, just as importantly, the human rights of the broader community;
(c) increased understanding of, and therefore increased acceptance of, the parole board’s decision by those affected; and
(d) increased confidence in the Boards’ decision making processes.

18. The HRLC considers that ensuring that these principles are implemented in Victoria by the APB will serve to improve their decision making processes. Indeed, compliance with the Victorian Charter would enable the APB to demonstrate that its decisions are robust and therefore promote rehabilitation of offenders and the confidence of the community.

19. Experience from other jurisdictions is illustrative:

(a) in Western Australia, the Prisoners Review Board has indicated that fair procedures are likely to lead to decisions that will be accepted more readily by prisoners and others;³ and
(b) in the United Kingdom, in a review in 2002, most prisoners regarded the parole process as unfair, with the result that very few prisoners saw parole refusal as an incentive to approaching their remaining time in prison more positively.⁴

20. In this respect, the HRLC highlights that perceptions of fairness are crucial to ensuring prisoners’ confidence and trust in the decision making process. 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.\(^5\)

21. The HRLC also wishes to emphasise that ensuring procedural fairness will not make it difficult to maintain community protection.\(^6\) It must be stressed that procedural fairness rights do not take precedence over the equally important rights that the broader community has in the decision making process that is undertaken by the APB. Despite greater human rights protection in Europe, Sir Duncan Nichol, the former Chair of the UK Parole Board, expressed in the United Kingdom context that "nothing in the [European Convention on Human Rights] or in the Human Rights Act takes away from our prime consideration to protect the public".\(^7\)

22. The HRLC also notes that, where the balance between procedural fairness and additional administrative burdens is necessary, appropriate regulations can be effectively implemented. For example, recently in the United Kingdom the right to an oral hearing was amended to provide that offenders only have a right to request an oral hearing.\(^8\) This change was made to allow the Board sufficient flexibility to only hold oral hearings when appropriate or necessary.

3.2 Legal Representation

23. The HRLC considers that consideration must be given to the concept that legal representation can have beneficial impacts on the quality of decision making and ensure that all relevant considerations, including the protection of the community, are taken into account. In New South Wales (NSW), offenders are provided with legal representation by legal aid through the Prisoner’s Legal Service (PLS). In 2006, the Legal Aid Commissioner’s review of the PLS found that the judiciary and other key stakeholders, such as the Parole Authority, regard the PLS as vital to the effective operation of the parole system in NSW and that the PLS should continue to represent prisoners in parole matters as part of its core work.\(^9\)

24. The HRLC submits that, not only should legal representation at APB hearings be allowed, but that it should be encouraged and that adequate funding of free legal representation should be made available through Victoria Legal Aid.

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\(^7\) Sir Duncan Nichol, cited in Padfield (ed), above n 5, 18.

\(^8\) See, *Parole Board (Amendment) Rules 2009* (UK).
3.3 Access to Information

25. It is essential that parolees be given access to information relevant to the APB’s enquiry in order for them to respond to it and to have the opportunity to put forward any relevant mitigating circumstances or correct factual errors. Again, a process that requires the APB to follow a more stringent decision making process should be embraced, and not avoided. Access to information is, arguably, central to the ability of prisoners to make effective contributions to decision-making affecting them, and will add to sense of fairness and accountability in the process and the operation of the parole system.

26. In the United Kingdom, for example, prisoners are provided with a dossier of information regarding their case, including reports prepared by a parole officer. The UK Home Office Research Paper 202: The Parole System at Work: A study of risk based decision making comments that despite initial fears that such a system would lead to more "circumspect" or "weaker" reports, "these fears have largely been proved groundless".10

27. Similarly, in Canada, access to information and the disclosure of relevant information is considered "a key component of the principles of fundamental justice".11

28. The HRLC considers that adequate protections regarding confidential information or information regarding victims can be implemented as appropriate safeguards, as has been legislated in the ACT.12 As has been demonstrated by these other jurisdictions, allowing offenders access to information about their own case can improve the process and the quality of decisions made, rather than detract from it.

3.4 Access to Reasons

29. The HRLC submits that the provision of reasons can only serve to benefit the process and enhance prisoners’, and indeed the community’s, confidence in it.

30. While it is acknowledged that in order to comply with this requirement the APB would have to keep more detailed records, access to reasons is likely to also have positive practical consequences. Reasons provide the prisoner with a record of the issues the prisoner must address and a time-frame in which to address them if the prisoner is to be successful in his or her next parole hearing. Reasons also allow the community to have a better understanding of the APB’s processes.

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9 Legal Aid New South Wales, Prisoners Legal Services Review, September 2006 at Executive Summary.
12 See, Crimes (Sentence Administration) Act 2005 (ACT) s 192.
31. Indeed, providing reasons is standard practice in many other jurisdictions:

(a) in New Zealand reasons are provided for any refusal to grant parole;\(^{13}\)

(b) in Canada reasons are provided for all decisions and are considered a hallmark of good decision making;\(^{14}\)

(c) in the United Kingdom reasons are provided to prisoners which help them and those working with them to understand the decision, the reasons and what needs to be done to manage or reduce their risk effectively;\(^{15}\)

(d) similarly, other Australian jurisdictions provide reasons, including in Western Australia where the parole board is required to provide a prisoner with written notice of any decision and reasons for that decision, as soon as practicable after the decision is made.\(^{16}\)

(e) in Queensland, South Australia, Tasmania, and the ACT, boards must provide reasons to prisoners when refusing their parole application.

32. Access to reasons is also an essential accountability mechanism for the APB. It encourages reasoned decisions based on clear criteria and relevant information. In this respect, it improves confidence in the APB’s decisions, as well as assists prisoner rehabilitation by allowing prisoners and those who assist them (such as parole officers) to understand how behaviours can be improved and risks reduced.

33. In the United Kingdom context, it has been observed that “[n]othing caused more bitterness and frustration under the old parole system than the refusal to give any reasons for a ‘knock-back’ – a decision to refuse parole.”\(^{17}\) For this reason, the HRLC considers that access to reasons, in appropriate circumstances, will enhance the operation of the Boards’ policies and practices.

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\(^{16}\) Sentence Administration Act 2003 s 107(B). Furthermore, victims registered with Victim Notification Register (VNR) will be notified of a decision, and provided with reasons for a decision.

3.5 Rights of Appeal

34. The right of appeal is central to a just legal system. Appeals or reviews allow mistakes and injustices to be corrected. In Victoria there is no statutory right of appeal, although informal reviews may be available. In contrast:

(a) in Canada full rights of appeal are available;\(^ {18} \)
(b) in New Zealand review decisions are available.\(^ {19} \) In New Zealand only 98 applications for review were considered out of 4261 decisions made in the year 2007/2008.
(c) in the United Kingdom human rights litigation has not undermined the Board’s decision making.\(^ {20} \)

35. A formal process for appeal of the APB’s decisions, along with improvements in the process of their initial decision making, would enhance the credibility of the APB. For similar reasons identified throughout this submission, rights of appeal would assist to enhance the sense of fairness and credibility about the APB’s processes, which has the benefit of enhancing confidence in the parole system for both prisoners and the broader community.

4. Political Considerations

36. A significant factor in the reluctance of parole bodies to expose their decision making to public scrutiny is the fear of public criticism. Experience from other jurisdictions indicates that compliance with procedural fairness and other human rights obligations can, in fact, promote and enhance the credibility of the role of parole boards and the importance function that they play.

4.1 The Western Australian Experience

37. In Western Australia, the parole board provides reasons for decisions and publishes those decisions when it is in the public interest to do so. Indeed, the Prisoners Review Board of Western Australia actively engages with the media to promote understanding of (and increase public confidence in) its decision-making.\(^ {21} \) Valerie French (Chairman of the Parole Board)

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\(^ {19} \) **Parole Act 2002** (NZ), s.62.

\(^ {20} \) According to Sir Duncan Nichol (former Chair of the Parole Board of England and Wales) in the years 2002 to 2007 only 7 of 294 judicial review decision founded in the right to a fair trial under the European Convention have been lost. See, Sir Duncan Nichol in Padfield (ed), above n 5, 18.

states that the media have been actively encouraged to investigate and report on the work of the Boards rather than just on the cases that excite public attention. The number of decisions that have been released to the Western Australian Parole Board’s website has increased.

Additionally, the Western Australian parole board has the ability to publish decisions and reasons for decisions on its website when a request is received, if it is in the public interest to do so. Ultimately, Western Australia has not found the requirements to provide, and in some instances publish, reasons too onerous.

4.2 The New Zealand Experience

In New Zealand, the parole board provides reasons for decisions and publishes those decisions when it is in the public interest to do so. The NZ Parole Board also publishes decisions that are considered to be of public interest on its website. Reasons for decisions can be requested by stakeholders such as the media (as was the case in the Capill Case).

However, all or part of a decision may be withheld under the Act, particularly on privacy grounds.

The NZ Parole Board reported, in its Annual Report, “[p]ublic interest in the Board’s work continues to be high, with media covering many Board activities and decisions. This coverage has been well balanced, with a wide variety of parole based issues receiving attention.” In the 2007/08 year, 310 decisions were supplied to the media.

5. Operation of the Victorian Charter

While the APB is currently exempt from regulation as a “public authority” under the Victorian Charter, the codification of APB decision-making criteria and guidelines in legislation would mean that such legislative provisions would be subject to the “interpretative principle” contained in section 32 of the Charter. Section 32(1) provides that all statutory provisions must be interpreted in a way that is compatible with human rights, so far as it is possible to do so consistently with their statutory purpose.
42. In the HRLC’s view, the inclusion of any statutory criteria to be applied by the APB could be drafted in an appropriate way that maintains the Board’s current flexible practices. The requirement in section 32 that legislative provisions be interpreted compatibility with human rights applies “so far as it is possible to do so consistently with their statutory purpose”. Accordingly, statutory criteria could be appropriately drafted to make their intended application explicit and transparent.