

Do Prisoners have a Right to Fairness before the Parole Board?

Bronwyn Naylor* and Johannes Schmidt†

Abstract

Many people sentenced to imprisonment receive a ‘head’ sentence together with a minimum term — a period that should be served as punishment — after which the offender may be released on parole, to serve the remainder of the sentence in the community. The parole authority deciding whether, in fact, to release the prisoner has an extremely important role in balancing the risk of release against the benefit of reintegrating the prisoner as early as possible. We argue that the procedures of this body should be fair and accountable. They should ensure that a prisoner be able to participate fully in the decision-making process, have access to information and be able to introduce information, and have avenues for appeal. These procedures apply in comparable international jurisdictions, but in most Australian jurisdictions the procedures are closed and unaccountable. We argue that all prisoners are entitled to fair decision-making processes.

I Introduction

A person sentenced to imprisonment usually is eligible to be released, under supervision, after part of that sentence has been served. This ‘parole’ process is available in most developed countries. Its aims are to provide an incentive to good behaviour and rehabilitation for prisoners, to ensure that a prisoner is not held in custody longer than needed for community safety, and also to protect the community by maintaining supervision and support for a period after the person’s return to the community. The High Court of Australia has specifically noted that the parole system operates in the interests not only of the offender, but also of the community.¹ As the Canadian legislature explains it, the purpose of such conditional release is

to contribute to the maintenance of a just, peaceful and safe society by means of decisions on the timing and conditions of release that will best facilitate

* Senior Lecturer, Faculty of Law, Monash University. The author is grateful for the helpful comments of Dr Heli Askola and two anonymous reviewers on an earlier version of this article.

† Final-year LLB student, Monash University. Early stages of Schmidt’s contribution to this article were completed as partial fulfilment of the requirements of the *Law Reform & Community Development* elective unit, supervised by David Taylor, Community Development Worker, Springvale Monash Legal Service.

¹ *Bugmy v The Queen* (1990) 169 CLR 525, 530–1.

the rehabilitation of offenders and their reintegration into the community as law-abiding citizens.²

In some jurisdictions, specific categories of prisoners are released on parole automatically, at the expiry of a set component of their sentence. This regime may serve the above purposes, but also operates pragmatically as a mechanism for reducing prison numbers, to minimise overcrowding.³

Other prisoners are released at the discretion of a parole board, or similar authority. It is this decision-making process that is the focus of this paper. In some jurisdictions, this decision-making process is one of a range of transparent and accountable criminal justice decisions. In other jurisdictions, the process is closed and unaccountable. It is our argument that parole decision-making in Australia should fulfil the highest standards of accountability. Comparisons will be made with New Zealand (NZ), Canada and the United Kingdom (UK), all of which have reframed their parole decision-making in recent years, to include key features of procedural fairness and accountability.

Every Australian state and territory denies the prisoner at least one of the key features of a fair process:

- access to the material on which the authority will be basing its decision;
- reasons for denying parole; and
- a right of appeal.

For example, only the Australian Capital Territory (ACT) requires that prisoners be provided with copies of documents to be used by the parole board.⁴ Only Queensland, South Australia (SA), Tasmania and Western Australia (WA), ordinarily require that prisoners be provided reasons for refusal of parole.⁵ Only New South Wales (NSW), Queensland and WA provide, in some circumstances, statutory avenues of review.⁶

The Victorian Parole Board is not subject to freedom of information legislation, and the parole authorities in the ACT, Queensland, Tasmania and Victoria are not subject to review by the respective Offices of the Ombudsman.⁷ The parole boards in Victoria and the Northern Territory (NT) are expressly exempted from the rules of natural justice.⁸ Indeed, the head of the Victorian Board

² *Corrections and Conditional Release Act*, SC 1992, c 20, s 100.

³ See, eg, *Crimes Act 1914* (Cth) s 19AL; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 50; *Correctional Services Act 1982* (SA) s 66; *Criminal Justice Act 2003* (UK) c 44, s 244.

⁴ *Crimes (Sentence Administration) Act 2005* (ACT) s 127(3). This is subject to considerations of the victim's privacy.

⁵ *Corrective Services Act 2006* (Qld) s 193(5)(a); *Correctional Services Act 1982* (SA) s 67(9)(b); *Corrections Act 1997* (Tas) s 72(8); *Sentence Administration Act 2003* (WA) s 107B.

⁶ *Crimes (Administration of Sentences) Act 1999* (NSW) s 139(2); *Corrective Services Act 2006* (Qld) s 196; *Sentence Administration Act 2003* (WA) s 115A.

⁷ *Ombudsman Act 1989* (ACT) s 5(2)(d); *Ombudsman Act 2001* (Qld) s 16(2)(a); *Ombudsman Act 1978* (Tas) s 12(3), sch 2; *Ombudsman Act 1973* (Vic) s 13(3).

⁸ *Corrections Act 1986* (Vic) s 69(2); *Parole of Prisoners Act 1979* (NT) s 3HA.

admits 'that in all likelihood [the board denies] people natural justice'.⁹ It is currently exempt from compliance with Victoria's *Charter of Human Rights and Responsibilities Act 2006* (Vic) ('the Charter').¹⁰

It is argued here that prisoners should be able to participate fully in such important decisions affecting their lives, and should be afforded fair and open procedures. We make two main arguments. First, fair and transparent procedures lead to decision-making that is better informed, more effective and has greater legitimacy. Second, they should be provided as a matter of principle, as a matter of natural justice, and as a matter of human rights.

In Part II we outline the nature of the parole system, and the rationale for providing this regime of early, supervised release. In Part III we argue that fair procedures are required for such decision-making as a matter of principle. In Part IV we outline statutory approaches to providing these fair procedures.

We argue that statutory regimes should be reformed along the lines of those already well established in NZ, Canada and the UK.

II The Parole System

The High Court in *Power v The Queen* stated that the non-parole period is the 'minimum time that a judge determines justice requires [the prisoner to serve] having regard to all the circumstances of his offence'; release on parole then provides 'mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate'.¹¹ This means that such offenders are given sentences made up of two components:

1. a non-parole period, or minimum term, which must be served as a penalty for the crimes of which they were convicted; and
2. a further component, during which they may remain imprisoned, or be released into supervision, at the discretion of the parole authority.

In most Australian jurisdictions prisoners who have non-parole periods set are entitled to have the parole authority consider whether to release them upon completion of their non-parole periods. This is a right that arises automatically in some states.¹² In the ACT, Queensland and SA, however, the prisoner is required to

⁹ Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 3 June 2008, 8 (Rob Hulls, Attorney-General).

¹⁰ Until December 2013, under *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* (Vic) ss 5–6.

¹¹ (1974) 131 CLR 623, 629.

¹² *Crimes Act 1914* (Cth) s 19AL; *Crimes (Administration of Sentences) Act 1999* (NSW) s 137 (automatic consideration when first eligible; if not released, prisoner can apply subsequently: at s 137A but the board can also consider without application in circumstances of 'manifest injustice': at s 137B); *Corrections Act 1997* (Tas) s 72; *Sentence Administration Act 2003* (WA) s 20. In Victoria the parole board website states that prisoners are considered automatically without the need for application. UK and NZ prisoners are automatically considered for parole: *Prison Service Order 2005* (UK) SI 6000, 5.12 ('PSO 6000') and *Parole Act 2002* (NZ) s 21.

apply to have the question of parole considered, and the application presumably then depends on the prisoner's sources of advice and support.¹³

Similar parole regimes operate in the UK, NZ and Canada, where parole boards decide on release of at least some prisoners, usually the more serious offenders. In the UK, since major reforms in 2003, most prisoners serving a determinate sentence are now released automatically after expiry of one-half of their sentenced terms.¹⁴ However, where offenders are convicted of certain violent or sexual offences, and judges believe the offenders to be dangerous, judges are to sentence them to the required custodial period, together with an 'extended period'. For these prisoners, once they have served half of the custodial term, the parole board decides on their release on licence. The parole board also decides on release of prisoners serving life sentences. The board, therefore, only exercises decision-making discretion in relation to more serious offenders, an important distinction for the future discussion.

In NZ, prisoners with sentences of 2 years or shorter are automatically released after serving half of their sentence,¹⁵ but offenders with longer sentences are considered for release on parole after expiry of one-third of their sentences, or at any later non-parole date, and released on parole through the parole board.¹⁶

In Canada, all prisoners are eligible for conditional release. The National Parole Board makes conditional release decisions in relation to all federal offenders and offenders in areas without their own parole boards.¹⁷

The role of a parole authority is to determine whether prisoners may safely be released back to the community before the expiry of their terms. The central issue is the authority's assessment of risk.

For example, the UK Parole Board may only direct release if satisfied 'that it is no longer necessary for the protection of the public that the prisoner should be confined.'¹⁸ The Victorian Adult Parole Board identifies its objectives as being to:

Make independent and appropriate decisions regarding the release of offenders on supervised conditional release ... [and] [e]nsure that offenders are properly prepared to reintegrate into the community.¹⁹

A The Nature of the Parole Authority

In Australian state and territory jurisdictions, parole decisions are made by independent statutory bodies that are not subject to direction from the relevant

¹³ *Crimes (Sentence Administration) Act 2005* (ACT) s 121; *Corrective Services Act 2006* (Qld) s 180; *Correctional Services Act 1982* (SA) s 67 (application to be made by the prisoner or the CEO of the department).

¹⁴ *Criminal Justice Act 2003* (UK) c 44, s 244.

¹⁵ *Parole Act 2002* (NZ) s 86(1).

¹⁶ *Ibid* s 84.

¹⁷ Government of Canada National Parole Board, *2009–2010 Report on Plans and Priorities* (2009) 2; *Corrections and Conditional Release Act*, SC 1992, c 20, ss 107–8.

¹⁸ *Criminal Justice Act 2003* (UK) c 44, s 247(3).

¹⁹ Adult Parole Board of Victoria, Department of Justice (Vic), *Annual Report 2007–2008* (2008) 3.

ministers.²⁰ The parole boards are empowered to make orders for release of prisoners on parole.²¹

Independence from government is an important characteristic of these decision-makers, to ensure institutional separation from political influence, in what can be controversial cases. At the same time, parole authorities commonly have both a judicial and a community membership, reflecting the varied goals of the parole process. The membership usually comprises current and retired judges and magistrates, and members representing the community.²²

The National Parole Board of Canada and the NZ Parole Board are both independent bodies, whose members are appointed by the respective Governors in Council.²³

The institutional independence of the parole board, and parole decision-making, have been points of contention recently, in the UK, NZ and Victoria. In the UK, the power of the Secretary of State to give, in some cases, directions to the parole board, in carrying out what is characterised as a judicial function, was held, in 2008, to breach the requirement for independent and impartial decision-making, under both common law and art 5(4) of the *Convention for the Protection of Human Rights and Fundamental Freedoms*.²⁴ The Court of Appeal was also concerned at the 'hands on' approach of the sponsoring department. UK commentators have proposed that the board be located outside the Home Office, for example as one of the tribunals comprising the new Tribunal Service.²⁵

In NZ, on the other hand, the High Court held in *Miller v Parole Board (NZ)* that the NZ Parole Board was not carrying out a 'judicial' function,²⁶ and did not require the level of judicial independence endorsed in *Brooke*.²⁷ The applicant's

²⁰ Richard Edney and Mirko Bagaric, *Australian Sentencing: Principles and Practice* (Cambridge University Press, 2007) 315.

²¹ *Crimes (Sentence Administration) Act 2005* (ACT) s 135; *Crimes (Administration of Sentences) Act 1999* (NSW) s 138; *Parole of Prisoners Act 1979* (NT) ss 3GB, 5; *Corrective Services Act 2006* (Qld) ss 193, 217; *Correctional Services Act 1982* (SA) s 67; *Corrections Act 1997* (Tas) s 72; *Corrections Act 1986* (Vic) s 74(1); *Sentence Administration Act 2003* (WA) ss 20, 23. See, also, Adult Parole Board of Victoria, above n 19, 1; New South Wales Law Reform Commission, 'Sentencing' (Discussion Paper No 33, 1996) ch 7; Parole Board of Tasmania, Department of Justice, *2008 Annual Report* (2008); Parole Board of the Northern Territory, Department of Justice, *2006 Annual Report* (2006) 2; Prisoners Review Board of Western Australia, *Prisoners Review Board Annual Report For the Year Ended 30 June 2008* (2008) 4; Queensland Corrective Services, *Queensland Parole Boards: Annual Report 2007/08* (2008) 6.

²² *Crimes (Sentence Administration) Act 2005* (ACT) s 174; *Crimes (Administration of Sentences) Act 1999* (NSW) s 183(2)–(3); *Parole of Prisoners Act 1979* (NT) s 3B(1); *Corrective Services Act 2006* (Qld) s 218(1); *Correctional Services Act 1982* (SA) s 55(3); *Corrections Act 1997* (Tas) s 62(2); *Corrections Act 1986* (Vic) s 61(2); *Sentence Administration Act 2003* (WA) s 103.

²³ *Corrections and Conditional Release Act*, SC 1992, c 20, s 103; *Parole Act 2002* (NZ) ss 108(1), 111.

²⁴ *R (Brooke) v Parole Board* [2008] 3 All ER 289 ('*Brooke*'). The court held that the parole board fell within the definition of a 'court' for purposes of the *European Convention on Human Rights*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*') art 5(4).

²⁵ Duncan Nichol, 'Who Should We Keep Locked Up?' in Nicola Padfield (ed), *Who to Release?: Parole, Fairness and Criminal Justice* (Willan, 2007) 17, 18.

²⁶ At least in the context in question, that is, the decision whether to release a prisoner serving an extended period of preventive detention.

²⁷ [2008] EWCA Civ 29 (1 February 2008).

arguments, based on inadequate independence, were therefore rejected.²⁸ The High Court considered that the board could not be held to the standards of a court, given the sensitive and closed nature of its hearings. The High Court concluded that the NZ Parole Board, nonetheless, provided adequately fair procedures, by ensuring prisoners' rights of review and appeal. The decision is currently on appeal.

A similar view appears to have been adopted in Victoria, where the Supreme Court rejected an argument that the appointment to the parole board of a judge of the Supreme Court was incompatible with judicial office. The argument was that the parole board is *not* independent of government and may be regarded as an instrument of the executive. The appointment of a judge therefore breached the principle in *Kable v Director of Public Prosecutions (NSW)*.²⁹ The court noted that the exclusion of natural justice and private nature of the board's decision-making gave 'colour' to this submission, but ultimately accepted that, on the contrary, 'the necessary appointment of a judge of this court may be perceived by some as an attempt to assuage concerns about the unfairness of the procedures prescribed by the legislation'.³⁰

Given the political sensitivity of some parole decisions we would argue that the independence of the body should be guaranteed, as should the overt fairness of the process. This is one way of interpreting the reasoning in *Kotzmann* although the decision also appears to imply that the Victorian Parole Board may only be achieving these attributes by means of its judicial membership.

B Making the Decision: Risk and Community Safety

Key criteria for deciding whether to release an offender on parole are risk of reoffending, and safety of the community. This is the nub of the process, and the one that can be the most problematic. While many jurisdictions use quantitative risk assessment tools to assist the board, the assessment of risk is inevitably linked to levels of community fear, or perception of risk.³¹

The WA Board, for example, has a prescribed set of criteria, the main foci of which are risk of reoffending, and circumstances of the original offence.³² The board is, however, directed to 'regard the safety of the community as the paramount consideration'.³³ In the last few years, other jurisdictions have also amended their parole legislation to give priority to 'community safety'.³⁴

²⁸ *Miller v Parole Board (NZ)* (Unreported, High Court of New Zealand, MacKenzie J, 16 December 2008).

²⁹ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

³⁰ *Kotzmann v Adult Parole Board (Vic)* [2008] VSC 356 (15 September 2008) [45] ('*Kotzmann*').

³¹ On methods of risk assessment, and their use in parole decision-making, see James Bonta, 'Offender Risk Assessment and Sentencing' (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 519, and other papers in that special issue; see also Roger Hood et al, 'Sex Offenders Emerging from Long-Term Imprisonment: A Study of Their Long-Term Reconviction Rates and of Parole Board Members' Judgements of Their Risk' (2002) 42 *British Journal of Criminology* 371.

³² *Sentence Administration Act 2003* (WA) s 5A.

³³ *Ibid* s 5B. This provision was added in 2006.

³⁴ See, eg, *Correctional Services Act 1982* (SA) s 67(3a).

In NSW, there is a presumption against release. Pursuant to s 135(1) of the *Crimes (Administration of Sentences) Act 1999* (NSW), 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'. Some other jurisdictions, similarly, emphasise the need for the board to ensure that there is no, or little, risk.³⁵

The increased focus on risk has been criticised in the UK. The UK Parole board is required by Directions of the Secretary of State to consider 'primarily the risk to the public of a further offence being committed at a time when the prisoner would otherwise be in prison and whether any such risk is acceptable.'³⁶ While this is to be balanced against 'the benefit, both to the public and the offender, of early release back into the community under a degree of supervision which might help rehabilitation and so lessen the risk of re-offending in the future', the board is to be aware that 'safeguarding the public may often outweigh the benefits to the offender of early release'.³⁷ A Home Office Research Study concluded that the increased emphasis on risk in the Secretary of State's Directions had led to a substantial reduction in the proportion of prisoners being granted parole, and refusal of parole to prisoners who would actually not have been likely to reoffend:

Parole Board members often believe that the risk of reconviction during the parole licence period is substantially higher than that indicated by the actuarially-based risk of reconviction score (ROR) ... In fact, it was found that half the prisoners in the sample of decisions observed had a risk of being reconvicted for a serious offence while on parole licence of seven per cent or less — equivalent to an average of four prisoners in every 100 being reconvicted of an offence that would be likely to lead to imprisonment. Yet the Board paroled only half of these low-risk prisoners.³⁸

The study found that very few prisoners saw parole refusal as an incentive to approaching their remaining time in prison more positively, and most thought the reasons for refusal were unfair. The authors concluded that 'too great a restriction of parole may foster negative attitudes and undermine efforts made in prison to encourage prisoners to change their patterns of criminal behaviour'.³⁹

By contrast, the Canadian legislation prescribes, as a guiding principle, that 'parole boards make the least restrictive determination consistent with the protection of society'.⁴⁰ The Canadian Board is explicitly required to consider both risk and potential reintegration of offenders: parole is to be granted based on the board's opinion that

³⁵ In the ACT, the parole board is to 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: *Crimes (Sentence Administration) Act 2005* (ACT) s 120(1).

³⁶ Parole Board (UK), *Directions to the Parole Board Under Section 32(6) Criminal Justice Act 1991 (UK) — Issued May 2004* (May 2004).

³⁷ *Ibid.*

³⁸ Roger Hood and Stephen Shute, 'The Parole System at Work: A Study of Risk Based Decision-Making' (Research Study No 202, Home Office, 2000) 77–8.

³⁹ *Ibid.* 78.

⁴⁰ *Corrections and Conditional Release Act*, SC 1992, c 20, s 101(d).

- (a) the offender will not, by reoffending, present an undue risk to society before the expiration according to law of the sentence the offender is serving; and
- (b) the release of the offender will contribute to the protection of society by facilitating the reintegration of the offender into society as a law-abiding citizen.⁴¹

This provides a very different approach to release decisions. There is not a requirement to decide first that there is no or little ‘risk’ of any type of reoffending, as appears to be the expectation of the Australian parole boards in order to ensure ‘community safety’. Rather the question is whether any anticipated reoffending will present an ‘undue risk’ to society, balanced against the value to society of the reintegration of the offender, and the overriding requirement for the choice of the ‘least restrictive’ disposition.

Parole authorities have powers to order release on parole, to defer a decision, or to deny release. If they order release, they can also impose special conditions aimed at managing the risk of reoffending on release: regular reporting to authorities, alcohol or drug treatment and testing, attendance for personal development programs, not residing in particular neighbourhoods or associating with particular people, and avoiding contact with particular people, including the victim.⁴² These conditions should of course bear a clear relationship to the assessed risk, and not impose a burden which increases the chance of breach.

The Victorian Adult Parole Board reports that common reasons for denial of parole include offenders’ failure to undertake programs in prison to address offending behaviour, their drug use in prison, and their previous performance on parole.⁴³ These are all factors regarded as indicating an increased risk of reoffending on release.

C Information Used by the Boards

Parole boards will usually consider the offender’s criminal history, behaviour in prison, and plans for release when making their decision on release.⁴⁴ They will usually be provided with sentencing remarks, psychiatric and medical reports, reports from corrections staff on progress in custody, including participation in programs, reports on prison incidents and disciplinary issues, and any submissions from the applicant or from victims.⁴⁵

This material clearly is important for a properly informed and balanced decision. In some jurisdictions, the board’s information is made available to the prisoner, but, in others, the prisoner is given none of this information prior to the board making its decision. Access to information is, arguably, central to the ability of prisoners to make effective contributions to decision-making affecting them.

⁴¹ Ibid s 102.

⁴² See, eg, Adult Parole Board of Victoria, above n 19, 16.

⁴³ Ibid.

⁴⁴ Ibid; *Crimes (Administration of Sentences) Act 1999* (NSW) s 135.

⁴⁵ See, eg, *ibid* s 135A; *Corrections Act 1997* (Tas) s 72(4).

The ACT requires that (subject to confidentiality issues) notice to the prisoner of a parole hearing must be accompanied by copies of all reports and documents to be considered by the board.⁴⁶ In Tasmania, where the board requests preparation of a report about a prisoner, that prisoner may ask for a copy of that report.⁴⁷

Aside from these provisions, offenders in Australia have no formal right to access to information before the board. As will be discussed further below, offenders in Australian jurisdictions will, at most, be called for interviews, and asked questions by members of the parole board. Even this level of participation commonly is discretionary.⁴⁸ They will usually have been interviewed by corrections or parole officers beforehand, but will have no knowledge of the material before the board, and if the decision is to refuse parole, no reasons will be provided. There will have been no opportunity to challenge or elaborate on the material before the board, either relating to the decision whether to release on parole, or to the imposition of any conditions upon release, and no guidance on how to improve any future application.

This contrasts with the practice in NZ, the UK and Canada, where offenders are given copies of all information to be used by the board, subject to security and safety considerations.⁴⁹

In the UK, the correctional authority prepares a 'dossier' containing these documents, which is given to the prisoner to read, and to which the prisoner can add relevant material. The prisoner is able to obtain legal advice on this process. The dossier then goes to the parole board for decision.⁵⁰

The UK Parole Board website contains information specifically directed to prisoners to assist in preparation of their case:

In almost every case, you will see everything in the dossier before the Parole Board. It is your legal right to full disclosure. But, sometimes the Governor can stop you from seeing documents under *Prison Service Order 6000*. If this happens, you will be told and asked to sign a form to say that you understand. ... Papers that can be kept from you might include a victim's statement or a security report, but whatever it is, it has to be justified by the Governor under *PSO 6000*.⁵¹

In Canada, the National Parole Board reviews all eligible prisoners according to the statutory principles in the *Corrections and Conditional Release Act*, SC 1992, c 20, s 101. These principles emphasise — together with the primacy of community protection — the values of transparency and communication,

⁴⁶ *Crimes (Sentence Administration) Act 2005* (ACT) s 127.

⁴⁷ *Corrections Act 1997* (Tas) s 74.

⁴⁸ See, eg, *Crimes (Administration of Sentences) Act 1999* (NSW) s 137C (board 'may (but need not) examine the offender', and 'an offender is not entitled to make submissions'); see also *Parole of Prisoners Act 1979* (NT) s 3G; *Corrective Services Act 2006* (Qld) s 189; *Corrections Act 1997* (Tas) s 72(2); *Sentence Administration Act 2003* (WA) s 109.

⁴⁹ *Parole Act 2002* (NZ) s 13; *Parole Board Rules 2004* (UK) r 6; *Corrections and Conditional Release Act*, SC 1992, c 20, s 141.

⁵⁰ *Parole Board Rules 2004* (UK) rr 5–7.

⁵¹ Parole Board of England and Wales, *My Dossier* (2008). *PSO 6000* deals with matters of parole release and recall.

including exchange of relevant information with other parts of the criminal justice system, communication of policies and programs to offenders, victims and the general public, and providing offenders with ‘information, reasons for decisions, and access to the review of decisions in order to ensure a fair and understandable ... process.’⁵²

In Victoria, it is argued that provision of fair procedures is too time-consuming and costly to be justifiable. The Victorian Attorney-General commented recently that the judicial members of the parole board were concerned that:

if you change that, and you put in place a whole range of appeal rights and they have to give voluminous reasons for decisions and the like, it would tie down the work of the parole boards and, in their view, they could well become unworkable. That is their argument.⁵³

There is, in fact, little evidence of such problems in the jurisdictions that actively resource and provide fair procedures, including information, reasons and rights of appeal. In NZ, for example, in 2008–9, only 4.2 per cent of decisions to deny parole were reviewed.⁵⁴ The Chairperson of the NZ Parole Board observed in correspondence with one of the authors that ‘the procedures which bind us in the way we work, have not led to unmanageable costs and time burdens and indeed we have been saving a lot of money recently by adopting a fully electronic information management solution and by a move to centralisation.’⁵⁵

When the new regime, requiring open decision-making and procedural fairness, was introduced in Canada in 1992, there were concerns about imposing an additional burden on the system, but one longstanding participant in the process commented recently that the requirement for a fair process so outweighed any other concerns that this was not regarded as an issue:

I can’t imagine now not sharing the info we use to make decisions with the offender, or not providing them with the reasons for those decisions, or an appeal process. These are really the same rights I have as a citizen to any decisions the government makes regarding me, or any information the government holds about me. This is for us a normal part of the process of natural justice, and the duty to act fairly. ...

⁵² *Corrections and Conditional Release Act*, SC 1992, c 20, s 101(f).

⁵³ Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 3 June 2008, 8 (Rob Hulls, Attorney-General). In Victoria reasons must be provided for the cancellation of parole: *Corrections Act 1986* (Vic) s 74(8). The single paragraph cited as reasons for decision in the recent case of *Kotzmann* [2008] VSC 356 [45] (15 September 2008) suggests that voluminous reasons are not in fact currently provided in that state: at [10]. What constitutes ‘adequate’ reasons is however a separate question. Decisions and reasons reported on the NZ Parole Board website run to no more than 1300 words, and decisions reported on the WA Prisoners Review Board website comprise only two or three paragraphs; these are however likely to be edited documents. Statements of reasons cited in judicial review applications in Queensland are in fact fairly detailed: see, eg, *Grigg v Parole Board (Old)* [2010] QSC 115 (19 April 2010).

⁵⁴ New Zealand Parole Board, *Annual Report 2008/09* (2009) 18, 23: calculated from statistics provided in that report.

⁵⁵ Email from Justice David Carruthers to Bronwyn Naylor, 11 August 2009.

Administratively, of course it requires resourcing and organization to meet these safeguards for the offender and to provide information to the public. ... There is a system in place however which supports the processes, and we work very closely with the correctional authorities. It's the cost of doing business and is just normal practice to us now.

Notably, I don't think we find such access is abused by offenders, and we are able to protect their personal info, and personal info about victims, informants, etc. as well. It just takes a structure.⁵⁶

D *Politics and Parole*

A factor in the reluctance of parole bodies to expose their decision-making to public scrutiny will be the fear of public criticism. In practice, though, parole boards cannot be politically insulated.⁵⁷ The decision to release may be greeted with media 'shock and horror' headlines — 'Neo-Nazi Killer on Parole'.⁵⁸ Any reoffending will also be blamed on the parole board — 'Vicious Killer on the Run After Second Parole Breach'.⁵⁹

The robust UK print media frequently criticises release decisions. One commentator observed, in 2007, after a particularly fraught period, resulting in three major government inquiries into the release of parolees who reoffended, that '[s]carcely a week seems to pass without some negative report appearing in the press about parolees who have committed serious crimes while on parole licence'.⁶⁰

In jurisdictions where decision-making is more open, however, engagement of the media and communication of the fullest possible information (consistent with privacy and security) is, arguably, a major component of the process.

The Prisoners Review Board of WA actively engages with the media to promote understanding of its decision-making.⁶¹ The board has a policy of publishing decisions on its website if it receives requests to do so, and the Chair finds that it is in the public interest to do so.⁶² During the period February to April 2010 the board published over 120 decisions, including 60 parole grants, 16 parole denials, 21 cancellations and 11 suspensions of parole.⁶³

⁵⁶ Email from Simonne Ferguson (Regional Vice-Chairperson, National Parole Board, Ontario/Nunavut Region, Canada) to Bronwyn Naylor, 23 December 2008.

⁵⁷ Kevin R Reitz, 'Questioning the Conventional Wisdom of Parole Release Authority' in Michael H Tonry (ed), *The Future of Imprisonment* (Oxford University Press, 2004) 199, 206.

⁵⁸ Mark Buttler, 'Neo-Nazi Killer on Parole', *Herald Sun* (Melbourne), 4 October 2005.

⁵⁹ Mark Buttler, 'Vicious Killer on the Run after Second Parole Breach', *Herald Sun* (Melbourne), 12 January 2008.

⁶⁰ Stephen Shute 'Parole and Risk Assessment' in Nicola Padfield (ed) *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 21, 21–2.

⁶¹ Prisoners Review Board of Western Australia, *Prisoners Review Board Annual Report For the Year Ended 30 June 2008* (2008) 9.

⁶² Prisoners Review Board of Western Australia, Policy on Publication of Board Decisions, 19 November 2007.

⁶³ Prisoners Review Board of Western Australia, *Prisoners Review Board Decisions* (2010). Decisions are reported as very brief summaries. The board recently rejected a request to report decisions using initials only, rather than full names of prisoners: see Prisoners Review Board of Western Australia, *Publication of the Names of Prisoners Before the Prisoners Review Board*.

The NZ Parole Board takes a similar approach, publishing recent decisions that have been released to the media, and are, therefore, considered to be of public interest.⁶⁴ The published decisions, on both websites, outline the offences for which the prisoners were sentenced, the programs that they had undertaken in prison, and the factors the boards took into account when making their decisions. The Chief Executive of the UK Parole Board recently expressed disappointment at the fact that the board is not permitted to publish its reasons on its website, commenting that ‘I am still of the view that if we were able to be more open here ... the public would have much better information and understanding of our role’.⁶⁵

E *How Effective is Parole in Fact?*

The concept of early release from a prison sentence was introduced in the UK following the perceived success of the use of transportation to America, and then to Australia, in the 18th and 19th centuries, under which scheme prisoners were eligible for release on ‘ticket of leave’ for good behaviour. From the late 1850s, in the UK (following the end of transportation), the penal sentence was structured to maintain ‘an invigorating hope’, with the establishment of schemes of remission of sentence, and release on licence, for good behaviour.⁶⁶

The idea of releasing convicted people back into their communities (rather than at a great distance in the colonies) was ‘politically highly sensitive’ in the 1850s. As Livingstone notes, there was ‘a moral panic in the late 1850s caused by an outbreak of garrotting, which increased public alarm at the idea of unreformed convicts roaming the streets’.⁶⁷ Parole continues to cause public concern when there is high-profile reoffending.

However, as the statistics below show, the reality is that most people released on parole do not reoffend during the parole period. Further, most people sentenced to prison will inevitably be released in any event, whether ‘on licence’ or without supervision. It must be recognised that it is not possible to guarantee a person will not reoffend, just as there is no guaranteed way of preventing people offending in the first place.

Release on parole will be ‘effective’ if it reduces the time offenders spend in custody, and the offenders demonstrate that they are not a risk to the community by not reoffending while on parole. The occasional tabloid headlines, and the lack of media reporting of successfully completed parole orders, create a public perception that many people reoffend on parole. However, the majority of parole orders are completed successfully. For example, in Victoria, in 2007–8, 1010 parole orders

⁶⁴ New Zealand Parole Board, *Decisions of Public Interest* (4 March 2010) <<http://www.paroleboard.govt.nz/decisions-statistics-and-publications/decisions-of-public-interest.html>>: currently lists four decisions, in a more detailed format than occurs in WA.

⁶⁵ Christine Glenn, ‘Pulling Together the Threads — Public Confidence and Perceptions of Fairness’ in Nicola Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 231, 233.

⁶⁶ Stephen Livingstone, Tim Owen and Alison Macdonald, *Prison Law* (Oxford University Press, 4th ed, 2008) 498–500.

⁶⁷ *Ibid* 500.

were completed successfully, while only 435 were cancelled, most for breaching parole conditions.⁶⁸

In the UK, there were approximately 2400 determinate sentence prisoners on parole in 2008–9; only 4 per cent were recalled from parole after an allegation of a further offence in that year.⁶⁹ In Canada in 2008–9, day parole was granted to 69 per cent of people eligible to be considered.⁷⁰ Fewer were granted full parole, with a success rate of 44 per cent, indicating the rigorous testing of risk.⁷¹ Of these, most day parolees (85 per cent), and three-quarters of people on full parole successfully completed their parole periods.⁷²

It is important to highlight that parole failure is more commonly due to breach of parole conditions than to reoffending. For example, in Victoria, of the 435 orders that were cancelled in 2007–8, 74.5 per cent were cancelled for violations of parole conditions (mostly continued substance abuse and/or failure to attend appointments or programs). Only 25.5 per cent of the 435 were cancelled due to further criminal convictions.⁷³

This is not to suggest that people released from prison do not at some point reoffend. For example, research on reoffending amongst people released on parole in NSW, in the period 2001–2, found that 23 per cent had reoffended within 3 months of release, 52 per cent had reoffended within a year of their release on parole, and 64 per cent had reoffended within 2 years.⁷⁴ Most had received sentences shorter than 18 months, and most reoffending was, therefore, after the expiry of their parole period. However UK research showing significantly reduced reconviction rates for offenders released on parole compared with those who were released at the end of their sentence also concluded that parole appeared to delay the onset of reoffending.⁷⁵

It is argued here that the parole decision brings with it two possible protective features: the individualised analysis of risk at the time of decision-making, and the provision of supervision on release through the parole period.

⁶⁸ Adult Parole Board of Victoria, above n 19, 18.

⁶⁹ The Parole Board for England and Wales, *Annual Report 2008–2009* (2009) 44. There were also 1646 life sentence prisoners under active supervision in the community in 2008–9, of whom only 5.4 per cent per cent were recalled: at 52–3.

⁷⁰ Prisoners can be granted day parole in preparation for release on full parole or statutory release: *Corrections and Conditional Release Act*, SC 1992, c 20, ss 99, 122.

⁷¹ *NPB QuickStats* (15 June 2010) Government of Canada National Parole Board <http://www.npb-cncl.gc.ca/infocntr/facts/parole_stats-eng.shtml>.

⁷² *Ibid.* This may be compared with the 60 per cent success rate of people released automatically on statutory release, without the exercise of discretion by a parole body.

⁷³ Adult Parole Board of Victoria, above n 19, 18. In Canada, 'a little over 17 per cent had their parole revoked for breach of conditions while almost 13 per cent had their parole revoked as a result of committing a new offence': National Parole Board Statistics, *Parole Decision-Making — Myths and Realities* (3 July 2009) Government of Canada National Parole Board <http://www.npb-cncl.gc.ca/infocntr/myths_reality-eng.shtml>.

⁷⁴ Jones et al, 'Risk of Re-offending Amongst Parolees' (2006) 91 *Contemporary NSW Bureau of Crime and Statistics Research Crime and Justice Bulletin: Contemporary Issues in Crime and Justice* 1, 5.

⁷⁵ Tom Ellis and Peter Marshall, 'Does Parole Work? A Comparison of Reconviction Rates for Paroled and Non-Paroled Prisoners' (2000) 33 *Australian and New Zealand Journal of Criminology* 300.

Prisoners who are refused parole will be released at the expiry of their sentences, with no such support.

An important difference in rates of reoffending appears to be related to whether the prisoner had been released following a decision of a parole board, or automatically at the parole date set by the sentencing court. There is a significantly lower rate of reoffending for people released by the parole board where an individualised decision has been made. Research in both NSW and Canada found that offenders released automatically, on statutory release, were far more likely to have had their releases revoked than offenders released by the parole board on day parole or full parole.⁷⁶

When evaluating effectiveness of the parole process, we should then consider the effectiveness of the period spent on parole in reducing reoffending, compared with prisoners only released at the end of their sentences.

International research indicates that ‘managed release on parole is at least twice as successful in preventing reoffending as automatic release at the end of the sentence’.⁷⁷ It also shows better results for individualised parole decisions than for automatic release on parole.

Effectiveness, of course, depends not only on the most accurate assessment of risk and readiness, but also on the existence of post-release supervision, and, further, on the quality of that supervision. The underlying principle of parole is that offenders released on parole will be under supervision, and given support to assist their reintegration into the community. The supervisory relationship is intended to minimise the risk of reoffending. At least as importantly, it is intended to support the prisoner in resettling into community life, in obtaining accommodation and work, reconnecting with family, and stabilising any drug or other health issues.

The international shift in focus over the past decade, from welfare-based supervision to monitoring and control-based supervision, has meant that, in some jurisdictions, ex-prisoners receive little positive support to assist in their re-entry to the community.⁷⁸ In such communities, an evaluation of the ‘success’ of parole will not accurately reflect the potential benefit of a properly resourced parole process.

However, recent studies from the United States (US) concluded that the filtering function of the parole board might be the key to predicting the likely successful completion of a parole period (at least in a jurisdiction where supervision may be minimal). Recent US analysis concluded that prisoners released on parole on the decision of a parole body were less likely to reoffend than prisoners released, without supervision, at the end of their sentences. The same analysis found, however, that prisoners released on parole automatically, with supervision, but with no parole board risk assessment, were as likely to reoffend as those released at the end of their sentences.⁷⁹

⁷⁶ Jones et al, above n 74; National Parole Board Statistics, above n 71.

⁷⁷ New Zealand Parole Board, *Annual Report 2007/08* (2008) 5.

⁷⁸ Amy Solomon, Vera Kachnowski and Avinash Bhati, ‘Does Parole Work? Analyzing the Impact of Postprison Supervision on Rearrest Outcomes’ (Research Paper, The Urban Institute (US), March 2005) 16.

⁷⁹ Ibid.

The US analysis suggests that the discretionary parole process, in itself, has an important role to play in selecting people for release. It does not show that the post-release process, in itself, assists people to avoid reoffending, but the limited nature of the supervision on offer — in the US population studied, parole officers typically met any one individual for about 15 minutes once or twice a month — does not provide a credible test of the value of supervision, as such.

The NSW research, mentioned earlier, also found that prisoners released on the basis of court-imposed parole conditions (that is, set at the time of sentencing) were more likely to reoffend than prisoners released by the NSW Parole Authority.⁸⁰ The researchers speculated that this was either because the parole authority was better placed than the court accurately to assess risk of reoffending, or because people released by the parole authority tended to have more intense supervision when released.⁸¹ Both interpretations highlight the importance of properly supervised parole and a fully-informed parole decision.

It is argued here, therefore, that the most effective parole release will be based on well-informed individualised decision-making, together with a properly resourced system of supervision.

F *Making the Best Parole Decision*

It is argued here that fair procedures are needed in parole decision-making as a matter of principle, a point that will be developed further in Part III. It is also argued, however, that fair procedures lead to better decision-making, and more legitimate processes.

On the first point, the Australian Best Practice Guidelines for decision-makers states:

Natural justice requires that administrators adhere to a fair decision-making procedure ... fair procedures tend to result in better decisions ... a fair decision is one that is properly made, in accordance with the statute and the requirements of natural justice.⁸²

A commentator on the impact of UK reforms rejected the argument that the introduction of procedural fairness made it difficult to maintain community protection:

[I]ndeed, one of the principal virtues of procedurally proper decision-making is that it is liable to yield more accurate outcomes — risk assessments, in the

⁸⁰ Jones et al, above n 74, 10.

⁸¹ In NSW, only prisoners sentenced to more than three years' imprisonment are paroled by the parole authority, from which Jones et al, above n 74, inferred that such parolees are likely to be given longer and more intense periods of supervision.

⁸² Administrative Review Council, 'Decision Making: Natural Justice' (Best-Practice Guide No 2, August 2007) 1.

present context — by ensuring that decision-makers are in receipt of, and equipped fully to test, all relevant information.⁸³

On the second point, fair procedures are also likely to lead to decisions that will be accepted more readily by prisoners and others. The Chair of the Prisoners Review Board of WA wrote, in her 2008 Annual Report, that

[a] system that allows prisoners an opportunity to ‘put their case’ before important decisions are made affecting their liberty is more likely to be respected, not only by the prisoners but by the community generally. If a parole system is regarded by prisoners as unfair or unreasonable it will not be successful.⁸⁴

Tyler and others have proposed that fairness in decision-making is at least as much about how decisions are made as it is about the outcomes. Outcomes may be *less* significant to the person’s sense of the fairness of the decision.⁸⁵ Liebling’s findings, from extensive research with prisoners and staff, about the prison experience and prison values, emphasises the importance given to fairness, comprising staff fairness, clarity, and formal or procedural justice.⁸⁶ Liebling concluded that

[b]eing treated unfairly leads to negative consequences — non-compliance and, importantly, distress. We need just institutions of criminal justice if we are to avoid hypocrisy, disaffection and further damage.⁸⁷

Offenders interviewed about their perceptions of the risk assessment process in the UK emphasised a fair process, which was one that relied on accurate information, and one that provided for their contribution to the process, in which there was clarity about the process itself, through clear communication with the offender. It was also a process that resisted political and media influence.⁸⁸

The remainder of this article will, therefore, make the argument that fair parole decision-making procedures should immediately be introduced in Australian jurisdictions that exclude them. It will argue that common law principles, as well as domestic and international human rights principles, require that prisoners receive fair hearings.

⁸³ Mark Elliott, ‘The Parole Board and the Changing Face of Public Law’ in Nicola Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 43, 55–6.

⁸⁴ Prisoners Review Board of Western Australia, above n 21, 8.

⁸⁵ Tom R Tyler, *Why People Obey the Law* (Yale University Press, 1st ed, 1990); Tom Tyler and Yuen Huo, *Trust in the Law: Encouraging Public Cooperation with the Police and Courts* (Russell Sage Foundation Publications, 2002).

⁸⁶ Alison Liebling, ‘Why Fairness Matters in Criminal Justice’ in Nicola Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 63, 69.

⁸⁷ *Ibid* 71.

⁸⁸ Gill Attrill and Glenda Liell, ‘Offenders’ Views on Risk Assessment’ in Nicola Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 191, 199–200.

III Provision of a Fair Hearing: the Principles

Fair procedures are called for under the principles of natural justice, enforceable through judicial review. They are also called for under human rights principles.

Features of a fair process would include access to information prior to the hearing, the right to appear, and to make submissions, before the board, legal representation or other assistance at the hearing, access to reasons for decisions, and avenues for appeal and review.

The scope for achieving these will be the focus of this part. Implementation through statutory protections for prisoners applying for release will then be considered in more detail in Part IV.

A *Natural Justice*

It is a fundamental legal principle that statutory bodies must operate within the law. Any statutory body is open to judicial review of the legality of its actions — that is, that it acted within the powers granted to it by statute.

Judicial review is available on two broad grounds: that the body acted ultra vires (outside its legal powers), and that the body failed to provide natural justice, where this is required.

Judicial review under the ultra vires head would be available if, for example, a parole board acted entirely unreasonably, for improper reasons, or in bad faith.⁸⁹

Of specific relevance here, however, is the application of the principles of natural justice. Natural justice, sometimes called procedural fairness, comprises the hearing rule, and the rule against bias. The focus here will be the hearing rule.

The hearing rule — ‘*audi alteram partem*’ — requires that a decision-maker give a person, whose interests will be adversely affected by a decision, the opportunity to be heard. The common law formulation of the rule, as a presumption in favour of natural justice, subject to clear intent to exclude it, was set out authoritatively by Mason J in the High Court decision in *Kioa v West*:

The law has now developed to the point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness, in the making of administrative decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of a contrary statutory intention.⁹⁰

Mason J stated that ‘rights and interests’ included ‘personal liberty, status, preservation of livelihood and reputation, as well as ... proprietary rights and

⁸⁹ Review on this basis is explicitly made available in NSW: *Crimes (Administration of Sentences) Act 1999* (NSW) s 155. Judicial review of parole board decisions is available in Victoria, eg, under the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) r 56.01.

⁹⁰ *Kioa v West* (1985) 159 CLR 550, 584.

interests'.⁹¹ This formulation clearly extends to the decision whether to release someone from custody.

In relation to the operation of procedural fairness and natural justice in the parole board, there will be two questions: first, does the statute displace the presumption that the rules of natural justice apply (that is, show the clear parliamentary intent to exclude); and then, if not, what does natural justice require here?

1 *Does the Presumption of Natural Justice Apply?*

In Victoria, the argument for the legal requirement to provide natural justice falls at the first hurdle, as the *Corrections Act 1986* (Vic) expressly excludes the operation of natural justice in the work of the parole board. There are similar statutory exclusions in WA and the NT.⁹²

In NSW, the board has been held to be bound by the rules of natural justice.⁹³ However, the NSW legislation requires provision of information to specific parties (not including the offender) and explicitly precludes the offender making any submission to a parole hearing, or having a representative present, suggesting a limited reading of natural justice in that state.⁹⁴

Natural justice is part of the ACT regime under amendments made in 2005, following the coming into force of the *Human Rights Act 2004* (ACT) ('HRA ACT'). The ACT Parole Board is required, in the first instance, to conduct an inquiry into parole, without a hearing. However, if it concludes that releasing the prisoner on parole is not justified, it must hold a hearing. Notice of such a hearing must be accompanied by copies of the documents before the board, subject to confidentiality. At the hearing, the prisoner has the right to appear and have legal representation, make submissions, produce documents and exhibits, and give evidence on oath.⁹⁵

The exclusion of natural justice may be explained by reference to the importance of maintaining access to confidential information, and protecting informants to ensure the board can make the best-informed decisions. It is also clearly related to the issue of workload.

It is argued here, however, that natural justice should, in any event, clearly be available in principle. Arguments based on administrative inconvenience cannot outweigh fundamental rights to a fair hearing, and issues of confidentiality and

⁹¹ Ibid 582.

⁹² *Parole of Prisoners Act 1979* (NT) s 3HA; *Corrections Act 1986* (Vic) s 69(2); *Sentence Administration Act 2003* (WA) s 115.

⁹³ The board has been held to be required to comply with the rules of natural justice, at least in cases involving the rescission of parole: *Baba v Parole Board of NSW* (1985) 5 NSWLR 338. In *Todd v Parole Board* (1986) 6 NSWLR 71 a decision as to whether a prisoner's non-parole period would be reduced (under previous legislation) was held to require procedural fairness including provision to the prisoner of information to be relied on, the opportunity to make a written response, and the opportunity for an oral hearing.

⁹⁴ See *Crimes (Administration of Sentences) Act 1999* (NSW) ss 137C, 193A.

⁹⁵ *Crimes (Sentence Administration) Act 2005* (ACT) ss 125–127, 192, 209.

security can properly be addressed with procedural safeguards, as is the case in NZ, the UK and Canada. The Chairperson of the NZ Parole Board has observed:

Routinely I am managing half a dozen cases in our equivalent of the Victoria Supreme Court. These are either appeals or judicial review cases. It is very good for us to be challenged in this way constantly. We fulfil an important function on behalf of the communities of this country and we need to be transparent in the way we do that.⁹⁶

As in the ACT and NZ, developments in the UK have been driven by the engagement with human rights legislation and jurisprudence. In 1988, the European Court of Human Rights held that a refusal to grant parole is a deprivation of liberty and that, in England, natural justice is required for parole decisions.⁹⁷

2 *The Content of Natural Justice*

If it were accepted that natural justice be required in parole decision-making, there would then be the question of its content. Natural justice has been held in various contexts to include the opportunity for a hearing, access to the information at the hearing and the capacity to address this information, legal representation or support, and access to reasons for decision and some level of review.⁹⁸

The courts can, of course, conclude that the content is minimal, depending on the circumstances; the obligation to provide natural justice is a flexible one requiring the adoption of 'fair procedures which are appropriate and adapted to the circumstances of the particular case'.⁹⁹ In the UK, the House of Lords held that prisoners must be afforded a hearing in order to comply with basic principles of procedural fairness, but that the hearing can be limited to take account of practical factors. An oral hearing may not always be required, but fairness and good decision-making require that the prisoner at least be able to comment on material before the board, and to make submissions to the board. Lord Bingham elaborated in *R (West) v Parole Board*; *R (Smith) v Parole Board (No 2)*:

The common law duty of procedural fairness does not, in my opinion, require the Parole Board to hold an oral hearing in every case where a determinate sentence prisoner resists recall, if he does not decline the offer of such a hearing. But I do not think the duty is as constricted as has hitherto been held and assumed. Even if important facts are not in dispute, they may be open to explanation or mitigation, or may lose some of their significance in the light of other new facts. While the Parole Board's task certainly is to assess risk, it may well be greatly assisted in discharging it (one way or the other) by exposure to the prisoner or the questioning of those who have dealt with him. It may often be very difficult to address effective representations without knowing the points which are troubling the decision-maker. The prisoner should have the

⁹⁶ Email from Justice David Carruthers to Bronwyn Naylor, 10 August 2009.

⁹⁷ *Weeks v United Kingdom* (1988) 10 EHRR 293.

⁹⁸ For a full discussion of the range of procedural components of natural justice see Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) ch 8.

⁹⁹ *Kioa v West* (1985) 159 CLR 550, 585.

benefits of a procedure which fairly reflects, on the facts of his particular case, the importance of what is at stake for him, as for society.¹⁰⁰

The majority of the House of Lords concluded that an acceptable minimum standard of natural justice had been provided in a case where both the prisoner, and his legal representative, were excluded. Natural justice was held to be satisfied because a special advocate had been appointed to attend and act on the prisoner's behalf in the closed hearing.¹⁰¹

B Human Rights

Human rights are articulated in a range of international and domestic instruments, including the *International Covenant on Civil and Political Rights* ('ICCPR').¹⁰² The ICCPR is paralleled in the *European Convention on Human Rights*, which affects parole practice in the UK.

The rights articulated in the ICCPR, have been embodied in Australia in the HRA ACT, and in the Charter. These instruments will be the practical focus of discussion here. However, the implications of the internationally-recognised human rights are also significant for state, territory and federal governments.

The Victorian and ACT legislation impose an obligation on 'public authorities' to act in a way which is compatible with human rights.¹⁰³ Relevant rights in the parole context include the right to liberty and freedom of movement,¹⁰⁴ and the right to privacy and reputation.¹⁰⁵ Rights of families and children may also be engaged.¹⁰⁶

It is beyond the scope of this article to go into detail about procedural requirements and remedies under the existing human rights instruments. It is noted that the HRA ACT has recently been amended to create a new right of action for breach of human rights, which came into force in January 2009.¹⁰⁷

Parole processes in other jurisdictions have been significantly changed with the passage of rights legislation. The regimes in Canada, NZ and the UK were all restructured following the passage of human rights charters.

¹⁰⁰ [2005] 1 All ER 755, [35] (Lord Bingham).

¹⁰¹ *R (Roberts) v Parole Board* [2005] 2 AC 738 (Lord Bingham and Lord Steyn dissenting), a ruling demonstrating 'visceral disagreement' between members of the court, according to Livingstone, Owen and Macdonald, above n 66, 609.

¹⁰² *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

¹⁰³ Charter s 38(1); HRA ACT s 40B(1). Each exempts actions under statute that require that they be carried out in a way which is inconsistent with human rights: see Charter s 38(2); HRA ACT s 40B(2).

¹⁰⁴ Charter ss 21 and 12; HRA ACT ss 18 and 13.

¹⁰⁵ Charter s 13; HRA ACT s 12.

¹⁰⁶ Charter s 17; HRA ACT s 11.

¹⁰⁷ HRA ACT s 40C. See also Human Rights Act 1998 (UK) c 42. The Victorian Charter does not have such a free standing right of action (that is, on the basis of a breach of statutory duty, with the Charter being the statute).

In Victoria, the parole board is not currently required to comply with the Charter as it has been declared not to be a 'public authority', an exemption initially granted for 2008, the Charter's commencing year. In response to a question on this issue by the State Public Accounts and Estimates Committee, in June 2008, the Attorney-General noted the parole board's concern that compliance could limit the board's capacity to make timely decisions, and assured the committee that he would need to be persuaded to grant an extension for 2009.¹⁰⁸ He subsequently granted the extension for 2009, and has since granted another extension, until December 2013.¹⁰⁹

The ongoing exclusion of the adult and youth parole processes from the operation of the Charter was strongly criticised by the Victorian Equal Opportunity and Human Rights Commission ('VEOHRC') in its 2008 Report on the operation of the Charter, in which it observes acerbically that

insufficient information has been provided publicly to explain why the challenge for these Boards is so different to that experienced by many other public authorities as to justify their continuing exemption from the Charter.¹¹⁰

There is no similar exemption under the ACT legislation.

The regulatory impact statement prepared for the proposed 2009 Victorian regulations concluded that the board should continue to be exempt on the basis that compliance with the Charter would require substantial changes to the board's procedures, and would in fact lead to fewer prisoners being released on parole.¹¹¹ The RIS proposed that an obligation to comply with human rights would require 'a relatively formalised decision-making process', the introduction of 'certain elements of procedural fairness' and the development of a more transparent decision-making process according to specific criteria. At least with respect to decisions to impose conditions and to cancel parole, such requirements were thought likely to lead to more conservative initial decisions to release on parole, as it would reduce the board's capacity to respond quickly to parole breaches.¹¹²

We suggest that the decision to extend this exemption to 2013 is a disappointing one. First, all other 'public authorities' have to grapple with the requirements of compliance with the Charter, and the other jurisdictions where human rights obligations apply to parole boards have embraced these. Second, the nature of the procedural fairness required is determined in the context of the types of decisions being made, which in the case of parole decisions also requires consideration of public safety. As the former Chair of the UK Parole Board observed after some years of applying human rights legislation in that jurisdiction,

¹⁰⁸ Evidence to Public Accounts and Estimates Committee, Parliament of Victoria, Melbourne, 3 June 2008, 8 (Rob Hulls, Attorney-General).

¹⁰⁹ *Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009* (Vic) s 5.

¹¹⁰ 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.

¹¹¹ The Allen Consulting Group, 'Proposed Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 Regulatory Impact Statement' (Report to Victorian Department of Justice, October 2009) ('RIS').

¹¹² *Ibid* 17, 25.

‘nothing in the ... *Human Rights Act* takes away from our prime consideration to protect the public.’¹¹³

The economic considerations of workload and resourcing which underlie the arguments of the RIS are recognised, but proper resourcing of fair processes for prisoners will be justified in the interests of producing a more effective system which maintains the confidence of the community while maximising the opportunity for offenders’ rehabilitation.¹¹⁴

Our argument is that parole decision-making should comply with increasingly influential human rights principles, whether or not they are currently legally enforceable. The application of some individual rights relevant to parole will, however, be considered briefly here, drawing on both domestic and international jurisprudence.

1 *Right to Liberty, Including Declaration of Lawfulness of Detention*

The right to liberty includes the right to seek a declaration by a court as to the lawfulness of continued detention.¹¹⁵ This right is explicitly included in the two Australian charters, in the Canadian *Bill of Rights*, SC 1960, c 44 (art 2(c)(iii)) and the *European Convention on Human Rights* (art 5(4)).

The Victorian Charter provides, in s 21(7), that:

Any person deprived of liberty by arrest or detention is entitled to apply to a court for a declaration or order regarding the lawfulness of his or her detention, and the court must—

- (a) make a ... decision without delay; and
- (b) order the release of the person if it finds that the detention is unlawful.

The application of the equivalent ACT provision in the parole context was the basis of one of the first applications for relief under the new direct right of action in the ACT. The applicant challenged a delay in considering his application for parole to some weeks after his eligibility date, raising the right to liberty.¹¹⁶ The board subsequently made a decision, and the matter was only heard as to costs, but the court observed that, while recognising some inevitable time constraints,

the parole eligibility date is of central importance to applicants. If they are to be found eligible for parole then that decision ought to be made at the earliest

¹¹³ Nichol, above n 25, 18.

¹¹⁴ See further Human Rights Law Resource Centre, *Submission on the Charter of Human Rights and Responsibilities (Public Authorities) Regulations 2009 (Vic)* November 2009.

¹¹⁵ Charter s 21(7); HRA ACT s 18(6).

¹¹⁶ *Jackson v Department of Justice and Community Safety (ACT)* [2009] ACTSC 102 (25 August 2009).

date practicable ... the plaintiff's application was, in substance, successful ... The respondent will pay the plaintiff's costs.¹¹⁷

In the UK, it is accepted that the parole board is required to comply with the equivalent provision of the *European Convention on Human Rights* art 5(4). As the Court of Appeal explained succinctly in a recent decision:

[T]he sentencing court is considered to have two objectives when imposing the initial sentence. The first objective is punishment, and the first part of the sentence satisfies the requirements of Article 5(1)(a) in that it fulfils this objective. Once, however, a prisoner has served the penal part of the sentence and is entitled to be considered for release under licence, his continued imprisonment can only be justified in so far as it is necessary to satisfy the second objective, namely the protection of the public ... Article 5(4) entitles the prisoner to challenge the lawfulness of his detention on the ground that imprisonment is no longer necessary to satisfy this objective.¹¹⁸

The European Court, in several key decisions under art 5(4), had held that English law, dealing with procedures for releasing, and subsequently recalling, specific categories of prisoners, was in breach of the *European Convention on Human Rights*.¹¹⁹ The procedures were subsequently amended.

Article 5 was recently held to have been breached in the UK by a decision of the Secretary of State to defer, for 18 months, the review of a prisoner's eligibility for release from a life sentence.¹²⁰ However, it is clear that not all delays in dealing with a parole issue will render detention unlawful under art 5(1); the delay must be of 'considerable magnitude'.¹²¹ This may be contrasted with the ACT approach, which may be inferred to be that a delay of only weeks is unacceptable.

2 *Right to Privacy and Family Life*

The Victorian and ACT instruments simply prohibit the 'unlawful or arbitrary' interference with privacy and family, in terms similar to that in the *ICCPR*.¹²² In contrast, the *European Convention on Human Rights* specifies a range of grounds for acceptable constraints on this right, such as are 'necessary in a democratic society in the interests of national security, [and] public safety ...'.¹²³

¹¹⁷ Ibid [19]–[21]. The parole board was accepted as being included in the concept of a 'court' under the ACT legislation, in which 'court' is given a non-exhaustive definition. The application of the equivalent provision in Victoria will be less clear, where 'court' is defined specifically as the Supreme, County, Magistrates' or Children's Court: Charter s 3(1). There is no definition of 'court' for the purposes of art 5(4) of the *European Convention on Human Rights*.

¹¹⁸ *Brooke* [2008] 3 All ER 289, [18].

¹¹⁹ *Weeks v United Kingdom* (1988) 10 EHRR 293; *Thynne v United Kingdom* (1991) 13 EHRR 666; *Stafford v United Kingdom* (2002) 35 EHRR 32.

¹²⁰ *R (Loch) v Secretary of State for Justice* [2008] EWHC 2278 (Admin) (2 October 2008).

¹²¹ *Dunn v Parole Board* [2009] 1 WLR 728, [28].

¹²² Charter s 13; HRA ACT s 12.

¹²³ *European Convention on Human Rights* art 8(2).

The UK High Court was not prepared to find that licence conditions, requiring an offender to live at a particular hostel, breached art 8 of the *European Convention on Human Rights* (the equivalent right to respect for private and family life). The court accepted the justification for the conditions, but also stated that licence conditions are matters for the judgment of prison and probation experts, in which ‘courts must be steadfastly astute not to interfere save in the most exceptional case.’¹²⁴

There is, inevitably, a tension for supervising courts, between maintaining the accountability of state correctional agencies and accepting the expertise of the decision-maker. This was recognised in the same case, where the method of risk-assessment employed by the parole board was also challenged. The court was reluctant to intervene, but ultimately held that the risk-assessment should be quashed, as it was wrongly based on a number of convictions that had, in fact, been overturned on appeal. The licence conditions were, therefore, also quashed, as the risk assessment had been erroneously used to determine the conditions for release.¹²⁵

3 *The Significance of Human Rights Instruments in Parole Decision Making*

A UK commentator has observed that, contrary to some media claims, the incorporation of human rights in the UK has not meant that the individual rights of prisoners now trump the protection of the public. As is the case with the Victorian Charter, the rights instrument in the UK is, in fact, premised on the idea that ‘the interests of the individual must yield where this is necessary in the interests of public safety.’¹²⁶ The Victorian Charter specifies that human rights can be subject to ‘such reasonable limits as can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom’, taking into account such factors as ‘(b) the importance of the purpose of the limitation; and (c) the nature and extent of the limitation’.¹²⁷

The incorporation of human rights simply ensures that the parole decision now balances the prisoners’ right to release, if detention is unnecessary, with the authority’s obligation to gauge whether the protection of the public requires continued detention.

In summary, it has been argued in this part that parole authorities ought, as a matter of principle, to comply with the rules of natural justice when making parole decisions. Developing human rights jurisprudence also supports the inclusion of fair procedures in such important decision-making.

However, prisoners will, in fact, be best protected by explicit statutory protections and appeal rights, and it is, therefore, to statutory reforms that the discussion now turns.

¹²⁴ *R (Carman) v Secretary of State for the Home Department* [2004] EWHC 2400 (Admin) (30 July 2004) [33].

¹²⁵ *Ibid* [101]–[102].

¹²⁶ Elliott, above n 83, 62.

¹²⁷ Charter s 7(2).

IV Provision for Fair Hearings: the Practical Implementation

In this part we will outline existing statutory schemes demonstrating the acceptability of provision of fair procedures in comparable jurisdictions, arguing that statutory protections should be extended to prisoners in all Australian jurisdictions.

A *Access to Information Before the Parole Authority and Capacity to Challenge and Contribute*

Australian jurisdictions generally provide for prisoners to make submissions, either in writing or in person.¹²⁸ However, fundamental to the concept of a fair hearing is that participants know on what decision-makers base their decisions, and that participants be able to address that information and provide their own information. Prisoners need to know what the board will be considering, in order to make submissions in response. It is also important that prisoners be able to comment on the quality of evidence, and identify, and comment on, prejudicial material, as emphasised by Lord Bingham in the comments extracted above.

For example, correctional advice on completion of programs may need elaboration where required programs are unavailable or oversubscribed in particular prisons. It is common in correctional systems for programs to be under-resourced, withdrawn at short notice, or available only at certain sites, a point raised critically by many parole authorities.¹²⁹ It may also have become apparent that particular proposed programs were inappropriate for the offender, given his or her levels of competence or ability, rather than because of any unwillingness on the offender's part.¹³⁰

Disciplinary records, including findings of Governor's hearings or adjudications, may warrant explanation by the prisoner, given that, in various jurisdictions, the adjudicator may not be bound by rules of evidence,¹³¹ and a prisoner is commonly not allowed to be legally represented at the disciplinary hearing.¹³²

Unsubstantiated reports of incidents may be recorded as observed events. As recent UK commentators have warned:

¹²⁸ *Crimes (Sentence Administration) Act 2005* (ACT) s 209; *Crimes (Administration of Sentences) Act 1999* (NSW) s 140 (limited to review hearings: s 137C(2)); *Parole of Prisoners Act 1979* (NT) s 3G (may be required to appear); *Corrective Services Act 2006* (Qld) s 189 (if leave is granted); *Correctional Services Act 1982* (SA) s 77(2)(c); *Corrections Act 1997* (Tas) s 72(2) (if leave is granted); *Sentence Administration Act 2003* (WA) s 109 (may be required to appear).

¹²⁹ See, eg, Prisoners Review Board of Western Australia, above n 21, 19–20, and Adult Parole Board of Victoria, *Annual Report 2006/2007* (2007) 6–7.

¹³⁰ I would like to acknowledge the comment of an anonymous reviewer on this point.

¹³¹ See, eg, *Corrections Regulations 2009* (Vic) reg 52(c).

¹³² *Corrections Act 1986* (Vic) s 53(3).

In our experience as practitioners, we are aware that inaccuracies may creep into offenders' files across time ... opinion, evidence or conclusions can be repeated in new reports making it difficult to identify the original author, context or time it was written.¹³³

It is important that prisoners have access to this information, and be able to address inaccuracies at an early point. In NSW, when a prisoner alleges that the parole authority made a decision based on false, misleading or irrelevant information, the prisoner may apply to the NSW Supreme Court to have that information ruled false, misleading or irrelevant.¹³⁴ While this is valuable, its usefulness depends on the prisoner knowing what was before the board. Reasons are not, however, provided, although refusal of parole in that jurisdiction brings with it the requirement that, if the prisoner applies for reconsideration of the refusal, he or she is to be provided with a limited range of the 'reports and other documents' on which the board will be relying.¹³⁵ Supreme Court action is also costly and slow, and an impractical approach for most decision-making in the corrections setting.

The inherent unfairness of a process which does not provide an opportunity to test the accuracy of information being relied on was noted in the Victorian case of *Kotzmann*. The applicant sought judicial review of a decision of the Victorian Adult Parole Board to revoke his parole, challenging the board's reliance on particular information. The Supreme Court, in rejecting his application, noted:

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.¹³⁶

The application also challenged the constitutionality of the board's composition, and the role of the judicial member, as noted above. The court observed that under the Victorian regime,

[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. the necessary appointment of a judge of this court may be perceived by some as an attempt to assuage concerns about the unfairness of the procedures prescribed by the legislation.¹³⁷

The democratic values embodied in the widespread freedom of information regimes in Australia usually include provisions for not only access to information,

¹³³ Attil and Liell, above n 88, 196.

¹³⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) s 155(1)(b).

¹³⁵ *Ibid* ss 139(3), 146(3), subject to s 194.

¹³⁶ *Kotzmann* [2008] VSC 356 (15 September 2008) [61].

¹³⁷ *Ibid* [45].

but also the correction of inaccurate information.¹³⁸ The freedom of information regime is not available in relation to the parole board, but its underlying values are applicable here.

Greater access to information is provided in the ACT, as well as in the UK, NZ and Canada. In the ACT, if the board is not satisfied on the papers that parole should be granted, the board must hold a hearing. The board is required to give notice of the hearing to the offender and others in the corrections system, and this notice is to be accompanied by a copy of any reports or other documents to be used by the board in making its decision (subject to confidentiality requirements).¹³⁹

As mentioned earlier, since 1992, UK prisoners receive a dossier containing the documents going to the parole board. The Carlisle Committee, in 1988, had recommended that reports used in decision-making should usually be disclosed to prisoners, arguing that:

[s]ecrecy breeds rumour and suspicion. Inmates suspect that a prison officer or probation officer has spoiled their chances of parole even when in fact he has submitted a fair and favourable report. Sometimes an officer may write something which is unintentionally misleading or inaccurate but the prisoner will have no opportunity to correct it or put his side of the story.¹⁴⁰

The UK government rejected this recommendation in 1990, stating that 'there is a risk that openness could lead to less full and telling reports and so to less well informed decisions'.¹⁴¹ Nonetheless, an argument along these lines, used to resist discovery of medical reports used in a decision to refuse parole, was forcefully rejected in 1988, in *R v Secretary of State for the Home Department; Ex parte Benson*:

I cannot believe that a professional man, such as a doctor, would trim his views or be less than candid just because he thought his report might one day see the light of day. If that is true of medical men in general, then I cannot follow why it should not be true of a prison medical officer.¹⁴²

The current policy of open reporting was ultimately adopted in 1992, with provision for withholding information in exceptional circumstances, such as for reasons of national or prison security, or where provision of the information could harm the prisoner, the victim or a third party.¹⁴³

¹³⁸ *Freedom of Information Act 1982* (Cth) ss 48–51D; *Freedom of Information Act 1989* (ACT) ss 39–46; *Information Act 2002* (NT) ss 16, 31–36, 144; *Freedom of Information Act 1991* (SA) ss 30–37; *Freedom of Information Act 1982* (Vic) ss 39–49; *Freedom of Information Act 1992* (WA) ss 45–54.

¹³⁹ *Crimes (Sentence Administration) Act 2005* (ACT) s 127(3)(b).

¹⁴⁰ Review Committee, Parliament of Great Britain, 'The Parole System in England and Wales' (Report of the Review Committee, 1988) [336] cited in Livingstone, Owen and Macdonald, above n 66, 526.

¹⁴¹ British Government, 'Crime, Justice and Protecting the Public' (White Paper, 1990) [6.26] cited in Livingstone, Owen and Macdonald, above n 66, 509. This approach was consistent with early case law on the subject.

¹⁴² *R v Secretary of State for the Home Department; Ex parte Benson* (Unreported, Divisional Court, 9 November 1988) cited in Livingstone, Owen and Macdonald, above n 66, 527.

¹⁴³ *PSO 6000* ch 5 sets out the content of the dossier, rules on disclosure, and the timeline for disclosure.

The Canadian National Parole Board is expressly required to provide access to information. The *Corrections and Conditional Release Act*, SC C 1992, c 20 s 101(f) establishes guiding principles for parole boards, including:

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.

The new Canadian regime, introduced in 1992,

introduced greater openness and accountability in ... decision processes through provisions calling for information sharing with victims of crime, observers at hearings and access to [National Parole Board] decisions through a registry of decisions.¹⁴⁴

The National Parole Board will usually hold a hearing, attended by the offender and approved observers.¹⁴⁵ The board is required to provide the offender, at least 15 days before the hearing, with all the information that will be considered by the board (or a summary of that information).¹⁴⁶ The board's decision must be recorded, with reasons, and held in a registry of decisions available to appropriate people. A copy must be provided to the offender.¹⁴⁷ Similarly, in NZ, the offender is given the information going to the board beforehand, and can make a submission at the board's hearing.¹⁴⁸

We argue here that a fair parole hearing requires consideration of *relevant* information, and the provision of that information, subject to real security concerns, to the prisoner. To be effective in producing a fair process, prisoners should also be provided the information with sufficient time to prepare their own submissions. The Victorian RIS proposed that compliance with human rights would necessitate the development of specific criteria for cancellation of parole, a right to an oral hearing and provision for review processes, which would lengthen the time taken to cancel parole and therefore dissuade the board from granting parole in the first place as readily as it currently does.¹⁴⁹ Given the Victorian Parole Board's current informal practices along these lines, it is suggested that formal compliance with the *Charter* would not have such dire consequences. While we argue that fair processes should apply at this as well as the earlier stages of parole decision-making, human rights legislation allows for fair procedures to be balanced with the administrative needs of the decision-maker.¹⁵⁰

¹⁴⁴ Government of Canada National Parole Board, *2008–2009 Report on Plans and Priorities* (2008) 1.

¹⁴⁵ *Corrections and Conditional Release Act*, SC 1992, c 20, s 140.

¹⁴⁶ *Ibid* s 141. There are exceptions, eg, where the board believes that it would not be in the public interest to disclose the information, or where it would jeopardise safety or security: at s 141(4).

¹⁴⁷ *Ibid* ss 143–144.

¹⁴⁸ *Parole Act 2002* (NZ) ss 13 (access to information), 43(2), 43(5) (right to make a submission).

¹⁴⁹ RIS, above n 110.

¹⁵⁰ The UK, eg, has recently replaced the right to an oral hearing before the parole board with the right to request an oral hearing: see *Parole Board (Amendment) Rules 2009* (UK) SI 2009/408; see also Human Rights Law Resource Centre, above n 113, 7.

B *Legal Representation at the Hearing*

The common law principles of natural justice do not automatically include the right to representation. However, it is arguable that a fair hearing before the parole authority should include a right to representation, or at least legal support, in view of the significance of the hearing for the prisoner's liberty and the substantial power imbalance at the hearing.

The European Court of Human Rights determined, in 1991, that a UK parole board hearing where the applicant was denied legal representation did not meet the requirements of due process.¹⁵¹ It is now routinely funded in that country through Legal Aid.

Closer to home, prisoners have a right to legal representation in parole hearings in the ACT and SA.¹⁵² In NSW, representation is provided by Legal Aid through the Prisoners Legal Service ('PLS'), a service regarded by the judiciary as a valuable one. As of 2006, the bulk of legal representation provided by PLS was in parole hearings, where it represents around 2000 prisoners each year.¹⁵³ The service is clearly valued by the parole authority: '[w]e would not be able to function without the PLS. They (and the ALS [Aboriginal Legal Service]) are the benchmark and provide excellent representation.'¹⁵⁴

In Canada, where hearings are open, and there are full rights to appeal, prisoners are permitted to have assistance (including legal assistance) at the hearing, although only to advise the offender, and to address the board on behalf of the offender. They are also entitled to an interpreter, if needed.¹⁵⁵ In NZ, prisoners are entitled to be accompanied by support persons. They may also be represented by counsel, with leave of the board.¹⁵⁶

C *Access to Reasons*

A decision to deny a person's liberty should come with reasons. Reasons are central to any properly accountable process of decision-making, to demonstrate that proper factors have been taken into account, and that no irrelevant factors have been taken into account. They underpin the legitimacy of the decision, and go to reinforce trust in public decision-making. They are also essential if any challenge is to be made to the decision.

As a general principle, however, there is no right under common law to be given reasons for a decision.¹⁵⁷ The right will generally have to be provided by statute.

¹⁵¹ *Thynne v United Kingdom* (1991) 13 EHRR 666.

¹⁵² *Crimes (Sentence Administration) Act 2005* (ACT) s 209; *Correctional Services Act 1982* (SA) s 77(3).

¹⁵³ Richard Funston and Monique Hitter, 'Prisoners Legal Service' (Review, NSW Legal Aid Commission, September 2006) 15.

¹⁵⁴ *Ibid*, citing Justice Ian Pike, Chairman of the NSW Parole Authority.

¹⁵⁵ *Corrections and Conditional Release Act*, SC 1992, c 20, s 140(7)–(9).

¹⁵⁶ *Parole Act 2002* (NZ) s 49(3).

¹⁵⁷ *Public Service Board of NSW v Osmond* (1986) 159 CLR 656. In the UK it was held in *Payne v Lord Harris of Greenwich* [1981] 1 WLR 754 that the general duty of fairness did not require disclosure of reasons for a refusal of release on licence to a mandatory life sentence prisoner, a

Livingstone notes, in the UK context, 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.’¹⁵⁸

Notice in writing, and a statement of reasons, must be provided to an offender for any rejection of a parole application on the papers in the ACT.¹⁵⁹ Reasons for refusing parole must be provided to the prisoner in Queensland,¹⁶⁰ South Australia,¹⁶¹ Tasmania and the Commonwealth.¹⁶²

In contrast, there is no requirement to provide reasons for refusal of parole to the prisoner in NSW, the NT or Victoria, although in NSW and Victoria there is a statutory obligation to provide reasons for the *revocation* of parole.¹⁶³ The NSW and NT Parole Authorities are required to record reasons for parole decisions, but appear to be under no obligation to provide these to the prisoners.¹⁶⁴ The minimum requirement appears to be that orders be provided, and explained, to prisoners.¹⁶⁵ In Victoria, while the government has permitted the board to continue to be exempt from the requirements of the Charter, the board nonetheless claims to comply with many of the Charter’s objectives informally, providing most parolees with the chance to respond to concerns, providing oral reasons for decision, and having some scope for review of decisions.¹⁶⁶

Reasons are provided in Canada, NZ and the UK. In Canada, reasons for all decisions are provided as of right to the offender, and held on a public registry.¹⁶⁷ Board Vice-Chair, Simonne Ferguson, commented:

we maintain a registry of all decisions, and make these available to anyone (not just the offender) on request. Again, there are some limitations due to privacy concerns but overall we release most information. We have found that this has certainly assisted us in achieving better public understanding of how we operate and why we make the decisions we do. We are no longer the ‘faceless bureaucrats’ making decisions.¹⁶⁸

Similarly, in NZ, reasons are provided for any refusal.¹⁶⁹ Decisions of the parole board are also posted on the parole board’s website, with detailed reasons.

decision only overruled in 1994 by the House of Lords in *R v Home Secretary; Ex parte Doody* [1994] 1 AC 531.

¹⁵⁸ Livingstone, Owen and Macdonald, above n 66, 535.

¹⁵⁹ *Crimes (Sentence Administration) Act 2005* (ACT) s 122.

¹⁶⁰ *Corrective Services Act 2006* (Qld) s 193(5)(a).

¹⁶¹ *Correctional Services Act 1982* (SA) s 67(9)(b).

¹⁶² *Crimes Act 1914* (Cth) s 9AL(3)(b); *Corrections Act 1997* (Tas) s 72(8).

¹⁶³ *Crimes (Administration of Sentences) Act 1999* (NSW) s 163(5); *Corrections Act 1986* (Vic) s 74(8).

¹⁶⁴ *Crimes (Administration of Sentences) Act 1999* (NSW) s 193C(1)(a); *Parole of Prisoners Act 1979* (NT) s 3GB.

¹⁶⁵ *Crimes (Sentence Administration) Act 2005* (ACT) s 132; *Crimes (Administration of Sentences) Regulations 2008* (NSW) reg 227; *Corrections Regulations 2009* (Vic) regs 83(2)(c), 84(1).

¹⁶⁶ RIS, above n 110, 30–1.

¹⁶⁷ *Corrections and Conditional Release Act*, SC 1992, c 20, ss 143–144.

¹⁶⁸ Email from Simonne Ferguson (Regional Vice-Chairperson, National Parole Board, Ontario/Nunavut Region, Canada) to Bronwyn Naylor, 23 December 2008.

¹⁶⁹ *Parole Act 2002* (NZ) s 67 (review by chairperson or delegate).

The NZ Parole Board reported, in its Annual Report, that it had supplied 310 decisions to the media in 2007–8, noting,

[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.¹⁷⁰

In the UK, a non-legislative instrument was issued in 1992, requiring the provision of reasons. The parole board 'must give reasons, in writing, for every decision or recommendation made, and the prisoner is entitled to see the reasons when advised of the result.'¹⁷¹

Access to reasons for decision is central to the fairness of the decision-making process and should be an express right. As Hale LJ observed in *Rodgers v Brixton Prison Governor*, in which a decision to recall a prisoner released on licence was quashed:

[i]t is a general principle that it is incumbent upon decision-makers to give the right reason at the right time. A citizen should not have to start proceedings in order to discover why something has happened to him.¹⁷²

D Appeal from Parole Board Decisions

Decisions affecting a person's liberty should be subject to appeal — a reconsideration of the merits of the decision. Having an avenue of review and redress is regarded as a fundamental component of any fair decision-making process.

There is, however, no common law right to appeal any government agency decisions. Any such right must be provided by statute. In practice, any right of appeal would also necessitate a right to obtain the reasons for the original decision.

In Queensland, which has both regional and state parole boards, decisions of a regional board may be appealed to the state board, and the review is a full reconsideration of the merits of the application.¹⁷³

As noted above, in Victoria there is no statutory provision for an appeal. The Victorian Parole Board points out, however, that informal review is available:

While there is no formal avenue of appeal, an offender may request a review of a decision of the Board ... initiated in writing by the offender, or by a

¹⁷⁰ New Zealand Parole Board, above n 77, 10.

¹⁷¹ *PSO 6000* [5.18.3].

¹⁷² *Rodgers v Brixton Prison Governor* [2003] EWHC 1923 (Admin) [26]. Moses J agreed, with the trenchant comment that '[t]his case exposes the danger of rubber stamp reasoning and of ex post facto decision-making ... The result is, for the reasons given by my Lady, that the Secretary of State is hoist by his own petard': at [34].

¹⁷³ *Corrective Services Act 2006* (Qld) ss 196(1), 198. Parole decisions are also the subject of judicial review applications in that state. In Queensland, where reasons for decision are provided, these have formed the basis for judicial review applications in cases such as *Grigg v Parole Board (Qld)* [2010] QSC 115 (19 April 2010) and *Harrod v Parole Board (Qld)* [2010] QSC 85 (30 March 2010).

person on behalf of the offender, or by the offender requesting an interview with the Board.¹⁷⁴

There are also provisions in WA and NSW for prisoners to request that the respective boards review their decisions.¹⁷⁵

In Victoria, it was concluded over 25 years ago that the board should not be subject to appeal, on the assumption that ‘the great majority’ of prisoners would appeal, and the likely increase in workload would be unsustainable.¹⁷⁶

However, this does not appear to be a problem in other jurisdictions, however. Parole boards in Canada and NZ have rights to appeal. In Canada, there is provision for appeal to the Appeal Division of the board on specified grounds, paralleling the ultra vires grounds.¹⁷⁷ The *Parole Act 2002* (NZ) provides for a review process on similar grounds, together with a right of appeal to the NZ High Court from certain decisions, following review.¹⁷⁸ As noted earlier, only 4.2 per cent of decisions to deny parole were appealed in NZ in the 2008–9 period.¹⁷⁹ An appeal process can be designed with limited grounds, and be established as an appeal division or appeal panel, rather than involving a full court hearing, to minimise cost.

In any event, in addition to the reality that other jurisdictions do provide an avenue of appeal, it must be emphasised that the fact that people may access a right is not a good reason for denying that right.

We have argued in this part, therefore, that statutory provisions for fair procedures — access to information, representation, reasons and review — are already well established in comparable jurisdictions. They should be available in Australian jurisdictions, too.

A perennial stumbling block to proposed reforms is, of course, the economic issue. This was clearly a concern in the decision in Victoria to continue the parole board’s exemption from formal human rights compliance. Proper resourcing of fair proceedings for effective and credible parole proceedings is essential. As a UK commentator observed on this issue, ‘economies at one vital point in the criminal justice process can have huge costs elsewhere.’¹⁸⁰ Detaining prisoners who could have been released costs the taxpayer directly, while reducing their potential for subsequent reintegration, just as releasing prisoners inappropriately represents huge (and unquantifiable) costs to society.

¹⁷⁴ Adult Parole Board of Victoria, above n 129, 15.

¹⁷⁵ *Crimes (Administration of Sentences) Act 1999* (NSW) s 139; *Sentence Administration Act 2003* (WA) s 115A.

¹⁷⁶ Sentencing Committee, Parliament of Victoria, ‘Parole and Remissions: Second Report’ (Report, 1982) 19–20.

¹⁷⁷ *Corrections and Conditional Release Act*, SC 1992, c 20, s 157: the grounds can be summarised as 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.

¹⁷⁸ *Parole Act 2002* (NZ) ss 67–68.

¹⁷⁹ New Zealand Parole Board, *Annual Report 2008/09* (2009) 18, 23.

¹⁸⁰ Nicola Padfield, ‘Introduction’ in Nicola Padfield (ed), *Who to Release? Parole, Fairness and Criminal Justice* (Willan, 2007) 11; see also 243.

V Conclusion

The state's power to remove a citizen's liberty must be limited to what is required for proper punishment. When a sentencing court determines that a person can be considered for release on parole after expiry of a certain period, the fairness of the procedure for deciding whether the person can, in fact, be released at the time is fundamental to the quality and legitimacy of the decision, and to the legitimacy of the person's detention. A UK writer concluded, regarding the changes in that jurisdiction, that:

The procedural changes which public law has precipitated in the parole system ensure that individual prisoners' cases are more fully and transparently considered, something which should only improve the quality of decision-making.¹⁸¹

We have argued that the parole decision must be made with full information, and with the fullest participation of the prisoner. It must be both fair and accountable, providing for appeal and review. We argue that a fair process leads to better and more effective decision-making, and is, at the same time, required by the principles of natural justice and human rights.

Comparable jurisdictions now have well-established procedures for facilitating the prisoner's participation in decision-making. These procedures have reflected a human rights culture which is becoming more clearly a part of Australian legal culture, and to which all Australian jurisdictions can aspire. Australia's domestic and international obligations to its citizens require nothing less.

¹⁸¹ Elliott, above n 83, 62.