The Case
for a Fair Parole Hearing

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PROCEDURAL FAIRNESS IS AT THE CORE OF A JUST AND EQUITABLE LEGAL SYSTEM. PROCEDURAL FAIRNESS ENSURES THAT WE ARE HEARD IN DECISIONS THAT IMPACT UPON OUR RIGHTS AND IT PROTECTS US AGAINST ARBITRARY AND UNFAIR DECISION-MAKING PROCESSES. RUTH BELLA BARSON, THE ADVOCACY SOLICITOR AT THE NORTH AUSTRALIAN ABORIGINAL JUSTICE AGENCY ARGUES THE CASE ON BEHALF OF THE AGENCY.

This article will discuss the explicit exclusion of procedural fairness in parole proceedings in the Northern Territory. We will explore how this exclusion operates in practice, and how this exclusion particularly impacts Aboriginal prisoners. We provide the example of New South Wales as an alternative parole model, and argue that procedures governed by procedural fairness enhance the credibility and accountability of decision-making bodies.

The Northern Territory, along with all other Australian jurisdictions, endorsed the National Indigenous Law and Justice Framework (NILJF) in November 2009. The NILJF is heralded as a best practice guide to addressing the complex issues involved in the interaction between Aboriginal people and the criminal justice system. It is unsurprising that protection of procedural fairness is considered such a fundamental aspect of protecting against injustice, that it is enshrined as one of the seven guiding principles of the NILJF.

Ultimately, we conclude that the exclusion of procedural fairness from any proceedings should be a matter of concern for the profession. The Northern Territory Government should look to amend any legislation which excludes procedural fairness. This would not only be in keeping with its endorsement of the NILJF, it would also indicate the Government's commitment to equitable justice.

The exclusion of procedural fairness from parole in the Northern Territory

In criminal proceedings, procedural fairness rights are firmly enshrined. In parole proceedings, they are excluded.

Procedural fairness principles include:

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

Part 3H(A) of the Parole of Prisoners Act 1971 (NT)(the Act) reads:

> Subject to this Act, the rules known as the rules of natural justice (including any duty of procedural fairness) do not apply to or in relation to a decision or action of the Chairman or direction of the Board under this Act.

This removal of procedural fairness rights from proceedings which determine an individual's liberty is no longer consistent with contemporary standards of fairness and justice. It is difficult to reconcile how prisoners at parole proceedings should not be afforded the same procedural fairness allowed in criminal proceedings. Just as with criminal proceedings, the Parole Board makes decisions affecting an individual's fundamental right to freedom.

When embarking on the sentencing process, a judge or magistrate may impose a non-parole period on an accused as an indication

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of their earliest release date. Parole proceedings are therefore the second 'gate-keeper' when determining an accused's liberty. Whether or not a prisoner gets parole can be a difference of a number of years spent in custody, or in the case of a life sentence, whether a prisoner is ever released from custody. There is a marked contrast between the upholding of rights during a criminal trial, and the complete abolishment of procedural fairness rights, when the same person comes before the Parole Board, seeking to have their liberty conditionally reinstated.

Recidivism, Aboriginal people and procedural fairness

Aboriginal people comprise over 80% of the prison population, and they have a 50% chance of reoffending. A transparent, accessible and effective parole system is central to reducing recidivism rates and reducing Government expenditure on incarceration.

A successful parole system promotes rehabilitation by engaging prisoners in a process which increases the likelihood of a successful reintegration. The parole process often acts as an incentive for prisoners to participate in prison-based rehabilitative and vocational programmes, and also to give consideration to realistic post release plans. If granted parole, a prisoner is required to obey strict conditions whilst residing in the community, and is provided with community-based reintegration support.

The alternative to parole – a prisoner serving their full-term, not participating in rehabilitative programmes, and being unsupervised upon release, is more expensive and counter to the promotion of successful reintegration.

Currently prisoners are not provided with a copy of the Parole Board report written by their parole officer. They therefore have no opportunity to respond to the contents of the report. When the Parole Board comes to hear their application, prisoners are only allowed to be present when the Chairperson considers it 'necessary or desirable'.[1] It is our experience that this very rarely occurs. After the Parole Board meets, the prisoner is provided with a letter which provides only summary reasons for the Parole Board's decision. An example of this is a prisoner being told that they 'lack motivation'. The prisoner is not provided with detailed reasons for the Parole Board decision, and the prisoner has no appeal rights.

The impact of excluding procedural fairness from parole proceedings is that many prisoners, in particular Aboriginal prisoners, are discouraged from working towards achieving a supported release. This is because many Aboriginal prisoners do not understand, are confused by, or are disheartened by parole

processes. The consequences of this disengagement are far-reaching and ultimately results in fewer Aboriginal prisoners having the opportunity to rehabilitate and reintegrate through a supported release.

Allowing for natural justice in parole proceedings would go some way to remedy the exclusion of many Aboriginal prisoners from accessing a supported release, and may be part of the solution to reducing Aboriginal recidivism rates. This is not a novel conclusion. The NILJF explicitly recognises the connection between excluding procedural fairness and discriminatory outcomes. The very first paragraph of the NILJF reads:

> All governments have a responsibility to ensure that Aboriginal and Torres Strait Islander peoples are treated equitably before the law and are protected against discrimination. It is also important that governments ensure that Aboriginal and Torres Strait Islander peoples realise their right to positive participation in the justice system.

Currently, prisoners in the Northern Territory, the majority of whom are Aboriginal, have no right to positively participate in parole proceedings. Prisoners continue to be actively excluded from parole proceedings through the removal of procedural fairness. The consequence of this is a parole system which is inherently unfair. This unfairness disproportionately impacts Aboriginal prisoners and may be a contributing factor in growing Aboriginal recidivism rates.

The broader benefits of procedural fairness

The value of a fair and equitable system is not just felt by the parties, but also enhances the integrity of the system itself. There are a number of reasons why procedural fairness promotes better decision-making.

First, allowing procedural fairness increases transparency. Having a transparent system will increase prisoner and community confidence in Parole Board decisions, and increase confidence in the parole system more generally. It will also demonstrate to the community that there is a robust and thorough system of parole.

Second, allowing access to information and providing reasons for a decision will increase understanding of, and acceptance of, Parole Board decisions. It is our experience that many prisoners feel that their case for parole was not represented or considered at the hearing. This leads to heightened perceptions of unfairness.

Third, allowing representation at Parole Board hearings would allow prisoners an opportunity to place mitigating material before the Parole Board in response to what is in the parole report, and crucially, to correct factual errors. Legal representation in proceedings will enhance the rigour of the Parole Board's decision-making processes, and also has beneficial impacts on the quality of the decision, ensuring a stringent and informed decision-making process.

Fourth, allowing a right of appeal will ensure a fairer, more robust outcome for the prisoner and the community. Appeal processes promote accountability and more vigorous decision-making processes. This is because appeal processes allow for the redressing of mistakes by ensuring that proper procedure is followed in the making of a decision. A right of appeal is central to a just decision.

Fifth, prisoners should be encouraged to engage in parole processes and achieve a supported release. Allowing prisoner participation in parole proceedings will ensure greater comprehension of the parole system and its requirements. An opaque parole system alienates applicants, particularly Aboriginal prisoners, many of whom are already grappling with a culturally and linguistically foreign environment.

Parole in New South Wales – an example of procedural fairness in action

It is interesting to consider the New South Wales equivalent parole legislation, as a comparison to the opaque nature of parole proceedings in the Northern Territory. Part 6 of the Crimes (Administration of Sentences) Act 1999 (NSW) (the NSW Act), allows for transparent, accountable and fair parole processes. Sections 140 and 147 of the New South Wales Act afford prisoners and victims the right to make submissions, either in person, through their representative, or in writing, to the Parole Board, either in advance of, or at the hearing. They are provided

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with full disclosure of material before the Parole Board.

New South Wales Legal Aid provides representatives through their Prisoner Legal Service to appear for prisoners challenging their parole officer's recommendation to refuse parole. Representation is also provided through the Aboriginal Legal Service, and the private practice. Parole proceedings occur in open court.

New South Wales demonstrates how procedural fairness can operate within parole proceedings, and provides a good example of rigorous and transparent decision making.

A lawyer's picnic?

There are numerous checks and balances that decision-making bodies can employ to ensure the proceedings before them are both meritorious and expedient. Concerns regarding an increase in resources and litigation have been ameliorated in other jurisdictions, and examples of curtailing litigation can be found in our own courts.

Section 158 of the New South Wales Act specifies that prisoners serving a sentence of three years or less are automatically released once they reach their court ordered non-parole period. Section 66(1) of the Correctional Services Act 1982 (South Australia) requires that a person serving a sentence of less than five years be released at the expiry of their non-parole period. This means that the Parole Board only engages with offenders serving sentences of more than three years (in the case of New South Wales), and more than five years (in the case of South Australia). In a small jurisdiction like the Northern Territory, provisions such as these would substantially reduce the number of matters dealt with by the Parole Board.

Concerns regarding a flurry of appeal litigation in New South Wales have been addressed through limiting appeal criteria. Sections 155 and 156 of the New South Wales Act restricts appeal grounds to the prisoner or the State alleging that the parole decision was made on the basis of false, misleading or irrelevant information. Likewise, a hearing is only held in circumstances where parole is being refused.

Currently courts and tribunals have the power to regulate the proceedings before them. Vexatious litigants are syphoned off from meritorious litigants, and judges, magistrates and tribunal members often limit the length of both oral and written submissions. Further, it is a requirement of legal aid services that their clients meet a merit test before being granted aid.

There is also an additional reinvestment argument. A reduction in recidivism becomes more likely if prisoners are given the opportunity to rehabilitate and reintegrate through a supported, intensively case-managed release. This will in turn reduce incarceration rates, and therefore reduce expenditure on incarceration. It is a case of spending more now, in order to save more down the track.

Conclusion: it's time for change

The Northern Territory Government expressed an intention to address issues underpinning Aboriginal disadvantage in the criminal justice system when they endorsed the NILJF. A good first step would be providing for procedural fairness in parole proceedings. The Northern Territory should look to the New South Wales Act as a good practice example.

Excluding procedural fairness disproportionately impacts upon Aboriginal people, many of whom are already grappling with broader linguistic and cultural challenges. Precluding Aboriginal people from accessing a supported release may be another barrier to reducing recidivism rates for Aboriginal people.

As a profession, we should be advocating for people to have access to fair and proper process at all stages of the criminal justice system. Opaque decision-making processes compromise both the rights of individuals, and the credibility of a just and equitable legal system.

Endtnotes:

1. Parole of Prisoners Act 1971 (NT) s 3G.