

## **Gertie's Law**

### **Episode 3 - Mental Health, Drugs and Parole**

*This episode of Gertie's Law contains detailed descriptions of mental illness.*

#### **Carmel Arthur**

I think that this is probably where we as a community become really divided, and that is that our understanding of mental illness and the role that it plays in offending is really, really complex.

#### **Justice Bell**

It would be discriminatory to hold a person to the same standard of responsibility, where that person is intellectually impaired, as a person who is not intellectually impaired.

#### **Professor Jamie Walvisch**

It's one of the most difficult things a sentencing judge will need to balance. On the one hand, mental illness points towards a reduced sentence due to reduced culpability; on the other hand, it points to an increased sentence due to the need for community protection.

#### **Justice Hollingworth**

I think what's particularly disturbing and hard to deal with is where you've got drugs and mental health issues together because unfortunately they both exacerbate the other.

#### **Greg Muller**

I'm Greg Muller. This is Gertie's Law.

The morning of a sentencing and the court gets busy again. Only the diehards sit through the whole trial but when the judge is ready to pronounce sentence, the tension rises. People mingle nervously in the corridors outside the court.

One person might get five years, or ten years. Someone else might have the rest of their life written off in one courtroom moment. It's hard for the accused and victims of course. But it's not an easy time for the judge either.

Last episode we heard about the purposes and principles of sentencing - factors judges must consider when deciding someone's fate. This episode is about perhaps the most controversial and difficult aspects of sentencing.

Mental illness, drugs and parole.

#### **Justice Champion (court recording)**

*...as to my conclusions, you have been diagnosed with serious major depression. I accept in your case that principles five and six of the principles set out in Verdins apply to you... and there is a risk that imprisonment will have a significant adverse effect on your mental health.*

# SUPREME COURT OF VICTORIA

## **Justice Hollingworth (court recording)**

*Drugs may have played some role in what occurred in the room. The autopsy revealed that Mr Lowry had consumed morphine, methyl amphetamine (“ice”) and methadone.*

## **Justice Bell (court recording)**

*I accept your counsel’s submission that the sentence to be imposed should come with a parole period and should not be crushing.*

## **Greg Muller**

The links between crime and mental illness aren’t new to Justice Champion.

## **Justice Champion**

I think I can say that even though I’ve been a barrister for, what, 35 or so years, it wasn’t until I got appointed DPP...

## **Greg Muller**

That’s Director of Public Prosecutions.

## **Justice Champion**

..when I had a much clearer perception of the role of mental illness in the commission of crime. As DPP suddenly I was transported into a world where I was considering in multiple cases every day to make decisions about them. And in almost all of those cases mental illness was involved.

And it took a while to dawn on me that the criminal justice system is generally – mostly – dealing with people who have mental illness, to varying degrees, to people who have simply got behavioural issues, psychologically or cognitive issues through intellectual disability, right up to people who are just so far off the beam that they are quite mad.

It surprised me the extent to which mental illness was a component of the work that we do in the criminal justice system. And that continues through my time as being a judge: that almost every case you come across you have to consider reports that involve issues to do with mental illness. And, therefore, that you have to decide the impact of the mental illness on the offending and on the offender and, ultimately, on the sentence that you impose.

## **Greg Muller**

Principal Judge in the Criminal Division, Justice Hollingworth.

## **Justice Hollingworth**

Very sadly, we have a large number of homicides that occur in circumstances where the offender was suffering from mental health problems of a very serious nature, often have been suffering from them for years and with proper supports and treatment in the community the great tragedy is that sometimes we have cases that you can see afterwards were entirely avoidable... if as a community we put a lot more support into the offender in the first place.

**Dr Jamie Walvisch**

Jamie Walvisch. I'm a lecturer at Monash University, Faculty of Law.

**Greg Muller**

Dr Jamie Walvisch completed his PhD in 2016. His thesis, *Sentencing Offenders With Mental Illnesses: A Principled Approach*, looks at how mental illness should be taken into account when sentencing someone convicted of a serious crime.

**Dr Jamie Walvisch**

Very many, in the higher court, so in the Supreme Court, it's been suggested that it is raised in virtually every criminal sentencing hearing, and in the lower courts, it would be a significant proportion of cases.

**Greg Muller**

A word of caution first up. Just because most criminal cases involve mental illness - the reverse argument isn't true.

**Justice Whelan**

You've got to be careful with that, because most people with mental illness don't commit crimes and so treating mental illness as an excuse for crime is not something we would embrace in the sense that there's a necessary correlation between the two.

The great majority of people who have mental illness do not commit crimes. In fact, they're probably much more likely to be victims of crimes.

On the other hand mental illness is often a factor in explaining why people have behaved the way they did and sometimes it's a defence. Sometimes the person doesn't know that what they're doing is wrong because they're an untreated schizophrenic or they're having a psychotic episode or some such thing so.

**Greg Muller**

So the central question is can a mental illness reduce someone's responsibility- is it an excuse for offending? Dr Jamie Walvisch.

**Dr Jamie Walvisch**

That will depend on the nature of the mental illness and its relationship to the crime. So if there was a clear link between their mental illness and their criminal behaviour, then it may well reduce their culpability for the offence, and that is a reason which points towards a reduced sentence.

However, there are many other factors that are also taken into account that may mean the ultimate sentence is not actually reduced.

**Greg Muller**

One case in Victoria changed the way the courts deal with mental illness. It was *R v Verdins* in 2007. The Court of Appeal found that mental impairment was relevant to sentencing.

**President Maxwell**

I'm Chris Maxwell. I'm the President of the Court of Appeal which means that I'm the judge responsible for the efficient running of the Appeal Division of the Supreme Court.

**Greg Muller**

President Maxwell heard that case.

**President Maxwell**

I arranged for three separate appeals to be heard together in 2007 so that we could re-examine the principles and try and establish a framework within which the different aspects of relevance of mental illness could be clarified, and that turned into the now very well-known judgement in Verdins.

And we were able to identify the six different ways in which an impairment of mental functioning might be relevant to sentencing and it would vary from, at the one end, a condition which was operative at the time of the offending which might reduce the offender's moral culpability to, at the other end of the scale, a condition perhaps not operative at the time of the offending, but operative at the time of sentencing, which might mean that imprisonment would be harder for that person, having that condition, than it would be for someone who didn't have it.

I suppose the conclusion is that very many offenders are suffering from mental illness of one kind or another and, in a number of cases, that is explanatory of the offending. And so the conclusion will be arrived at, that we wouldn't hold someone who was mentally ill as morally accountable for conduct as we would someone who wasn't suffering from that illness.

**Greg Muller**

If a mental illness can reduce the culpability, because they weren't, perhaps, in complete control of their functions, and then that could lead to a shortening of the sentence, how does that then balance with the other role in sentencing – the protection of the community, if someone's out there that isn't in control of their functions?

**President Maxwell**

It's a very good question, and there have been cases, particularly where there is intellectual impairment which is permanent, where that very issue has arisen, and in a case some years ago we said, "Well, although the intellectual impairment reduces culpability, it increases risk to the community", and, on that basis, we increased the sentence for the offender because the balance had to be struck in favour of protecting the community.

How that balance is struck in a particular case will, of course, depend on what the expert evidence says about the likelihood of the condition being treatable.

**Greg Muller**

As a result of that case in 2007 - Victoria now has what's known as, the Verdins Principles.

**President Maxwell**

So Verdins set out six principles. Six sentencing considerations.

**Dr Jamie Walvisch**

The first is whether it reduced the offender's moral culpability, and that will be a question of what effect the mental illness had on the offender's behaviour.

A second thing they need to consider is whether it should change the kind of sentence that is given. So, for example, would it be better for them to serve their sentence in a hospital or to have a non-custodial sentence due to the mental illness.

The third thing to consider is whether it should affect the principle of general deterrence, so that's the principle that says one of the reasons why we sentence people is to send a message to the community that, "This crime is wrong." However, it's believed that it's inappropriate to use people who suffer from certain mental illnesses to send that message to the community.

The fourth principle that needs to be considered is the impact the mental illness has on the principle of specific deterrence. So specific deterrence is a principle which looks at the potential impact of the sentence on affecting the offender's behaviour, him or herself: will it change the way they behave in the future. And so there is a view that some mental health problems may affect an offender's ability to learn from the sentence and so should be taken into account in the way that specific deterrence is addressed.

The fifth way in which mental illness can affect sentencing is if a judge finds that, due to the mental illness, the offender will suffer disproportionately due to their punishment. That's an indication that the sentence should be reduced to take into account the unfair, unequal impact that would be imposed on the offender.

And the sixth principle of the Verdins Principles is: if a judge finds that there is a significant risk that imprisonment would have a substantial effect on the offender's mental health problem, it would cause it to deteriorate, and then that's another factor to take into account in determining the sentence.

**Greg Muller**

Supreme Court judge, Justice Bell.

**Justice Bell**

Mental illness, if proven, operates in reduction in sentence according to the Verdins Principles stated by our Court of Appeal so that a person who has impaired mental functioning, whether by reason of schizophrenia or other kind of mental illness, is not regarded as being criminally responsible to the same degree as somebody with normal mental functioning.

When you think about it, it would be discriminatory to hold a person to the same standard of responsibility, where that person is intellectually impaired, as a person who is not intellectually impaired, because they don't have the same control over their decision making capacity.

**President Maxwell**

It seems to me that, on principle, if involuntary mental conditions – that is, beyond your control – impair your ability to make the judgments on which the criminal law is premised – that is the judgment whether or not to do the act which results in conviction – then it seems

to me right that we should moderate the infliction of punishment to take account of that impairment.

It seems to me there is a fundamental issue of justice about recognising that it's not the same to do that offending act if you're thinking and judgment were impaired by mental illness as to do it when you're of perfectly sound mind.

**Dr Jamie Walvisch**

It's one of the most difficult things a sentencing judge will need to balance, and, historically, that was seen to be the real issue here. On the one hand, mental illness points towards a reduced sentence due to reduced culpability; on the other hand, it points to an increased sentence due to the need for community protection.

I think that Victoria is a world leader in this area. I think the approach that we have taken is – is the most nuanced approach of any jurisdiction in the world that I have come across. The difficulty that we face is both the sheer numbers that are coming through, the public perceptions that this is an excuse rather than a legitimate reason for affecting sentencing, but, most importantly, sentencing is only the start of the issue.

Once a person, for example, is sent to prison, the question then becomes what kind of services and supports are provided to people at that point.

**Greg Muller**

Another phrase which has caused significant angst is the term - not guilty by mental impairment.

**Dr Jamie Walvisch**

No, it doesn't mean not guilty because they didn't do it. So, under Victorian law, we believe that it's not right to convict a person if they were not responsible for their behaviour, and what we mean by being responsible for your behaviour is that you have to have known what you were doing, the nature of what you were doing, and you have to have known whether it was right or wrong.

And, if you didn't know either of those things because you were suffering from a mental impairment, then you can be found not guilty by reason of mental impairment. That doesn't mean you didn't do the act. It simply means you weren't legally responsible for that act.

However, this is what's called a qualified acquittal, because it doesn't mean, like a normal acquittal, that you get to simply go home with no further consequences. What it means is that you will have some kind of a supervision order imposed on you. So that might be a custodial supervision order where you will be detained in a secure mental health facility, like the Thomas Embling Hospital, or it might be a non-custodial supervision order where you are allowed into the community but with tight restrictions over what you can and can't do.

**Greg Muller**

Drug use can also lead to mental impairment. So should this be taken into account?

**Person on the street 1**

I don't think there should be any leniency just because they were using drugs.

**Person on the street 2**

If its drugs or alcohol that can affect your mental ability but it's been self-induced and those offenders have chosen to take those drugs or that alcohol and it's their responsibility for their actions if they use and commit after that.

**Person on the street 3**

There's no excuse for that. Full stop. The end. My, my brother in law was murdered by, by, by a - someone with drug problems so no. Full stop. No excuse.

**Person on the street 4**

I guess you have to take into consideration why they're on drugs. Is it a one off or is it something which has happened in their past to make them dependent on those drugs. So again it would be hard to know. Without knowing more about the situation.

**Justice Jane Dixon (court recording)**

*Your extensive substance abuse led into heroin addiction in your early 30s to the point where you could not sustain employment. You said you overdosed many times during your thirties and forties...*

**Greg Muller**

That's criminal judge, Justice Dixon, delivering a sentence earlier this year.

**Justice Dixon (court recording)**

*... you reported that your heroin use continued up until your arrest. You also used methamphetamines on a weekly basis and benzodiazepines whenever you could get them. Abuse of drugs and alcohol has severely damaged every area of your life.*

**Justice Champion**

Many of our decisions of our courts at high levels – and particularly our Court of Appeal – many of those decisions are reflected on the scourge of drugs. It's a huge factor within our community, the abuse of drugs and how that leads often to the commission of crime.

**Greg Muller**

That's Justice Champion from the Criminal Division. Drug use is another element to be taken into consideration when sentencing and one which is also very common.

Criminal judge, Justice Taylor.

**Justice Taylor**

It can affect the sentence in a number of ways. If someone, for example, has committed an act of violence, if they've been taking ice, and they know that the effect of ice upon them is to increase their capacity for violence, as ice often does to people, then that becomes an aggravating factor, and it makes the sentence higher in that respect.

On the other hand, if someone has a drug addiction that has developed because they have been, for example, horrendously physically or sexually abused as a child, and they start to

## SUPREME COURT OF VICTORIA

self-medicate themselves to deal with horror that very few people can imagine, then that puts an entirely different complexion upon someone's drug use.

So, again, there's no hard and fast rule. You need to know the particular details of why that person has taken drugs.

### **Greg Muller**

Justice Whelan again.

### **Justice Whelan**

We don't treat drug taking as an excuse, but it is part of the explanation. We always refer to it, because we have to explain why it is the person did what they did. That's not treating it as an excuse. More typically though, the drug taking is just a part of some kind of utterly dysfunctional life, which has existed since the perpetrator was a child. Unfortunately that's a common pattern with a lot of offenders; they've faced very considerable problems from birth. Not everyone, but there's quite a number that are like that. And so that's why it always gets a mention.

Is drug taking an excuse? No. Absolutely not.

### **Greg Muller**

President of the Appeal Court, Chris Maxwell.

### **President Maxwell**

Well, drug use has, of course, been a problem for sentencing courts for decades, and the accepted approach is that it doesn't mitigate. The conventional view of appeal courts across Australia has been that you are accountable for the choice you made at some point to embark on drug-taking, and that view takes account of common experience that, although withdrawal from drugs is difficult, it's not impossible, and that it's, therefore, not open to an offender to say, "Well, I was on drugs, and there was nothing I could do about it".

### **Justice Hollingworth (court recording)**

*Although drug use is not a mitigating feature of your offending, it may help explain why an argument broke out between the two of you, or why your judgment and impulse control may have been so poor at the time.*

### **Justice Hollingworth**

Certainly in a lot of the homicides some sort of drugs are involved. People talk about there being an ice epidemic. Depending on which of the experts you speak to, there either is or isn't an epidemic. Speaking to a lot of people in the drug area, there have been waves of popularity of particular drugs, and ice happens to be a particular drug at the moment.

I think what's particularly disturbing and hard to deal with is where you've got drugs and mental health issues together because unfortunately they both exacerbate the other and that's – that can be particularly problematic.



**Greg Muller**

Now it gets even more complicated. Drugs and mental illness can have similar effects on offending behaviour. Yet one increases culpability and the other reduces it. So what if they're both present?

**Dr Jamie Walvisch**

There is a very high rate of what's called comorbidity, which is where a person has both mental health problems and substance use disorders. I think it's over half the people who suffer from one suffer from the other.

The difficulty when it comes to the criminal justice system is trying to work out, for example, whether the person has some kind of underlying mental health problems that are the reason why they are using drugs, or whether their drug use is what's triggering their mental health problems or – and whether the mental health problems are only temporary or transient, or whether the drug use has actually caused some kind of permanent damage, although it started the problem, now you do have a permanent subsisting mental health problem. And so it's a very complicated issue and very difficult for the courts to address.

**Greg Muller**

President Maxwell.

**President Maxwell**

The exception would be if a person's state of drug addiction or intoxication on the particular occasion was referable to mental illness - in other words, that this could be seen, really, only as symptomatic of the underlying mental illness. If the evidence established that that was so, then the Verdins considerations might be available by way of mitigation. But that's the exception.

**Greg Muller**

Justice Hollingworth again.

**Justice Hollingworth**

It really depends why you're acting out of control. So if you're out of control because you voluntarily consumed alcohol or drugs, for instance, that isn't a mitigating factor. It doesn't make it more excusable. It might make it understandable why you did what you did, but it doesn't excuse it and it won't lead to a reduced sentence.

If, of course, your drink was spiked or someone gave you drugs against your will so it wasn't voluntary then it might be a mitigating circumstance. But, no, ordinarily if you voluntarily consume substances that make you angrier or less inhibited etcetera, you bear responsibility for that.

The complicating factor is this, quite often the interaction between drugs and alcohol and the mental health condition can exacerbate – each exacerbates the other and it can be very difficult for a mental health professional to tease out how much of your conduct – how much of what happened is attributable to your mental health problem versus your voluntary consumption of drugs or alcohol, and because the law deals more benignly with mental health problems than with drugs and alcohol, that can be an important but difficult distinction to try to draw.

**Greg Muller**

Dr Walvisch.

**Dr Jamie Walvisch**

The relationship between drugs and mental illness is a complex one.

The difficulty arises where a person uses a drug such as ice, which is closely associated with certain mental health consequences, such as psychosis, and so a significant portion of long-term ice users may suffer an ice-associated psychosis.

What the law says in this area is that if it is clear that the drug use caused the psychosis, then, again, that's no excuse. The difficulty is that it's often not straightforward whether what is happening is the drug has caused the psychosis or the person had some kind of underlying mental health condition, such as schizophrenia, which has been triggered by the drug use.

So if it's clear that a person actually had an underlying mental health problem and the drug use simply triggered it, but it's really considered to be a mental health problem that was the cause of the behaviour, then the Verdins principles or the defence of mental impairment are available for use.

However, it's very difficult, and this then becomes a matter of evidence – psychiatric, psychological evidence – to try and tease out whether or not the behaviour was caused by an underlying mental health problem or by the drug use.

**Greg Muller**

So when it comes to drugs and mental illness - how well are these sentencing considerations understood?

**Dr Jamie Walvisch**

I think that there is a large amount of misunderstanding of mental illness and a lot of stigma surrounding mental illness. I think there probably is some kind of a perception that people are using it as an excuse to – to get away with what they have done, which I don't think is justified, given the importance of having evidence to support your claim, and given the serious impact that mental health problems have on people's behaviour.

**Greg Muller**

Carmel Arthur was thrust into the criminal justice system when her husband was killed in 1998. Carmel now sits on the Post Sentence Authority and the Sentencing Advisory Council.

**Carmel Arthur**

This is probably where we as a community become really divided, and that is that our understanding of mental illness and the role that it plays in offending is really, really complex and, you know, we can be divided on whether or not we have empathy for someone who has got a mental illness and subsequently goes on to commit a crime versus someone who doesn't have a mental illness and subsequently goes on to commit a crime, should they both be dealt with in the same way?

## **SUPREME COURT OF VICTORIA**

And the courts don't deal with people in the same way. I think our understanding of mental illness and the fact that we talk about mental illness has become vitally important, as it has with drugs and drug addiction.

### **Greg Muller**

We heard in the earlier episode about sentencing that generally - when informed about a case - the public are more lenient than judges. One exception to this is when mental illness is involved.

This was one of the findings of the Juries' Study undertaken by Professor Kate Warner.

### **Professor Kate Warner**

So we found that probably jurors were much less sympathetic about mental disorder being mitigating than judges.

But we found two things in relation to the attitudes of jurors: first of all, they didn't seem to be very sympathetic to impact mitigation. They only wanted mental disorder to be mitigating if they could see it as being relevant as a cause of the offending, then they were happy for it to be mitigating.

And as well, they didn't seem to regard a lot of conditions as really being a mental disorder. So, things like post-traumatic stress, depression, weren't also regarded as being a mental disorder in the sense that it could mitigate, which was interesting.

### **Greg Muller**

What do you take from that? Is it a lack of understanding about mental illness?

### **Professor Kate Warner**

I think so. I think it is. So there's not a wide appreciation in our society about mental disorders and mental illness. We found that those jurors who were sympathetic when we interviewed them tended to have some experience of having a family member or a friend with a mental disorder, and then they were much more likely to regard it as mitigating, which suggests to us that, perhaps, yes, it is lack of knowledge a lack of awareness of mental disorders, and the distinction between depression when it's clinically diagnosed and just someone feeling unhappy or sad.

### **Greg Muller**

President of the Appeal Court, Chris Maxwell.

### **President Maxwell**

It may be that the community's lack of sympathy for that sort of argument reflects a lack of appreciation of the ways in which mental illness can impair thinking. It may also reflect a cynicism which one occasionally hears in public discussion that a claim of mental illness is just an easy answer to a criminal charge.

As to the first, I think there's a continuing need for us to educate our fellow community members about the nature and effect of mental illness. As to the second, I think it's vitally important for public confidence in sentencing that we insist, as we have done, on absolutely rigorous expert evidence, and that it's not enough to say, "I was suffering from a bit of

depression at that time". We've said over and over assertions like that won't result in any change in the sentence.

**Greg Muller**

Dr Walvisch again.

**Dr Jamie Walvisch**

I think it's important to be clear that there is a distinction between being depressed in the way that we commonly talk about it, "I'm feeling depressed today," and having some kind of depressive disorder which is a substantive mental health problem that has been diagnosed by a mental health professional as an ongoing concern that is impacting on your substantial daily functioning.

So, while the same term is used, I think that's part of the problem here, is that we do start to think, "Well, everybody is like that. Why should that be an excuse?" But that's not what we're talking about here. We're talking here about serious mental health problems that significantly affect the way that a person thinks, the way they reason, the way they function.

**Justice Bell (court recording)**

*I ask you now to stand. Therefore for the offense of manslaughter you will be imprisoned for a period of 13 years. I direct that you serve a period of ten years before you become eligible for parole.*

**Greg Muller**

Do you think there should be parole for violent offenders?

**Person on the street 1**

No I don't, they recommit don't they? Time and time again. They get out on parole and do the same crime or another crime.

**Person on the street 2**

I think case by case with that and they'd have to really prove it to me that they were allowed back in society and wouldn't be dangerous to us all.

**Person on the street 3**

I don't agree with it. I don't agree with people being allowed parole if they're violent offenders.

**Greg Muller**

Why not?

**Person on the street 3**

I think obviously - there's a chance obviously that they're going to re-offend and history shows that these people are continually reoffending. So I think they give up all rights to have that choice of parole.

**Person on the street 4**

Depends what they did. If it is something where you don't think they've fully rehabilitated and come out good then no parole - keep them right until the end. If you think it's something they're not going to re-offend then I guess you'd give them that chance but you'd weigh up if they're going to do it again.

**Greg Muller**

I'm standing here in court one, where the other day a 54 year old man was sentenced to 30 years for murder, with a non-parole period of 24 years.

**Justice Dixon (court recording)**

*Please stand. The total effective sentence is 30 years' imprisonment. I fix a non-parole period of 24 years...*

**Greg Muller**

How many times have you heard something like that on the news? Which number do you recount when asked: "how long did he get?"

**Carmel Arthur**

With sentences, you've got your – if you're getting parole, you get what we call a top and a bottom.

**Greg Muller**

As well as sitting on the Sentencing Advisory Council and being a full time member of the Post Sentence Authority. Carmel Arthur also spent nine years on the Adult Parole Board.

**Carmel Arthur**

So the full sentence is what is what you must serve. The parole period is the period of your sentence that you serve in the community. So you're still under sentence. It's just that you are not incarcerated.

**Greg Muller**

Justice Whelan.

**Justice Whelan**

The theory is that when you pass a sentence on someone, you fix the sentence, which was, say, 10 years, but then you have to turn your mind to, well, after what period of time, bearing in mind how serious the offending is – after what period of time should the person have an opportunity to apply for release under supervision, still serving their sentence in the sense that they can be put back in jail any time the Parole Board says?

**Carmel Arthur**

In fact I always considered parole to be a form of sentence discount. It wasn't until I sat on the Parole Board that I realised parole is an insurance policy for the community.

## **SUPREME COURT OF VICTORIA**

If you straight release somebody from prison, without a bus ticket, without any money, without any social supports you're setting them up to fail and all of the evidence will tell you that. Whereas if you can slowly reintegrate somebody into the community, it does a couple of things. One, they're less likely to reoffend and two, the community are certainly safer because you, as a Parole Board, have the opportunity to cancel their parole and put them back in prison.

It's very difficult for a lot of offenders to do parole. They find the restrictions really hard. But that's parole.

**Greg Muller**

So what are the rules around parole? It's important to clarify because parole gets a mention in every sentence here at the Supreme Court.

**His Honour Peter Couzens**

I'm Peter Couzens, Chair of the Adult Parole Board.

**Greg Muller**

His Honour, Peter Couzens was previously a County Court judge. He's chaired the Adult Parole Board since 2015.

**His Honour Peter Couzens**

In accordance with the provisions of the sentencing act, whenever a court imposes a sentence of life imprisonment or two years or more, the sentencing judge must impose a non-parole period unless he or she is of the view that it would be inappropriate to do so because of the nature of the offence. Or because of the person's criminal history.

In terms of sentences of one year up until two years the sentencing court has a discretion of whether or not to impose a non-parole period.

**Greg Muller**

One of the first things to note about parole is whose responsibility it is.

**His Honour Peter Couzens**

The Adult Parole Board has nothing to do with sentences - it's the court's process. Just as the court has got nothing to do with telling the board as to when they should release someone on parole.

**Greg Muller**

It's important to get your head around the numbers here, so to break it down: in the 2017-18 financial year, the Adult Parole Board received 1,680 applications for parole from eligible prisoners. Of the applications determined during the year, the Board granted parole for 53 per cent. Forty-seven per cent were denied.

Ninety-four per cent of eligible prisoners applied for parole, while just six per cent chose not to make an application - despite being eligible.

There's also various programs particular prisoners are required to do in order for their application for parole to be approved.

**His Honour Peter Couzens**

People sentenced to what were defined as serious violent offences or sex offenses for example for murder, manslaughter, armed robberies, aggravated burglaries, intentionally causing serious injury, recklessly causing serious injury - offences of that nature and then a whole range of sex offences, they must undertake offender behaviour programs if they are to be considered successfully for parole.

**Greg Muller**

And then there's general behaviour to consider which highlights another motivation for parole, as an effective management tool for prisons. Failing this is another reason for having a parole application knocked back.

**His Honour Peter Couzens**

They may have involved themselves in prison behaviour which would be contrary to what we would want of someone who's preparing to come out into the community. For example, there may be a history a history of verbal or physical abuse on security people in the prison system or episodes of violence between prisoners. So there is a multitude of reasons.

**Greg Muller**

But the most common reason for parole to be refused is more mundane.

**His Honour Peter Couzens**

The principle reason though where people are denied parole arises out of nothing more sinister than a lack of accommodation. So, of those people who are denied parole or were denied parole last year, over 60 per cent weren't able to offer any accommodation in which to reside if they were released into the community. It's a very sad situation.

Corrections Victoria have a very limited number of housing themselves. There are various agencies within the community trying to obtain housing for people in need but the need is more for women and children than it is for parolees so often people have difficulties finding accommodation, that's the major reason people are denied parole.

**Greg Muller**

So, let's presume someone has been granted parole, staying on parole is the next challenge. Carmel Arthur again.

**Carmel Arthur**

I'll give you some indication of the types of conditions, so the really obvious one is you can't break the law. It's obvious to those that don't break the law but not so obvious to others. They've also got to report to your community corrections officer. That may be two or three times a week. You've also got to do the programs you've been asked to do while you're on parole - so that may be drug and alcohol, it may be a behaviour change program.

So one condition may be that you have electronic monitoring on you so that you can't go to certain places. So you might want to go to the Boxing Day test but if there's a condition on

## **SUPREME COURT OF VICTORIA**

your parole that you can't go to certain venues or parks then an alert will come on your electronic monitoring and we'll be advised.

If you do want to go to the Boxing Day test for example, you actually have to come back to the Parole Board and get permission.

Curfew is another interesting one. We may say to you that you're not allowed to be away from your home between the hours of 11 o'clock at night and seven o'clock in the morning. The other one is where you live - we may say to you that you may only live at this location. There'll be another condition where we may say you cannot be anywhere near your victim and then we may put restrictions around other contacts or other associations.

The electronic monitoring is worn on the leg. It could be a 40 degree day in summer and you're wearing long pants to hide the fact that you're on electronic monitoring. Alcohol's another one - so there are two types of electronic monitoring. You've got electronic monitoring that looks at the geographic location and the other one is called a SCRAM and it's alcohol monitor and that basically reads your perspiration so it will tell us whether or not somebody has been drinking alcohol when they've got a condition on their parole that says they can't drink because drinking may be an antecedent to their offending.

There's also another point to make. Depending on how long your parole is - if you do fail and you fail terribly by breaching your conditions or through further offending you pay a high price for that - and the price is - you go back to prison and when you're released you start your parole again. So you don't get any credit for being in the community - you're unlikely to get credit.

### **Greg Muller**

Parole has been a particularly contentious issue in Victoria. Exacerbated by some tragic and high profile cases. But this has led to some extensive reforms. Judge Couzens again.

### **His Honour Peter Couzens**

And that followed what could be described I think as a very dark period in terms of parole highlighted by the Jill Meagher case. Ms Meagher was of course raped and murdered by Adrian Bayley who was on parole at the time. And that brought outrage from the point of view of the public. Understandably.

There were other cases however over the previous seven years which involved particularly women being murdered by men on parole. So, I've often referred, with due respect, to the Jill Meagher case as the catalyst for change. Confidence in the Adult Parole Board and the parole system was badly damaged. The government was conscious of that and determined to have a review conducted.

### **Greg Muller**

The subsequent review into the parole system at large and into the role of Adult Parole Board was conducted in 2013 by former High Court Judge, Ian Callinan QC. He made 24 recommendations to government, 23 of which were adopted and have now been implemented.

### **His Honour Peter Couzens**

His recommendation was also that in terms of considering applications for parole - the board's paramount consideration must be the safety and protection of the community. That



is now enshrined in legislation and that's the golden thread which runs through the whole system.

**Greg Muller**

Since the review's been conducted, has there been any evidence to suggest that less people are offending on parole?

**His Honour Peter Couzens**

Absolutely. In 2013 and '14, so that's the year immediately following the delivery of the report, some 60 people were convicted of serious violent offences or sex offences, committed whilst on parole. Last year, the number was five, and the year before that, five. So it dropped over the period from 60, to 23, to 13, then the last two years; five each. That's a 93 per cent reduction in the number of people on parole who are convicted of serious violent offences or sex offences whilst on parole. It's an extraordinary result.

The other very interesting statistic which often is not publicised or known is, as recently as this part of this financial year and last, approximately 80 per cent of parolees are now successfully completing their parole. In other words, they're not being cancelled and returned to custody. It's an historic high. So, this year it's even better, this financial year. So, up until March, the figure was 83 per cent.

**Carmel Arthur**

That was the highest - that's the highest rate since comparable records have been kept.

It's very much working. It is working. So more people are succeeding than not on parole which means it's a really good - it's a valid tool for using with offenders.

**His Honour Peter Couzens**

The purpose of parole is to provide a structured, supervised and supportive transition for prisoners back into the community. Transition into the community after a period of time in prison, no matter how long or short, is difficult.

The alternative is to have straight release. The statistics and all the surveys are very clear. Straight release will lead to more and more people returning to custody quicker.

The parole system is far less likely to produce people who will become recidivists. Recidivism meaning returning to custody within two years after release. So, the parole system is serving the community exceptionally well in reducing the community's exposure to further criminal offending by parolees upon their release.

**Greg Muller**

Gertie's Law is brought to you by the Supreme Court of Victoria. Please rate and review if you're podcast App allows.

Next episode, we'll take a detour from the legal aspects of the court and meet some of the people who keep the place running. From security staff managing prisoners who have just been given a life sentence to court reporters trying to communicate that to the public.

## SUPREME COURT OF VICTORIA

Before we go, have you ever wanted to ask a judge a question? Imagine if you had a room full of Supreme Court judges and you could ask anything you wanted. Well here's your chance.

Email us here at [gertie@supcourt.vic.gov.au](mailto:gertie@supcourt.vic.gov.au).

Send in text or even better, an audio file so we can hear you ask the question and we'll pass these on to judges for a future episode.