SUPREME COURT OF QUEENSLAND

CITATION:	*Pollentine v Parole Board Queensland* [2018] QSC 243
PARTIES:	**EDWARD POLLENTINE** (applicant) **v** **PAROLE BOARD QUEENSLAND** (respondent)
FILE NO/S:	SC No 4164 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	25 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 October 2018
JUDGE:	Bond J
ORDER:	**The application is dismissed.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – PROCEDURAL FAIRNESS – EXCLUSION OF PROCEDURAL FAIRNESS – GENERALLY - where the applicant was convicted of a number of very serious sexual offences against children in 1984 – where the applicant was detained at Her Majesty's pleasure pursuant to the *Criminal Law Amendment Act 1945* (Qld) – where the applicant applied to the Parole Board Queensland for parole under the *Corrective Services Act* 2006 (Qld) – where that application was refused – where the applicant contends that prior to the respondent's decision being made the applicant had requested an oral hearing and that oral hearing had been refused – whether the applicant was denied natural justice by not being afforded the opportunity of an oral hearing – whether the decision of the respondent should be set aside and be referred back to the respondent for further consideration *Corrective Services Act* 2006 (Qld), s 4, s 189, s 190, s 193, s 200, s 218, s 219, s 233, sch 4 *Criminal Law Amendment Act* 1945 (Qld), s 18, s 18B, s 18D s 18E

Judicial Review Act 1991 (Qld), s 20

Cutts v The Board of the Queensland Regional Parole Board [2010] QCA 60
Cutts v The Board (Queensland Regional Parole Board) [2009] QSC 208
Kioa v West (1985) 159 CLR 550
Maycock v Queensland Parole Board [2015] 1 Qd R 408
Minister for Immigration and Border Protection v WZARH (2015) 256 CLR 326
SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs (2006) 228 CLR 152

COUNSEL: D P O'Gorman SC with S T Lane for the applicant

G Beacham QC with B O'Brien for the respondent

SOLICITORS: Prisoner's Legal Services for the applicant

Crown Law for the respondent

Introduction

[1] On 24 July 1984, the applicant was convicted on his own plea of guilty of a number of very serious sexual offences against children, including two counts of attempted rape, four counts of carnal knowledge against the order of nature, two counts of indecent dealing with a girl under the age of 14 years, two counts of abduction, and four counts of indecent dealing with a boy under the age of 14 years.

[2] Consequent upon the learned sentencing judge's finding that the applicant was incapable of exercising proper control over his sexual instincts, the applicant was detained at Her Majesty's pleasure pursuant to the *Criminal Law Amendment Act* 1945 (Qld) (**CLAA**).

[3] In order for a person so detained to obtain release, two possibilities are open:

(a) unconditional release pursuant to s 18(5)(b) of the CLAA, consequent upon a determination by the Governor in Council that it is expedient to release the detainee; or

(b) conditional release by the Parole Board Queensland (**the Board**) under the provisions of Part 3A of the CLAA, which provide for the manner in which the parole release provisions in Chapter 5 of the *Corrective Services Act* 2006 (Qld) (**CSA**) apply to such a detainee.

[4] The present proceeding concerns the latter possibility.

[5] Some features of the parole regime which would apply to a detainee under the CLAA consequent upon reading Part 3A of the CLAA with Chapter 5 of the CSA should be identified:

(a) Chapter 5 of the CSA would apply to the detainee as though he were a prisoner serving a notional life imprisonment sentence: s 18B of the CLAA.

(b) If the detainee applies for parole, the Board must give the Attorney-General a copy of the application and the Attorney-General may make written submissions which the Board must consider: s 18D of the CLAA.

(c) The Board must not grant a detainee parole unless, in addition to any other matter of which the Board must be satisfied under the CSA, the Board is satisfied the detainee does not represent an unacceptable risk to the safety of others: s 18E of the CLAA.

(d) The Board must decide either to grant or to refuse the application within certain time limits, although the Board may defer making a decision until it obtains any additional information it considers necessary to make the decision: s 193 of the CSA.

(e) The Board has the power to do anything necessary or convenient to be done in performing its functions, including the power to require any person to attend before it at a stated time and place to give the Board requisite information: ss 218 and 219 of the CSA.

(f) A prisoner's agent may, with the Board's leave, appear before the Board to make representations in support of the prisoner's application for a parole order that may be heard and decided by the Board: s 189(1) of the CSA. The ability to appear with leave does not stop the Board deciding an application if the prisoner or the prisoner's agent fails to appear: s 189(2). "Appear" means appear by using a contemporaneous communication link between the Board and the prisoner or the prisoner's agent, or if the prisoner is a prisoner with a special need[1], by appearing personally: s 189(3). Curiously, the term "prisoner's agent" is defined so as not to include a lawyer: s 4 and schedule 4.

(g) An application for leave to appear must be made in the approved form to the Board, in which case the secretariat will tell the prisoner of the Board's decision on the application for leave, and, in the event leave is granted, the time and place at which the prisoner or his agent may appear before the Board: s 190 of the CSA.

(h) A prisoner granted leave to appear before the Board under s 190 of the CSA may appear before a meeting of the Board by using a contemporaneous communication link between the prisoner and the Board, or if the prisoner is a prisoner with a special need, by attending personally: s 233(8) of the CSA.

[6] On 2 May 2017, the Board received the applicant's application for a parole order under the CSA. On 2 February 2018, the Board advised the applicant that at its meeting on 19 December 2017 it had decided to refuse his application.

[7] This proceeding is an application for judicial review of the decision of the Board made on 19 December 2017, pursuant to the provisions of the *Judicial Review Act* 1991 (Qld).

[8] The sole ground of review was an alleged breach of the rules of natural justice within the meaning of s 20(2)(a) of the Judicial Review Act, based on contentions that –

(a) prior to the making of the decision, the applicant requested an oral hearing before the Board; and

(b) the Board denied the applicant's request for an oral hearing.

[9] It was common ground that the decision of the Board was amenable to review under the *Judicial Review Act*, on the application of the applicant.

[10] The applicant sought an order quashing or setting aside the Board's decision and an order referring his application for a parole order back to the Board for further consideration. For its part, the Board rejected the proposition that it failed to comply with the rules of natural justice. However, if it failed on that point, the Board accepted that the orders sought by the applicant should be made. The Board did not contend, if it was shown to have breached the rules of natural justice as alleged, that the application should be dismissed on the grounds that the particular failure caused no practical injustice because it did not deprive the applicant of the possibility of a successful outcome.

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[1] Special need is defined as a need an offender has compared to the general offender population because of the offender's age, disability, sex or cultural background.

[11] For reasons which follow, in my view, in the particular circumstances of this case, the failure to accord the applicant an oral hearing did not operate to deny natural justice to the applicant. The applicant was given, and availed himself of, the opportunity to make detailed written submissions on various concerns which the Board had identified for him, and that was sufficient in the particular circumstances of the case.

Relevant general principles

[12] In *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, the High Court identified a number of principles of present relevance. Although the Court referred to "procedural fairness", rather than the term "natural justice" which is used in the *Judicial Review Act*, the terms may presently be regarded as interchangeable.

[13] **First**, where an exercise of statutory power by an administrative decision-maker is conditioned on affording procedural fairness, to satisfy the condition of procedural fairness the administrative decision-maker is obliged to adopt a procedure which conforms to the procedure which a reasonable and fair repository of the power would adopt in the circumstances.[2]

[14] **Second**, the concern of procedural fairness, which operates as a condition of the exercise of a statutory power, is with procedures rather than with outcomes. It follows that a failure on the part of a repository of the power to give the opportunity to be heard which a reasonable repository of power ought fairly to give in the totality of the circumstances constitutes, without more, a denial of procedural fairness in breach of the implied condition which governs the exercise of the power.[3]

[15] **Third**, there is no general rule that procedural fairness requires an administrative decision-maker to afford a person affected by the decision an oral hearing in every case. Whether an oral hearing is required in order to accord procedural fairness to a person affected by an administrative decision depends on the practical requirements of procedural fairness in the circumstances of the case.[4] The statutory framework within which the decision-maker exercises statutory power is of critical importance.[5]

[16] **Fourth**, in some circumstances a reasonable opportunity to be heard will involve some form of oral hearing, and, in those circumstances, procedural fairness would require the decision-maker to entertain and give consideration to submissions seeking to establish that an oral hearing is required. In particular, it is right to say:

> "The one situation in which oral hearings are most often thought to be desirable is where questions arise as to a witness's credibility. An oral hearing will often assist in the resolution of credibility issues by allowing the decision-maker to interact directly with the witness by asking the witness questions, considering his or her answers, and having regard to the witness's demeanour."[6]

[17] It was common ground that it was a condition of the valid exercise of the Board's administrative decision-making that it comply with the rules of procedural fairness. It follows that the critical question for present determination is whether, in the totality of the

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[2] *Minister for Immigration and Border Protection v WZARH* per Gageler and Gordon JJ at [53], citing *Kioa v West* (1985) 159 CLR 550 per Brennan J at 627.

[3] *Minister for Immigration and Border Protection v WZARH* per Gageler and Gordon JJ at [55]. For consistency of language with the first principle, I have substituted reference to "repository of power" for the particular decision makers which were identified in the passage in their Honours' reasoning.

[4] *Minister for Immigration and Border Protection v WZARH* per Kiefel, Bell and Keane JJ at [33].

[5] In *Minister for Immigration and Border Protection v WZARH*, Kiefel, Bell and Keane JJ at [33] cited with approval of *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152 where that point is made in the judgment of Gleeson CJ, Kirby, Hayne, Callinan and Heydon JJ at [26].

[6] *Minister for Immigration and Border Protection v WZARH* per Kiefel, Bell and Keane JJ at [39] to [41], agreeing with a concession made by the Minister and referring with approval to the judgment of Nicholas J in the court below.

circumstances of this case, a reasonable and fair repository of the Board's power would have afforded an oral hearing to the applicant in addition to the opportunity which it did give the applicant and of which the applicant availed himself.

The course of the parole application

[18] The Board considered the application and supporting material at its meeting on 31 August 2017 and formed the preliminary view that the application should be declined because the level of risk the applicant appeared to present to the community was "unacceptably high".

The preliminary view letter

[19] By letter dated 7 September 2017, the Board advised the applicant of its preliminary view that the application should be declined and that it was required to make the community's safety its highest priority when determining parole applications. It then wrote:

> The primary purpose of this letter is to acquaint you with the factors which are of concern to the Board, in order to give you an opportunity to address them before a final decision is made on your application for a parole order.

[20] The letter then identified the various positive and negative factors affecting its view. For obvious reasons I will focus on the factors which the Board identified as operating adversely to the applicant. They were as follows.

[21] **First**, the applicant's proposed accommodation upon release. In this regard:

(a) the applicant would have to satisfy the Board that he could meet the cost of residing at the proposed address; and

(b) in any event, the proposed accommodation was unsuitable because (1) children could visit the premises; (2) there was no curfew; and (3) the level of independence expected of residence would not provide sufficient assistance to the applicant in terms of compliance with his pharmaceutical regime.

[22] **Second**, the psychiatric assessment of Dr Sundin dated 26 August 2014. In this regard, the Board noted (emphasis in the Board's letter):

(a) Dr Sundin's opinion that the applicant's risk of future sexual offending was "moderate to high";

(b) Dr Sundin noted that the applicant met the DSM-IV diagnostic criteria for (1) paedophilia, non-exclusive type, sexually attracted to both males and females; and (2) sexual sadism, these paraphilias occurring in the context of a man with strong avoidant personality traits.

(c) Dr Sundin noted:

> [The applicant's] offences occurred against a background of a persistent sexual paraphilia which onset in his early to middle teenage years and which has continued to be present for many decades. Mr Pollentine has been inconsistent in his account of the persistence of these deviant sexual fantasises but in his interview with me stated that they were still present until at least halfway through his participation in the High Intensity Sexual Offenders' Programme. Given the inconsistency in the accounts he has given and the ongoing issues of positive impression management and avoidant coping style, one cannot be confident in relying on Mr Pollentine's self-report of the persistence or absence of his deviant sexual cognitions".
>
> …
>
> In my opinion, Mr Pollentine represents an unacceptably high, unmodified risk for future sexual offending.
>
> **Future victims are likely to be prepubescent males and females. The offending is likely to involve a high level of physical and psychological trauma. Such offences may occur both opportunistically or in a planned fashion. They are at increased risk of occurring if Mr Pollentine is emotionally decompensating, isolated or angry.**

(d) that it accepted Dr Sundin's assessment that the applicant was an unacceptably high risk of future sexual offending.

[23] **Third**, the report of psychologist, Professor Freeman dated 29 May 2017. Professor Freeman had supported a conditional parole release. In this regard the Board noted that:

(a) Professor Freeman too had observed that the applicant had accepted that he misrepresented facts during the High Intensity Sexual Offenders' Programme (**HISOP**) in relation to the circumstances of his apprehension by police.

(b) Professor Freeman had recorded that the applicant disclosed to him that his deviant ideation in relation to his own sons had only ceased after further cognitive exploration through the HISOP as well as a psychopharmacological change.

(c) Professor Freeman noted that the applicant's paedophilic disorder appeared to be in remission due to his continuing to participate in a psychopharmacological regime.

(d) Professor Freeman thought that the applicant was an outlier consequent upon his unique criminogenic risk factors and treatment needs and therefore it "may be more difficult to predict his risk of recidivism".

(e) Professor Freeman thought that the applicant's assertion that he currently did not experience any deviant ideation, due primarily to being on medication, "appeared plausible".

[24] **Fourth**, the applicant's level of credibility was such that the Board regarded him as an unreliable source in relation to self-reporting, a factor which was of concern because the applicant's release plan was centralized around voluntary pharmacological intervention and many of the parole conditions that would be applicable in the applicant's case, as well as assessment of ongoing risk by Queensland Corrective Services Probation and Parole staff, who would rely heavily on the applicant's self-reporting. In this regard, the Board noted (emphasis in original):

> The highest priority for the Board is the safety of the community, as provided in the Ministerial Guidelines.
>
> The Board was concerned to see the continuous inconsistencies between not only the official record of events and your version of events, but between statements made by you on various occasions to various people. For instance:
>
> Dr Sundin notes comments made by the HISOP facilitators that "*when the fantasies involved his own children, he turned himself into the police*". Further, in her report, Dr Sundin noted:
>
> > *"Mr Pollentine insisted that he voluntarily attended the police station and confessed to his offending behaviour when he became aware that he was becoming sexually aroused to his young sons".*
>
> The Board is aware that you **did not** voluntarily hand yourself in, this is addressed in Dr Sundin's report where she notes:
>
> > *"it was his motor vehicle and some of the identifying marks on him that led him to be taken to the police station where he was interviewed in relation to this matter."*
>
> The Board viewed with concern Dr Sundin's comment:
>
> > *"I was particularly concerned by the **inconsistency** in his history as to the persistence or otherwise of his deviant sexual arousal fantasies. He has given **different accounts to different assessors** as to the **presence or absence of these sexual fantasies**. ..."*
>
> These inconsistencies demonstrate to the Board your ability to engage in fiction, with each story differing depending on your audience. The Board has thus rendered you an unreliable source as the Board cannot be certain as to the validity of your self-reporting.
>
> The Board is entitled to consider your level of credibility when assessing the level of risk you currently present to the community. It is in that regard that the Board considered your self-reporting. The Board has no way of knowing whether you were telling the truth when you spoke to Dr Sundin or Professor Freeman or whether you are now telling the truth; and that circumstance is relevant to the assessment of your risk.

> The Board considers it is entitled to take into account all psychiatric and psychological reports.
>
> The Board noted that your release plan is centralised around your pharmacological intervention. The Board noted that your pharmacological intervention is entirely voluntary. Further, the Board has great concerns given your criminal history and offending behaviour should you stop taking the medication. The Board therefore requires you to provide a more robust and structured release plan which guarantees your adherence to your pharmacological regime.

[25] I make the following observations concerning the credibility aspect of the Board's preliminary letter:

(a) The particular adverse factor identified by the Board was its conclusion that the applicant was an unreliable source in relation to the important consideration of accurate self-reporting.

(b) The Board justified that conclusion by reference to the fact that –

(i) there were inconsistencies between the official record and the applicant's version of events; and

(ii) there were inconsistencies between statements made by the applicant on different occasions to different people.

(c) The Board identified as examples of such inconsistencies:

(i) the applicant's version of the circumstances of his arrest as expressed during the HISOP and to Dr Sundin differed markedly from the true position, as to which Dr Freeman reported:

> ... he accepted misrepresenting the facts during HISOP participation in regards to the apprehension process. More specifically, Mr. Pollentine stated that he disclosed to the group that he voluntarily contacted the police, when in fact, the applicant was apprehended (at home) by the police soon after committing the third series of offences (due to the victim's ability to accurately describe his vehicle).

(ii) Dr Sundin's concern as to the inconsistency in the applicant's history as to the persistence or otherwise of his deviant sexual arousal fantasies and her noting in particular that the applicant had given different accounts to different assessors as to the presence or absence of his deviant sexual arousal fantasies concerning children.

(d) The Board's statement that it had "no way of knowing whether [the applicant was] telling the truth when [he] spoke to Dr Sundin or Professor Freeman or whether [the applicant was] now telling the truth" should be taken as an invitation to address that consideration.

[26] **Fifth**, s 18D of the CLAA required the Board to consider any submissions which had been made by the Attorney-General, and the Board noted that the Attorney-General had made submissions –

(a) that the Board should not be satisfied that the applicant did not represent an unacceptable risk to the safety of others and should therefore decline the application; and

(b) in the event that the Board was inclined to favour making a parole order, it should be subject to strict conditions along the lines of those imposed on prisoners conditionally released by the Supreme Court under the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

[27] **Sixth**, the Board was of the preliminary view that the level of risk the applicant posed to the community could not be sufficiently mitigated by (1) standard parole conditions; (2) conditions similar to those imposed under the Dangerous Prisoners (Sexual Offenders) Act or electronic monitoring pursuant to s 200(2) of the Corrective Services Act 2006.

[28] The Board's letter concluded by inviting the applicant to send any further written submissions or further supporting documents which addressed the issues raised in the letter and advised that any requisite extensions of time would be granted.

The applicant's response to the Board's invitation to address adverse factors

[29] At the request of his solicitors, Prisoners' Legal Service (**PLS**), the applicant was granted several extensions of time. His response was ultimately provided to the Board in the letter dated 4 December 2017 from PLS to the Board.

[30] If the applicant contended that an oral hearing was required before he could fairly address all or any of the adverse factors which the Board had identified, then the occasion to advance that contention was in that letter. If the proper way to address the Board's stated concern that it had "no way of knowing whether [the applicant was] telling the truth when [he] spoke to Dr Sundin or Professor Freeman or whether [the applicant was] now telling the truth", was to ask the Board to accord the applicant an oral hearing so the Board members could ask him questions and form their own views of his credibility, then the occasion to advance that contention was in that letter.[7] It would have been a simple thing to enclose with the letter an application for leave pursuant to s 190 of the CSA.

[31] However, the applicant, by PLS, chose not to take that course. PLS's letter did not contend that an oral hearing was required in order for the applicant fairly to address all or any of the adverse factors which the Board had identified. In particular, when it came to responding to the Board's credibility concerns, the applicant chose to present his response in the first instance through the lens of PLS's careful formulation of the instructions which he had given them - see the detail set out in the first 5 pages of the letter, summarised at [34] below – and without applying for leave to appear before the Board.

[32] There were evidently good forensic reasons for choosing this course. The letter of 4 December 2017 specifically recorded that the applicant had been assessed as functioning in the below average intelligence range; that various assessors in the past had expressed some concern as to the level of his intellect and that neuropsychological testing had revealed him to have "some specific deficiencies in the areas of selective and immediate auditory attention, verbal/visual memory, high order language and reasoning processes and some executive functions." Moreover, the letter advised the Board that the applicant had difficulty in recalling with certainty the language he may have used during previous assessments and the order in which events took place.

[33] The structure of PLS's letter dated 4 December 2017 was as follows.

[34] **First**, the letter dealt with the Board's concerns as to the applicant's credibility. This was the fourth factor identified by the Board: see [24] and [25] above. As to this:

(a) The point first made was that the applicant laboured under the intellectual and neurological deficits referred to at [32] above. The applicant invited the Board to regard those matters as "barriers" which should be taken into account when considering his submissions. The letter asserted that the applicant was "extremely confused and unable to articulate his answers properly" during his interview with Dr Sundin.

(b) The letter dealt with the first example of inconsistency identified by the Board, namely whether he had voluntarily handed himself in, or had been apprehended because he had been identified: see [25](c)(i) above. The letter articulated an

[7] The Board's preliminary view letter had not flagged to the applicant that it was open to him to seek leave to have an oral hearing so that the Board might make its own assessment of credibility. In a different case that might have some significance. In this case, because the applicant was legally advised and PLS was alert to the possibility of an oral hearing, that consideration does not matter.

explanation that he had honestly but mistakenly believed that it was his actions in contacting the police which resulted in his arrest. This was said to be a reasonable mistake that was devoid of any deliberate intention to mislead his audience or give a position impression of his role in bringing his offending to an end.

(c) The letter then dealt with the second example of inconsistency identified by the Board, namely that the applicant had given different accounts to different assessors as to the presence or absence of his deviant sexual arousal fantasies concerning children: see [25](c)(ii) above. The letter suggested that Dr Sundin's concerns appeared to be that the applicant had previously reported he was not having sexual thoughts about children in 2007 and 2009, however he later admitted to having continuous sexual thoughts about children at the rate of twice per week up until about halfway through the HISOP in 2013, and since then he had stopped letting himself think about children at all. The letter responded by developing a proposition that the applicant drew a distinction between sexual thoughts about children and sexual fantasies about children. The applicant felt that the former could not be got rid of and their presence or absence continued, albeit inconsistently. The latter had ceased during HISOP. The applicant submitted that when he experienced a sexual thought about children, it was fleeting and he was able to stop it from turning into a fantasy.

(d) As to his ability to self-report, the letter submitted that Professor Freeman's more positive opinion should be accepted over the opinion of Dr Sundin. In this part of the letter the applicant also sought to deal with the second and third factors identified by the Board, as to which see [22] and [23] above.

(e) The legal advisers concluded the submission concerning credibility in this way:

> We submit the Board's finding that our client has the ability to engage in fiction "with each story differing depending on your audience" is not correct. Should the Board continue to hold misgivings about his credibility, we respectfully request an oral hearing is conducted with [the applicant].

[35] I observe, parenthetically, that the paragraph last mentioned was (1) not an application for leave to appear pursuant to s 190 of the CSA; (2) not even an unconditional request for an oral hearing; and (3) did not explain why an oral hearing should be convened (and there was no other part of the letter which did). Rather it was an attempt unilaterally to impose on the Board a process in which the Board would expose its reaction to PLS's written submissions so as to give the applicant a second chance to persuade in the event that was necessary. To my mind it represented an attempt by the PLS to hedge their bets concerning the forensic choice they had made.

[36] **Second**, the applicant dealt with the Board's concerns as to his proposed accommodation. This was the first factor identified by the Board: see [21] above. The applicant responded in detail to each of the four matters about which the Board had expressed concerns and requested the Board to reconsider, namely the possible presence of children; the absence of a curfew condition; the support the applicant might have in relation to his pharmaceutical regime; and whether the applicant could meet the cost of the accommodation.

[37] **Third**, the applicant developed a response to the Board's concerns as to the voluntary nature of the applicant's pharmacological regime by pointing out that compliance could be made mandatory by way of a condition to the parole order. The letter advised the applicant's willingness to comply with a parole condition that he continue with the anti-libidinal pharmacological regime. The letter provided submissions concerning various options and how it was possible to test for compliance with respect to the current form of anti-libidinal medication taken by the applicant.

[38] **Fourth**, the applicant identified the support that was available to him in the community on his release to ensure that any challenges in the transition from a custodial environment to the community would be met.

[39] **Fifth**, the applicant dealt with the Board's need to consider the submission advanced by the Attorney-General. This was the fifth factor identified by the Board: see [26] above. The applicant submitted that the Board should provide a copy of his submissions to the Attorney-General to obtain an updated opinion.

[40] **Finally**, the applicant expressed a conclusion in these terms (notably without seeking leave to appear or otherwise reprising the conditional request for an oral hearing):

> Mr Pollentine has now been incarcerated for over 33 years. He has maintained an exceptional level of institutional conduct in this period and has completed every rehabilitation program made available to him, including HISOP and the Sexual Offending Maintenance Program with positive exit reports. He intends to continue with his treatment in the community and has developed a personal and professional support network that will help him remain offence free. There is expert opinion in favour of his release in circumstances where he will be appropriately supported, supervised and his psychopharmacological regime can be enforced. Given the supervision that can be provided by his parole order and *the Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004,* the arrangements for his adherence to his anti-libidinal medication and the protective measures associated with his accommodation, we submit that Mr Pollentine is suitable for release on parole.

The Board's decision and its subsequent provision of reasons

[41] At its meeting on 19 December 2017, the Board considered the applicant's application for parole, together with the submission made by the letter of 4 December 2017, and determined that the application should be declined.

[42] The Board notified the applicant of its decision by letter dated 2 February 2018 and, following a request by PLS, provided its formal statement of reasons pursuant to s 33 of the *Judicial Review Act*, by letter dated 20 March 2018.

The Board's notification letter dated 2 February 2018.

[43] The Board noted that it had written to the applicant on 7 September 2017 outlining features of concern in relation to the application; that it had invited the applicant to forward any new information and to make any further submissions that the applicant might wish the Board to consider; and that the 4 December 2017 letter had been received and considered.

[44] The letter then proceeded to explain its response to the various matters which had been raised in PLS's letter dated 4 December 2017, topic by topic and in the same order as had been set out in the letter. It concluded with the Board indicating that it consented to the applicant lodging a new application with the Board at any time six months from the date of the refusal decision.

[45] It is unnecessary to record the response to any of the topics other than those relating to the credibility issue and to the conditional request for an oral hearing.

[46] As to the credibility issues, the Board maintained its view that the applicant was not a credible source and his self-reporting could not be relied on. It observed:

> **Your Interview with PLS and PLS's submission dated 4 December 2017 and enclosures**
>
> The Board noted you were interviewed by PLS on 5 October 2017 in relation to the concerns that were raised by the Board in its correspondence to you dated 7 September 2017.
>
> **Your credibility and the validity of your self-reporting**
>
> In PLS's submission dated 4 December 2017, PLS addressed the Board's concerns in relation to your credibility, based upon your responses during your interview with PLS, specifically regarding:
>
> - Whether you voluntarily handed yourself in to the police; and
> - The absence or presence of your deviant sexual fantasies.

The Board noted that PLS identified 'barriers', including that you were unable to recall with complete certainty the 'language' you may have used in previous assessments, the order in which events took place and that during an interview with Dr Sundin, you were 'extremely confused and unable to articulate' answers. While the Board did take these factors into account when considering PLS's submission, the Board still maintains its view that you are not a credible source and your self-reporting cannot be relied upon.

Whether you voluntarily handed yourself in to the police

During your interview with PLS, you reported that previously, you believed that your own actions lead to your identification but you now understand that was not the case.[8] During your interview with PLS, you instructed PLS that on the day of your arrest:

- you attempted to hand yourself into police because you began to experience sexually deviant fantasies about your own children;
- you contacted the police and stated "I'm the guy you're looking for";
- when police officers arrived at your address, you denied any involvement in the charges;
- once at the police station, you were identified as the perpetrator by one of your victims;
- following this positive identification, "confessed to everything".

As noted above, you instructed PLS that you confessed **following**[9] your victim positively identifying you. Previously, as outlined in the Board's correspondence to you dated 7 September 2017, Dr Sundin noted that:

> "Mr Pollentine insisted that he voluntarily attended the police station and **confessed to his offending behaviour when he became aware that he was becoming sexually aroused to his young sons".**[10]

The Board does not accept that your provision of inconsistent statements, including those relating to your arrest and confession, can be explained by way of the barriers identified by PLS.

The Board maintains its view, as detailed in its correspondence to you dated 7 September 2017, that your level of credibility is relevant to the assessment of your risk.

The absence or presence of your deviant sexual fantasies

The Board noted you instructed PLS that the **thoughts themselves**[11] are inconsistent, rather than you being dishonest about the presence or absence of the sexual thoughts and that the issue has been confused because of the interchangeable use of the words 'thoughts' and 'fantasies'. The Board notes that you differentiate between fantasies, sexual thoughts and sexually sadistic thoughts as follows:

Sexual fantasies

You report that sexual fantasies involve playing out sexual scenarios with children. You report that you have not experienced sexual fantasies involving children since you participated in the HISOP.

Sexual thoughts

You report that sexual thoughts involve thinking sexually about children. You report that you made a conscious decision to stop allowing any sexual thoughts from developing into sexual fantasies about children. You report "you can never get rid of thoughts. They can come for one or two years and then they stop again . . .", "it wasn't the thoughts that stopped in HISOP it was the fantasies" and that when you experienced a sexual thought in relation to children ·it is a fleeting thought for around two seconds". Further, you note that there are times when you have to stop yourself but on other occasions, you are not even interested in looking at children at visits.

Sexually sadistic thoughts

You note that you have not had sexual sadistic thoughts for a "very long time" and you make a distinction between sexual thoughts and sexually sadistic thoughts.

As you are aware, the highest priority for the Board is the safety of the community, as provided in the Ministerial Guidelines. You have acknowledged that you still experience sexual thoughts about children, however it is your contention that you have the ability:

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[8] Underlining emphasis in original.
[9] Bold print emphasis in original.
[10] Bold print emphasis in original.
[11] Bold print emphasis in original.

- to stop yourself from thinking about children; and
- to stop "thoughts" becoming “fantasies".

It is not possible for the Board to determine whether or not these thoughts and/or fantasies still prevail and whether or not you have the ability to stop them from occurring.

The Board would have to consider your self-reporting to be credible for the Board to believe your contentions. Based upon a thorough review of your case, including your criminal history and continuous provision of inconsistent statements, the Board does not accept PLS's submission that there is no inconsistency in your reporting to various assessors over the years in relation to the presence or absence of sexual thoughts and/or fantasies.

The Board is therefore not convinced by your statements that you neither have the ability to stop yourself from thinking about children nor the ability to stop thoughts becoming fantasies.

[47] As to the oral hearing, the letter provided as follows:

Oral hearing

The Board noted PLS’s request that ‘should the Board continue to hold misgivings about his credibility’ that an oral hearing be conducted. Given the breadth of the materials before the Board, the Board considers that you have been given ample opportunity to address the Board’s concerns. As such, the Board did not consider your appearance necessary [original footnote: *Maycock v Queensland Parole Board* [2013] QSC 302].

The Board’s statement of reasons dated 20 March 2018.

[48] The structure of the Board’s statement of reasons was as follows.

[49] **First**, the Board recorded the procedural steps which had led up to its decision, including the fact of the application; its preliminary letter of 7 September 2017; the various extensions of time it gave the applicant at the request of PLS; the receipt of the PLS letter of 4 December 2017 and, finally, that at its meeting on 19 December 2017 the Board had considered that the PLS submission did not alleviate the Board’s concerns which had been detailed to the applicant in the preliminary letter and, in those circumstances, the Board had decided to decline the application and not to grant the applicant parole. The Board then recorded that it had communicated its decision by letter dated 2 February 2018 and had been requested to provide a statement of reasons.

[50] **Second**, the Board listed all the material which it had considered.

[51] **Third**, the Board recorded that its decision had been based on particular findings of fact, including that:

8. The Board commissioned two reports: one a psychological report from Professor Freeman, and the other a psychiatric risk assessment prepared by Dr Sundin. The Board accepted Dr Sundin's findings that you are an unacceptably high risk of future sexual offending.

9. You have nominated Victoria Gardens as your proposed accommodation for release to parole, however the Board has determined that the address is unsuitable for your release. As such, you do not have suitable accommodation.

10. You pose an unacceptable risk to the community and are not a suitable candidate for parole at this time.

[52] **Fourth**, the Board then elaborated upon the reasons for its decision. In so doing, it followed broadly the order of consideration of matters which had been apparent in the preliminary letter, but with the inclusion of a recording of and a responding to the submissions which had been made in the PLS letter of 4 December 2017. When addressing the issue of credibility, the statement of reasons repeated the matters which had been identified in the preliminary letter, but incorporated an identification of the submissions which had been made in the PLS letter of 4 December 2017 and its response thereto as expressed in the Board’s notification letter of 2 February 2018. It recorded its response to the oral hearing proposition using the same language it had previously used.

Analysis

[53] As I have identified, the critical question is whether, in the totality of the circumstances of this case, a reasonable and fair repository of the Board's power would have afforded an oral hearing to the applicant in addition to the opportunity which it did give the applicant and of which the applicant availed himself.

[54] The following considerations tended to favour a negative answer to the question:

(a) The Board's 7 September 2017 preliminary view letter transparently raised credibility as a substantive adverse factor amongst the many adverse factors which it invited the applicant to address. This was the procedural means by which the Board sought to discharge its obligation to afford the applicant an opportunity to address the matters thought to be adverse to him.

(b) The applicant availed himself of the opportunity to address those factors in a detailed letter dated 4 December 2017 drafted by PLS.

(c) Notably, however, the PLS letter did not advance an application for leave for the applicant to appear, whether in the approved form or at all. Nor did it advance any reason why there should be an oral hearing accorded to the applicant. In fact the PLS letter sought of the Board that it first evaluate PLS's written submissions on credibility and only treat the applicant as requesting an oral hearing in the event that the Board was not persuaded by the written submission. This was an attempt to secure a second bite at the cherry.

(d) It is plain from the terms of the Board's letter, dated 2 February 2018, that the Board considered, but was not persuaded by, the PLS's detailed submissions on credibility and that it separately considered the conditional request for an oral hearing and declined to embark on the process on which PLS sought to have it embark. The Board's statement of reasons dated 20 March 2018 confirmed that position.

[55] On the other hand, the following considerations tended to favour an affirmative answer to the question:

(a) It was evident from the outset that a substantive issue for the purposes of the exercise of power concerned the applicant's credibility. Oral hearings are often thought to be desirable where such questions arise.

(b) Some aspects of the PLS letter presented factual propositions not apparently advanced before either Dr Sundin or Dr Freeman, e.g. the matters referred to at [34](b) and [34](c) above do not seem previously to have been advanced. It might be thought that the Board's assessment whether those matters should be characterised as (1) yet further inconsistencies reinforcing the Board's preliminary conclusion; or (2) an adequate explanation necessarily defusing at least to some extent concerns as to previous inconsistencies, would have been assisted by affording an oral hearing.

(c) Dr Sundin's psychiatric report was a few years older than the more recent (and more favourable) report of Professor Freeman and an oral hearing might be thought to be one means by which the Board could assess whether there had been change.

(d) Although all parole order decisions involve to some extent the question of the freedom of the applicant, that point was more significant in this case because, unlike most other parole order applicants, this particular applicant was detained at Her Majesty's pleasure and without any full time release date.

[56] I do not think that the evaluation of the foregoing considerations is straightforward. Ultimately, however, I think the better view is that the balance of the considerations identified in [54] against those identified in [55] favours a negative answer to the question

posed at [53] above. The Board gave the opportunity to the applicant to be heard and in the response, PLS did not, as it could have done, submit that the applicant needed an oral hearing in order for the applicant fairly to address the credibility issue. It was neither unreasonable nor unfair that the Board declined to acquiesce in the procedural course which PLS sought to impose on it.

[57] But the analysis cannot conclude at that point. As I have indicated, when considering the totality of circumstances, the highest authority instructs that the statutory framework within which an administrative decision is made is of critical importance. I turn now to consider whether the statutory framework sheds any light on this issue.

[58] I have outlined the relevant features of the statutory framework at [5] above. A little more detail is presently required.

[59] Sections 189 and 190 provide as follows:

> **189 Appearing before parole board**
>
> (1) A prisoner's agent may, with the parole board's leave, appear before the board to make representations in support of the prisoner's application for a parole order that may be heard and decided by the board.
>
> (2) This section does not stop the parole board deciding an application for a parole order if the prisoner or the prisoner's agent fails to appear before the board.
>
> (7) In this section —
>
> ***appear***, before the parole board, means —
>
> (a) appear by using a contemporaneous communication link between the board and the prisoner or the prisoner's agent; or
>
> (b) if the person appearing is a prisoner with a special need —appear personally.
>
> **190 Applying for leave to appear before parole board**
>
> (1) An application for leave to appear before the parole board must be made in the approved form to the board.
>
> (2) The secretariat must tell the prisoner of—
>
> (a) the board's decision on the application; and
>
> (b) if the board grants the leave—the time and place at which the prisoner or the prisoner's agent may appear before the board.

[60] However, the current form of those sections reflect amendments which were made in 2017. Prior to the amendments, and at the time of the three cases I discuss below, the sections were in this form:

> **189 Appearing before parole board**
>
> (1) Unless the Queensland board makes a requirement under subsection (2), a prisoner's agent may, with the Queensland board's leave, appear before the Queensland board to make representations in support of the prisoner's application for a parole order that may be heard and decided by the Queensland board.
>
> (2) The Queensland board may require a regional board —
>
> (a) to hear a prisoner's, or prisoner's agent's, representations in support of the prisoner's application for a parole order that may be heard and decided by the Queensland board; and
>
> (b) to make a recommendation to the Queensland board on the prisoner's suitability for parole.
>
> (3) A prisoner or the prisoner's agent may, with a regional board's leave, appear before the regional board to make representations in support of the prisoner's application for a parole order that may be heard and decided by the regional board.

(4) The chairperson of a regional board may require a corrective services officer present at a board meeting to leave and remain out of the hearing of the meeting for the time the chairperson directs.

(5) If a prisoner appearing before a regional board insults a member of the board or disrupts the board's proceedings, the prisoner's leave to appear before the board may be cancelled.

(6) This section does not stop a parole board deciding an application for a parole order if the prisoner or the prisoner's agent fails to appear before the board.

(7) In this section —

appear, before a parole board, means —

(a) appear by using a contemporaneous communication link between the board and the prisoner or the prisoner's agent; or

(b) if the person appearing is a prisoner with a special need —appear personally.

190 Applying for leave to appear before parole board

(1) An application for leave to appear before a parole board must be made in the approved form to the board.

(2) The secretary of the board must tell the prisoner of—

(a) the board's decision on the application; and

(b) if the board grants the leave—the time and place at which the prisoner or the prisoner's agent may appear before the board.

[61] In *Cutts v The Board (Queensland Regional Parole Board)* [2009] QSC 208, when dealing with a breach of natural justice by denial of oral hearing argument, Dutney J expressed the view that s 189(3) should be construed as creating a limitation, namely that a personal appearance of a prisoner before the Board was only permitted with the Board's leave. His Honour observed, at [27] (emphasis added):

> [27] The allegation of breach of natural justice has no substance. The applicant was given the opportunity to address the Board's concerns in detail. In fact, he took that opportunity. The rules of natural justice do not require personal attendance in every case. **All that is required is a proper opportunity to address those matters thought to be adverse to the applicant. That opportunity has been afforded. A personal appearance by a prisoner before the Board is only permitted with the Board's leave.** [There followed a footnote reference to s 189(3) of the CSA.] The application must be in the approved form. [There followed a footnote reference to s 190 of the CSA] **There is no evidence that such an application in the approved form was made.**

[62] On appeal, his Honour's view was affirmed. Thus in *Cutts v The Board of the Queensland Regional Parole Board* [2010] QCA 60, Holmes JA (as the Chief Justice then was), with whom Muir and Fraser JJA agreed, observed (at [7] and [8], emphasis added):

> [7]The appellant said that the learned judge was wrong in rejecting his argument that the refusal to allow him to appear before the Board constituted a breach of the rules of natural justice. In this regard, his Honour observed that, in the context of the case, natural justice required an opportunity to address the matters thought to be adverse to the appellant, which had been afforded. **He went on to observe that the *Corrective Services Act* 2006 (Qld) permitted an appearance before the Board only with leave, upon an application made in the approved form.**
>
> [8]The content of what natural justice requires depends largely on construction of the statute under which the decision is being made; the obligation is a flexible one, to
>
> > "adopt fair procedures which are appropriate and adapted to the circumstances of the particular case."
>
> **His Honour was right to have regard to the statutory limitation on appearance in person and to conclude in the circumstances of the case that the obligation of fairness was met by the giving of the opportunity to make submissions**. The rules of natural justice did not mandate a personal appearance.

[63] If the proper approach to the present statutory framework is to regard the statute as permitting an appearance by the prisoner before the Board only with leave, upon an application made in the approved form, then the absence of such an application would be a

compelling factor in favour of concluding that there was no breach of the rules of procedural fairness in the present circumstances.

[64] The possibility that the present statutory framework might not be so construed derives from the judgment of Jackson J in *Maycock v Queensland Parole Board* [2015] 1 Qd R 408. His Honour was also considering a breach of natural justice by denial of oral hearing argument and distinguished the two *Cutts* decisions on the basis that they were cases involving the application of s 189(3) and the case before him involved s 189(1).[12] As to s 189(1), his Honour observed:

> [24] The respondent submitted that s 189(1) should be construed, in conjunction with s 190, as providing for representation before the respondent by either the prisoner or a prisoner's agent, with the respondent's leave. However, in my view, s 190 is a machinery provision. It provides that "an application for leave to appear" before a parole board is one which must be made in a particular manner. In context, "an application for leave to appear" is one provided for under s 189. Section 189(1) does not provide for a prisoner to make an application for leave to appear before the respondent. At first blush, it seems unlikely that was an oversight. However, having regard to the history of predecessor legislation, as set out above, that may be what happened.
>
> [25] Section 189(1) should be interpreted so that "the interpretation that will best achieve the purpose of the Act is to be preferred to any other interpretation". If it could be concluded that the omission of a reference to the prisoner in s 189(1) is just a clear drafting mistake and that the operation of the subsection were absurd, it would be possible to construe it even by supplying words so as to avoid absurdity. However, in my view, there is no problem of that kind which is engaged by the apparent difference between the operation of the text of s 189(1) and 189(3). Rather, s 189(1) leaves the question of any appearance before the respondent by a prisoner, as opposed to the prisoner's agent, as a matter to be resolved by the rules of natural justice.

[65] If his Honour's approach to the former s 189(1) is the approach which should be taken to s 189(1) after the amendments to the section, then the current statutory framework has no particular impact on the analysis, and the conclusion to which I have arrived at [56] would apply.

[66] However I do not think that his Honour's approach can still be that which applies. The statutory framework now operates such that the present Board is the sole deciding board for parole order matters. Despite the fact that s 189(1) of the CSA refers only to the "prisoner's agent" and not to "the prisoner", because there is only one board and the terms of ss 189(2), 190 and 233 each specifically contemplate the possibility of the prisoner, and not just the prisoner's agent, appearing consequent upon an application for leave to appear, s 189(1) should be construed as permitting the prisoner (and not just the prisoner's agent) to apply for leave to appear, so as to avoid absurdity.

[67] If this construction is right, then there is no basis on which the decision of the Court of Appeal in *Cutts* can be distinguished, insofar as it confirmed the correctness of the earlier view of Dutney J concerning the existence of the statutory limitation. The statutory framework of the CSA should be construed as permitting the applicant to appear before the Board only with the Board's leave. This is a compelling factor in favour of concluding that there was no breach of the rules of procedural fairness in the present circumstances and confirms the view I would have reached otherwise.

[68] The result is that, in the particular circumstances of this case, I would conclude that the Board's obligation to comply with the rules of procedural fairness did not mandate according an oral hearing to the applicant.

Conclusion

[69] The application is dismissed.

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[12] see *Maycock v Queensland Parole Board* [2015] 1 Qd R 408 at [28] to [31].