SUPREME COURT OF QUEENSLAND

CITATION:	*Commissioner of Police Service v Parole Board of Queensland & Anor* [2019] QSC 315
PARTIES:	**COMMISSIONER OF POLICE SERVICE** (applicant) **v** **PAROLE BOARD OF QUEENSLAND** (first respondent) **CLIVE ANTHONY NICHOLSON** (second respondent)
FILE NO/S:	BS No 6865 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2019
JUDGE:	Douglas J
ORDER:	**1. The application be dismissed.** **2. The parties be heard as to costs.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – POST-CUSTODIAL ORDERS – PAROLE – BOARDS, TRIBUNALS ETC: POWERS, DUTIES AND CONSTITUTION – where the second respondent was serving a life sentence of imprisonment for murder – where the body or remains of the victim of that offence have not been located – where the offence of murder is a homicide offence within the meaning of s 193A(8)(a)(iii) of the *Corrective Services Act* 2006 – where the Parole Board must refuse to grant an application for parole unless it is satisfied that the applicant has cooperated satisfactorily in the investigation of the offence to identify the victim's location – where in considering the applicant's cooperation the Parole Board must have regard to a report given by the Commissioner of Police relating to the applicant's cooperation – where the Parole Board "may have regard to any other information the Board considers relevant" – where the Commissioner's report was supplied by an Acting Inspector – where the first respondent made a

determination that in determining the second respondent's application for parole, the Acting Inspector be subjected to cross-examination by the second respondent's counsel – where the first respondent made a further determination that the Parole Board could take evidence from the Acting Inspector as the Commissioner's delegate on oath or otherwise – where the applicant challenges those two determinations – whether the Parole Board is entitled under the *Corrective Services Act* to hear evidence on oath or otherwise and to permit cross-examination of those giving evidence in respect of parole applications

Acts Interpretation Act 1954 (Qld), s 27
Corrective Services Act 2006 (Qld), ss 3(2), 189(1), 193A(5), 193A(6), 193A(7), 193A(8)(a)(iii), 218, 219, 230

Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority (2015) 227 FCR 95 referred
Kioa v West (1985) 159 CLR 550 referred
Lincoln v Parole Board of Queensland [2019] QSC 156 referred
Maclean v Workers' Union [1929] 1 Ch 602 referred
Rose v Bridges (1977) 79 FCR 378 distinguished

COUNSEL: S McLeod QC with M Nicholson for the applicant
J M Horton QC with E Longbottom QC for the first respondent
L Reece for the second respondent

SOLICITORS: Commissioner of Police Service for the applicant
Parole Board Queensland for the first respondent
Wallace O'Hagan Lawyers for the second respondent

[1] The applicant, the Commissioner of the Police Service of Queensland, challenges a decision of the first respondent, the Parole Board, by which it was decided that an Acting Inspector Knight be subjected to cross-examination by the second respondent's legal representative as part of the second respondent's application for parole. The Board also decided that it could take evidence on oath or otherwise to enable it to hear and determine the second respondent's application for parole.

Factual background

[2] The second respondent, Clive Anthony Nicholson, is serving a sentence of life imprisonment for murder. The body or remains of the victim of that offence have not been located. As the offence of murder is a homicide offence within the meaning of s 193A(8)(a)(iii) of the *Corrective Services Act* 2006 (Qld), the Board must refuse to grant the application for parole unless it is satisfied that the applicant has cooperated satisfactorily in the investigation of the offence to identify the victim's location.

[3] Section 193A(7) says that, in deciding whether the Board is satisfied about the prisoner's cooperation, the Board must have regard to a report given by the Commissioner of Police

under s 193A(6) dealing with whether the prisoner has given any cooperation and, if so, an evaluation of the nature, extent and timeliness of the cooperation, the truthfulness, completeness and reliability of any information or evidence provided in relation to the victim's location and the significance and usefulness of the cooperation.

[4] Section 193A(7) also provides that the Board must have regard to any information the Board has about the prisoner's capacity to give the cooperation, the transcript of any proceeding against the prisoner for the offence, including any relevant remarks made by the sentencing court. Notably, also, s 193A(7)(b) says the Board "may have regard to any other information the Board considers relevant".

[5] The Commissioner's report was supplied by Acting Inspector Knight.

[6] Counsel was instructed by Legal Aid Queensland on behalf of Mr Nicholson to appear before the Board at the hearing of Mr Nicholson's application on 7 June 2019. The Board, at counsel's request, issued an attendance notice to Acting Inspector Knight to attend the hearing.

[7] On the afternoon of 6 June 2019, the Commissioner wrote to the Board objecting to any intention by the Board to allow another party to the parole application to put questions to the officer requiring him to give information.

[8] The Commissioner's submission was that, if a party to the parole application wished to clarify matters provided in the officer's report, it would be appropriate for the party to provide the issues or questions to the Board which could then ask the officer for the relevant information. The Commissioner's view was that the Act did not provide for a Board meeting to take evidence on oath or otherwise. Nor did it provide for a party to examine or cross-examine or ask questions of a person whether or not their attendance had been required by way of an attendance notice.

[9] The Board rejected that submission and its premise, concluding that it was entitled to hear evidence on oath or otherwise and to permit cross-examination of those giving evidence.

[10] This is an application, therefore, seeking to review those decisions made on 19 June 2019 which determined that Acting Inspector Knight be subjected to cross-examination by Mr Nicholson's counsel and the further determination that the Board could take evidence from Acting Inspector Knight as the Commissioner's delegate on oath or otherwise.

The statutory context

[11] Other relevant sections of the *Corrective Services Act* apart from those to which I have already referred included ss 218, 219 and 230. Section 218 provided:

> "**Powers Generally**
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> The parole board has the power to do anything necessary or convenient to be done in performing its functions under this or another Act."

[12] Section 219 is a power to require attendance. Pursuant to it, the Board may require a person to attend a meeting of the Board at a stated time and stated place:

> "(a) to give the board relevant information; or
>
> (b) to produce a stated document containing relevant information."

[13] Section 230 provides that, subject to Division 4 of which it forms a part, the Board may conduct its business, including its meetings, in the way it considers appropriate.

[14] It is also relevant to refer to s 27 of the *Acts Interpretation Act* 1954 (Qld) which provides as follows:

> "**Power to hear and determine includes power to administer oath**
>
> A person or body authorised by law, or by consent of parties, to conduct a hearing for the purpose of the determination (by that or another person or body) of any matter has authority—
>
> (a) to receive evidence; and
>
> (b) to examine witnesses, and to administer oaths to witnesses, who have been lawfully called before the person or body."

[15] The Commissioner's submission was that s 219 should not be read so as to allow Mr Nicholson's counsel to ask questions of the officer. Rather, it was submitted, the Board should have required Mr Nicholson to respond to the reports and then could have sought further clarification from Acting Inspector Knight in respect to aspects of his reports with that response then being made available to Mr Nicholson. Apparently such a procedure was adopted by the Board in *Lincoln v Parole Board of Queensland*.[1] The Commissioner argued that the approach advanced accorded with the demands of procedural fairness.[2]

[16] The Commissioner submitted, therefore, that the powers provided to the Board under the *Corrective Services Act* should be circumscribed by reference to the procedures particularly prescribed, for example, in s 219 to give the Board relevant information or to produce a stated document containing relevant information.

[17] Reliance was placed on a decision of Finn J in *Rose v Bridges*.[3] There his Honour decided that a right to cross-examine witnesses cannot be asserted to be a possible requirement of procedural fairness, where the inquiry or tribunal in question does not possess the power to require the giving of oral evidence. His Honour went on to say, however, that, in the absence of power to require cross-examination, there was a variety of expedients open to the inquiry officer ranging from cross-examination through agreement with the witness concerned to providing both for comment on adverse evidence and for submitting evidence in rebuttal to having questions put to witnesses through the inquiry officer.

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1 [2019] QSC 156.

2 See a discussion of procedural fairness in *Kioa v West* (1985) 159 CLR 550, 583-584.

3 (1977) 79 FCR 378, 387-388.

[18] The argument for the Board, whose submissions were adopted for Mr Nicholson, pointed to the adverse evaluations contained in Acting Inspector Knight's report which suggested that Mr Nicholson's cooperation was not satisfactory.

[19] They drew attention to the Board's emphasis on the seriousness of the decision to be made, including the gravity of its consequences for Mr Nicholson and its conclusion that it had power to take evidence and examine witnesses.

[20] They argued that the statutory framework to which I have already referred, including the power under s 27 of the *Acts Interpretation Act* where a body authorised by law to conduct a hearing has authority to receive evidence and to examine witnesses, when coupled with s 193A(5), which requires the Board to state the day it proposes to hear the application, was said to justify the conclusion that it was conducting a hearing.

[21] In arguing against the Commissioner's submissions, counsel for the Board said that the statutory scheme did not support the negative implication for which the Commissioner contended. The argument was that, although the *Corrective Services Act* made specific provision for giving the Board relevant information, including by the production of a stated document, the breadth of its other powers in ss 218 and 230 did not preclude it from adopting another mechanism to assist it in making its determination, namely by the calling of evidence with cross-examination.

[22] In that context, they relied upon a decision of the Full Court of the Federal Court in *Hird v Chief Executive Officer of the Australian Sports Anti-Doping Authority*.[4] There the Full Court rejected a submission that there existed a negative implication said to limit the class of persons who could assist in a doping investigation by the Australian Sports Anti-Doping Authority to preclude it from acting with the Australian Football League in conducting its investigation.

[23] The Full Court said:[5]

> "Plainly enough, the scope of a grant of power of this kind should be interpreted in light of the functions of the parliament as conferred on the body in question … Where, as here, the legislature confers a function in general terms, a grant of power in the terms of [the relevant section] will, generally speaking, have a commensurably wide scope …"

[24] Accordingly, the Board submitted that it may require a person to attend and give "relevant information", but has a discretion to adopt another mechanism should that be appropriate in the circumstances. They relied particularly on the width of the language in s 218 and on the expression in s 3(2) of the *Corrective Services Act* which recognises that every member of a society has certain basic human entitlements, including an offender. They submitted that those entitlements should not be interfered with lightly.

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4 (2015) 227 FCR 95.

5 At [210].

[25] The second submission made for the Board was that it was authorised to "conduct a hearing" within the meaning of s 27 of the *Acts Interpretation Act*, referring to the language used in s 189(1) of the *Corrective Services Act* specifying that a prisoner's application for a parole order may be "*heard* and decided by the board". Accordingly, counsel for the Board submitted that, while there can be no right to cross-examination unless the decision-maker has the power to require a witness to attend and give evidence,[6] the power of the Board to receive evidence and examine witnesses under s 27 of the *Acts Interpretation Act* supported the conclusion that it had jurisdiction to direct cross-examination by another party.

Conclusion

[26] I agree with the submissions made for the Board and with the decision it made in reliance on those sections of the relevant legislation.

[27] The Board itself pointed out that, even though some of the language referred to it conducting its business by meetings, that did not preclude any meeting conducted by it from also being a hearing for the purposes of s 27 of the *Acts Interpretation Act*. They were, after all, hearing and deciding an application for a parole order at their meeting: see the heading to Chapter 5 Division 2 of the *Corrective Services Act* which is "Hearing and deciding application for parole order".

Order

[28] In those circumstances, it is my view that the application should be dismissed. I shall hear the parties as to costs.

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[6] See *Maclean v Workers' Union* [1929] 1 Ch 602, 620-621 discussed in *Rose v Bridges* (1977) 79 FCR 378, 387-388 per Finn J.