SUPREME COURT OF QUEENSLAND

CITATION:	*Sweeney v Queensland Parole Board* [2011] QSC 223
PARTIES:	**MICHAEL SHAWN SWEENEY** (applicant) **v** **QUEENSLAND PAROLE BOARD** (respondent)
FILE NO:	BS 1320 of 2011
DIVISION:	Trial
PROCEEDING:	Civil
DELIVERED ON:	5 August 2011
DELIVERED AT:	Brisbane
HEARING DATE:	21-22 July 2011
JUDGE:	Fryberg J

ORDERS:

1. **The decision of the Queensland Parole Board made on 5 November 2010 to decline the application for parole of Michael Shawn Sweeney dated 11 March 2010 is quashed with effect from 5 November 2010.**
2. **That application is referred to the Board for further consideration.**
3. **Direct that in giving the matter further consideration the Board take into account the fact that the applicant has successfully completed the Cognitive Self Change Program.**
4. **Direct that the Board complete such further consideration on or before 19 August 2011.**
5. **Liberty to apply on two days notice to the other party.**

CATCHWORDS: Administrative Law – Judicial review – Grounds of review – Applying policy and merits of the case – Application for parole – Acceptability of risk of reoffending

– – – Error of law – Parole – Right to parole on eligibility date – New information since sentence

– – – Relevant considerations – Application for parole – Eligibility date fixed by sentencing judge to mitigate sentence – New information since sentence – Nonparticipation in programs despite willingness to participate – Impossibility of reclassification

– – Powers of courts etc under judicial review legislation – Generally – Dismissal for lack of utility – Fresh application pending

Criminal law – Sentence – Post-custodial orders – Parole – Eligibility and release – Right to release

– – – – Boards' etc duties – Relevant considerations

Corrective Services Act 2000 (Qld) s 139
Corrective Services Act 2006 (Qld) ss 180, 181, 182, 183, 185, 192, 194, 199, 200, 209, 212, 213, 214,
Judicial Review Act 1991 (Qld) ss 20, 23, 24
Penalties and Sentencing Act 1992 (Qld) s 13

Bugmy v The Queen [1990] HCA 18; (1990) 169 CLR 525, cited
Cameron v The Queen [2002] HCA 6; (2002) 209 CLR 339, cited
Kruck v Queensland Regional Parole Board [2008] QCA 399, considered
Leeth v The Commonwealth [1992] HCA 29; (1992) 174 CLR 455, considered
McGrane v Queensland Parole Board [2010] QSC 209, considered
Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24, cited
R v Maxfield [2000] QCA 320; [2002] 1 Qd R 417, cited
R v Mokoena [2009] QCA 36, cited
The Queen v Shrestha [1991] HCA 26; (1991) 173 CLR 48, cited
Williams v Queensland Community Corrections Board [2000] QCA 75; [2001] 1 Qd R 557, cited

COUNSEL: Unrepresented
S A McLeod for the respondent

SOLICITORS: Unrepresented
Crown Law for the respondent

[1] **FRYBERG J:** The applicant is in prison. He has been there for some years, serving sentences for a variety of offences committed at different times. His fulltime release date is 1 August 2015, more than four years from now. If he remains in prison until then, his period of imprisonment will have been nine years one month and one day. At the present time he is serving two concurrent terms of 7½ years imprisonment for offences committed in May 2007. He does not want to remain there. He wants to be released on parole. The judge who sentenced him fixed his parole eligibility date as 15 August 2010. However his application to the Queensland Parole Board was refused. He now seeks judicial review of that decision.

History of the application

[2] The applicant filled out an application for a parole order and signed it on 11 March 2010. However he did not submit it to the Sentence Management Office at Woodford Correctional Centre, where he was incarcerated, until 21 May 2010, his 40th birthday. With it he submitted 55 pages of attachments and a six page relapse prevention and management plan. On 11 June he wrote an eight page letter to the Parole Board with 25 pages attached, which was placed with his application. He was interviewed by a panel of four officers for the purposes of preparing an assessment report for the Parole Board on 14 July 2010 and the panel's report was completed the following day. I shall refer to it further below; for now it is enough to say that it recommended against granting parole. For reasons which were not explained the application was not received by the Parole Board until 12 August 2010.

[3] The applicant wrote a further letter in support of his application on 22 August 2010. That letter had not been received by 27 August 2010 when the Board considered the application. On 30 August 2010 the Board wrote to the applicant to draw his attention to factors which suggested to it that he would pose an unacceptable risk to the community and to provide him with an opportunity to comment on them or present further relevant information to the Board.[1] It subsequently described this letter as a "preliminary decision to consider not granting [the applicant] release on parole."[2]

[4] In that letter the Board wrote:

> "The Board noted an assessment of your needs indicated you ought to participate in intervention programs notably the Cognitive Self Change Program and you have indicated a willingness to participate. The Board was concerned that to date you have been unable to participate through no fault of your own. This matter will be drawn to the attention of Queensland Corrective Services.
>
> The Board was informed the High Intensity Violent Offending Program consists of two components:
>
> The Cognitive Self Change Program (CSCP) and the Making Choices Program. Together, these programs will assist you to reduce the likelihood of violent re-offending.

---

1 Exhibit SD2.

2 Exhibit SD4.

> The CSCP does this by helping you pay attention to your thinking when you choose to be violent and helps you take control of your thinking, beliefs and feelings. The CSCP shows you how to practice different ways of thinking which avoid re-offending and which help you to feel good about yourself.
>
> After you complete the CSCP you will be placed on the Making Choices Program which continues the work you have started in CSCP, helping you to map how you came to offend and be able to recognise points in your life where you could have made a different choice. You will gain skills to get a better outlook on life, be able to manage your emotions and situations better and improve your relationships, as well as build a life free from crime.
>
> The Board regards the opportunity for offenders to gain knowledge of personal triggers and explore protective strategies from intervention programs as important in the rehabilitative process and of general assistance to offenders to avoid re-offending in the future.
>
> At this time the Board was of the opinion your assessed intervention needs remain outstanding but you will have the opportunity to address these in custody. It considered in your interests and the interests of the safety of the community, your outstanding needs be addressed in custody as this will ensure protective strategies are in place prior to your return to the community. The most effective and professional way for you to do this is through participation in the program."

After raising another matter the letter continued:

> "The Board noted that your conduct during your period of imprisonment has fluctuated and that you remain in the secure section of your Centre.
>
> The Board was concerned of an important element in your re-integration process remains outstanding. The Board has not had sufficient opportunity to assess your capacity to maintain acceptable behaviour in a less structured environment. You are therefore encouraged to demonstrate positive institutional conduct and progress in the system thereby giving the Board increased confidence in your ability to comply with the requirements of a Parole Order."

[5] On 13 September, after receiving that letter, the applicant responded:

> "I have done everything in my power to want to start doing CSCP, Getting Smart, Pathways programs but to no fault of my own I have not been given the change [*sic*] to do these coarses [*sic*] let alone start one.
>
> I can not get a Low Classification because I haven't been given the chance to do the programs, it is wrong in several reasons.
>
> By the time I even start the CSCP coarse[*sic*] which may be another 6 to 12 months away then the CSCP coarse[*sic*] takes around 8 months to complete, then Getting Smart will take around 6 months, then Pathways will take around 3 to 4 months this will bring my Sentence to the end of 2012 start of 2013 then by the time I get a Classification Review done and apply for Parole again it will be

> around 2014. This isn't good enough in my view because I've been in prison since May 2007, I've also been on the waiting list to do these programs since 2008."

[6] On 17 September the applicant wrote further submissions to the Board. Under the heading "Programs" he wrote:

> "I am and have always been willing to do the Programs. I have been on the waiting list to do the programs since 2008. But to know [*sic*] fault of my own I have not been given the chance to start any Programs and I would like to add I have been in Prison since May 2007 and I believe I should of [*sic*] being given the chance at least one year prior to my Earliest release date being my Parole eligibility date was the 15 August 2010. I have put in several Request forms and have seen several people at the Sentence Management window. I have never once refused to do any Programs.
>
> I believe that the Prison system should be effective and be professional in given [*sic*] me the opportunity to do these Programs a lot earlier. I think it is unfair in having me to wait and keep writing over a period of years before I can start these Programs and is unfair because I have wanted to give the Board the best Parole application so that the Board could see I am determined to learn more Strategies and knowledge of personal triggers and protective Strategies. … I am willing to do all programs if I'm Released on Parole. I believe all the programs are available at Spring Hill every Tuesday night also at Goori House and OZ care, therefore I can not understand why the Board won't Release me on Parole and add condition on my Parole Order for myself to start these Programs straightaway residing at Goori House. …"

Under the heading "Low classification" he wrote:

> "I can [*sic*] informed not getting a Low because I haven't done any of the Programs. I am keen to show the Board my ability to maintain acceptable behaviour in a less structured environment however my progress has been seriously impeded by the fact I can't do the programs. Also my next Classification Review or my earliest date for me to maybe [*sic*] given a Low will be no sooner then around 2011 or 2012."

[7] The Board considered the application on 5 November 2010. Ten days later it wrote to the applicant:

> "The Board was further informed that you are soon to commence Cognitive Self Change Program and that as at 5 November 2010 this was your only outstanding programme.
>
> You have received all the relevant material and have had the opportunity to respond to the Board's concerns. Notwithstanding the information outlined above, the Board was of the view that your submissions did not sufficiently address the concerns expressed in its previous letter to you and decided that you would be an unacceptable risk to the community on a parole order at this time and declined your parole application.

However, the Board advised that it considered your plan to participate in the Goori House Rehabilitation Program would be an acceptable plan for the purpose of your release and that you should include this with any future application for parole.

Additionally, the Board recommended that you successfully complete the program Cognitive Self Change Program and consents to you lodging a new application for parole after satisfactorily completing the Cognitive Self Change Program."

The statement of reasons

[8] The Board provided a statement of its reasons for its decision in December 2010. The statement has four sections. The first two are headed "Introduction" and "Evidence and other material upon which findings of fact were based". The Introduction contained a procedural history of the application and the Evidence section contained a list of documents. I set out the remaining two sections:

"Findings on material questions of fact

1. The Applicant is currently serving a period of eight years imprisonment for a range of offences including Break and Enter, Robbery with Actual Violence.
2. The Applicant became eligible to apply for Parole on 15 August 2010 pursuant to section 184 of the *Corrective Services Act 2006*.
3. The Board noted the following positive factors in the Applicant's favour:
4. The applicant submitted an acceptable relapse prevention plan which includes the Applicant having been accepted into the Goori House Residential Rehabilitation Centres.
5. The Applicant has completed the Transitions Program during this period of imprisonment.
6. The Applicant has responded positively to employment opportunities whilst in custody.
7. However the Board noted the following negative factors which outweigh the positive factors:
8. The Applicant has a minor breach and incident history recorded during this period of incarceration. These breaches including being in possession of a prohibited article. The Board accepted the breach of history set out in the Parole Board Assessment Report dated 15 July 2010 as an accurate summary of the Applicant's breach history. This breach history, whilst minor, gave the Board cause for concern as it indicated to the Board that even in a highly structure environment, the Applicant was unable to control his behaviour and comply with the directions given by Prison Management and corrective services officers. This led the Board to have concerns about how the Applicant would be able to cope in the community without the constant supervision that incarceration provides. The Board was concerned that the Applicant would re-offend if released into the community at this time.

9. The Applicant has responded poorly to previous community based supervision. This poor previous response includes the revocation and unsuccessful completion of community based orders. The Board accepted the summary of community based orders set out in the Parole Board Assessment Report dated 15 July 2010 as an accurate summary of the Applicant's response to previous community supervision. This history of poor response gave the Board cause for concern as it indicated to the Board that even with community based supervision, the Applicant was unable to control his behaviour and comply with directions given by Corrective Services Officers. This led the Board to have concerns about how the applicant would be able to cope in the community whilst subject to supervision.
10. The Applicant has outstanding identified treatment needs. The Board gave consideration to the program being completed in the community however has decided in this instance in light of the Applicant's extensive history of drug and alcohol abuse it would be too great a risk to release the Applicant into the community without having first successfully completed the program.
11. The Applicant is currently classified as a high security classification and is accommodated at the Woodford Correctional Centre in the secure area. The Board would be satisfied with the Applicant maintaining a period of breach free custodial time. The Board is of the opinion that a successful progress to a low security facility will enable the Applicant to demonstrate his ability to behave in a less structured environment.
12. The Applicant has a significant criminal history. This history includes offences relating to violence, weapons, property and breaching Court orders. The Board accepted the summary of criminal history set out in the Parole Board Assessment Report dated 15 July 2010 as an accurate summary of the Applicant's criminal history. This summary gave the Board cause for concern as it considered your criminal history to be significant as past behaviour may be an indicator of future behaviour.

Reasons for decision

Based on the findings listed above, the Board considered the Applicant as an unacceptable risk to the community and decided to refuse his application for parole."

There is no explanation of why the Board considered the applicant an unacceptable risk. It is unnecessary for present purposes to decide whether such a bold statement is sufficient to satisfy the Board's obligation under s 33 of the *Judicial Review Act 1991*. I doubt it.

The Parole Board Assessment Report

[9] The statement of reasons made a number of references to the Parole Board Assessment Report. That report, by a panel of four officers of Queensland

Corrective Services[3] ("QCS"), recommended against granting parole to the applicant. It gave the following reasons for this recommendation:

> "**Reasons for recommendation:**
> * Offender is currently domiciled within the secure area of the centre
> * Offender has outstanding program recommendations for completing CSCP and Pathways
> * Offender has breached his current Court Ordered Parole order
> * Offender has breached previous community orders
> * Offender has an extensive criminal history
> * Offender does not acknowledge his part in the offending
> * Offender has a limited release plan"

It seems that the reference to a current court ordered parole order was a mistake.

The applicant's case

[10] The grounds of the application as particularised were: breach of the rules of natural justice in relation to the applicant's legitimate expectation of a parole order and in relation to principles set out in *Kioa v West*[4] and *Minister for State of Immigration and Ethnic Affairs v Teoh*[5]; and failing to decide the application on its merits but rather deciding on the basis of a policy. These were expanded without objection in the applicant's outline of submissions:

> "12. The Applicant submits that in arriving at its decision, the Respondent had exercised its discretionary power according to a rule or policy, without full and proper consideration of the merits of the application before it.
>
> 13. The Respondent stated in its statement of reasons that the respondent was required to participate in a certain activity when at the same time did not acknowledge his inability to do so. The Respondent requested the Applicant make every effort to reduce his classification and progress to a low security environment however made no reference to the fact that this was impossible for the Applicant to achieve whilst ever [*sic*]he was excluded from participating in certain intervention programs.
>
> …
>
> 15. The Applicant further asserts that the Respondent's decision was unreasonably arrived at, based on the improper exercise of its powers and in accordance with a rule or policy, in contravention of JRA 1999 [s.23, (b), (f) & (g)] and which resulted in a decision that failed to take neither a relevant consideration into account nor consider the merits of the Applicant's particular circumstances, in his application for parole.

---

3 The name adopted by an agency within the Department of Community Safety in the Queensland government.

4 [1985] HCA 81; (1985) 159 CLR 550.

5 [1995] HCA 20; (1995) 183 CLR 273.

…

16. The Applicant submits that the Respondent has exercised its power contrary to the terms of the JRA [s. 20, (2)(e) & (f)] in:

‘ … that the making of the decision was an improper exercise of the power conferred by the enactment under which it was purported to be made’ and

‘… the decision involved an error of law (whether or not the error appears on the record of the decision.’

…

20. The Applicant submits that he has completed all recommended programs offered to him, the one outstanding program is available in the community, that his high security classification is as a result solely of the fact that he has not completed programs. The Respondent also acknowledges employment achievements by the Applicant and the positive results the applicant has achieved in intervention programs thus far.

21. The Applicant accepts that the respondent’s highest priority, in determining applications for parole orders, is the safety of the community and the assessed risks that an applicant might pose in the granting of a parole order. The Applicant submits that the Respondent has not given proper and appropriate merit to the fact that the Applicant has completed intervention programs and is prepared complete further programs within the community.

22. The Applicant contends that the Respondent has not given proper and appropriate merit to his particular circumstances in arriving at its decision to decline his application for a parole order and in doing so, has exercised a discretionary power in bad faith.

23. The Applicant further contends that the Respondent has not taken into account the period of time left until the Applicant reaches his full time release date or considered the risk to the community if the Applicant is released without supervision at his full time date.

‘Moore v Queensland Parole Board BSB 14349 of 2010 23 April 2010 Fryberg J’

24. The Applicant asserts that the Respondent’s decision was unreasonably arrived at, based on the improper exercise of its powers and in accordance with a rule or policy, in contravention of JRA 1999 [Ss. 20(2)(e) & 23(a)] and which resulted in a decision that failed to consider the merits of the Applicant’s particular circumstances, in his application for parole.

25. The Applicant also contends that he has established a basis under the Judicial Review Act 1991 23(g) to set aside the decision in question as the decision involved an improper exercise of power because the decision was ‘so unreasonable that no reasonable person could so exercise the power.’

Conclusion

26. Finally, the Applicant contends that the Respondent has exercised a power that was 'so unreasonable that no reasonable person could so exercise the power'.

In Gough v Southern Queensland Regional Parole Board, Applegarth concluded in part, [at 79] thus:

'My conclusion that the applicant has established a basis under JRA to set aside the decision under review makes it strictly unnecessary to decide the final arguable basis of his claim. This is the contention that the decision involved an improper exercise of power because the decision was 'so unreasonable that no reasonable person could so exercise the power.' The ground of statutory judicial review in s 23 (g) of the JRA reflects Wednesbury *unreasonableness, namely the principle that if an exercise of power is so unreasonable that no reasonable repository of the power could have taken the impugned decision or action, the court hold the purported exercise of power to be invalid.'*

At [8], Applegarth J further states that.

'It is arguable that the exercise by the Board … was so unreasonable that no reasonable person could so exercise the power.'"

Although the applicant was not legally represented, it appears that he had some assistance in preparing the outline.

The respondent's case

[11] The respondent submitted that it was entitled to reach the conclusion that in the light of the applicant's extensive history of drug and alcohol abuse it would be too great a risk to release him into the community without his having first successfully completed the Cognitive Self Change Program. It had taken into account the fact that the program could be completed in the community in reaching that conclusion. The Board's requirement for the applicant to complete the program in prison was not imposed in accordance with any rule or policy. The Board was entitled to form the opinion that the successful progress to a low security facility would enable the applicant to demonstrate his ability to behave in a less structured environment (citing *McGrane v Queensland State Parole Board*[6]). Issues such as those dealt with in *Moore v Queensland Parole Board*[7] did not arise in this case; and there was no evidentiary basis to establish unreasonableness in the *Wednesbury* sense.

The nature of parole in Queensland

[12] The *Corrective Services Act 2006* ("the Act") does not define parole. In the main it leaves the nature of parole to be deduced from the common law. The High Court has recognised that parole serves two functions: mitigation of penalty and rehabilitation of the offender:

---

6 [2010] QSC 209.

7 [2010] QCA 280.

> "17. It has been said that '(t)he intention of the legislature is that a minimum term is a benefit to the prisoner': Iddon & Crocker v. The Queen (1987) 32 A Crim R 315, at pp 325-326; and so it is. The effect of fixing a minimum term is that the Parole Board may thereafter, in the exercise of its discretion, grant parole: Corrections Act 1986 (Vict.), s.74(1); Community Welfare Services Act 1970 (Vict.), s.195(1), since repealed. But that does not mean that the sentencing judge, in fixing the minimum term, approaches the task on the footing that he or she is solely or primarily concerned with the prisoner's prospects of rehabilitation. Power v. The Queen [1974] HCA 26; (1974) 131 CLR 623 put paid to that notion. Barwick C.J., Menzies, Stephen and Mason JJ. observed (at p 628):
>
> > 'In a true sense the non-parole period is a minimum period of imprisonment to be served because the sentencing judge considers that the crime committed calls for such detention.'
>
> After pointing out (at p 628) that the fixing of the non-parole period was concerned with deterrence, their Honours went on to say (at p 629):
>
> > 'To read the legislation in the way we have suggested fulfills the legislative intention to be gathered from the terms of the Act, i.e. to provide for mitigation of the punishment of the prisoner in favour of his rehabilitation through conditional freedom, when appropriate, once the prisoner has served the minimum time that a judge determines justice requires that he must serve having regard to all the circumstances of his offence.'
>
> That comment was repeated in the unanimous judgment of the Court in Deakin, at p 367; p 766 of ALR. See also Reg. v. Paivinen [1985] HCA 39; (1985) 158 CLR 489, at p 495; Reg. v. Watt [1988] HCA 58; (1988) 165 CLR 474, at p 481. Although Power concerned different legislation, no relevant distinction with the Victorian law is suggested."[8]

[13] In this context, rehabilitation is not conceived as solely or even primarily as a process undertaken for the benefit of the offender. It is undertaken for the benefit of the community:

> "[T]he release of an offender for the purposes of rehabilitation through conditional freedom is not to be seen solely as a mercy to the offender but also, and essentially, as a benefit to the public."[9]

[14] Mitigation on the other hand is for the benefit of the offender. Sentencing judges frequently mitigate the sentence for a wide variety of reasons, many personal to the offender. One way of doing this is granting early release on parole or at least the right to apply for early release on parole. The mechanisms by which that is achieved are, as far as I am aware, different in Queensland from those applicable in

---

8 *Bugmy v The Queen* [1990] HCA 18; (1990) 169 CLR 525.

9 *The Queen v Shrestha* [1991] HCA 26 [20]; (1991) 173 CLR 48.

other States. That comes as no particular surprise. As a plurality observed in *Leeth v The Commonwealth*, the parole system in Australia varies to a greater or lesser extent from State to State.[10]

[15] Parole in Queensland is effected by a parole order. The Act specifies some conditions which must or may be included in an order:

> "**200 Conditions of parole**
>
> (1) A parole order must include conditions requiring the prisoner the subject of the order—
>
> (a) to be under the chief executive's supervision—
>
> (i) until the end of the prisoner's period of imprisonment; or
>
> (ii) if the prisoner is being detained in an institution for a period fixed by a judge under the *Criminal Law Amendment Act 1945*, part 3—for the period the prisoner was directed to be detained; and
>
> (b) to carry out the chief executive's lawful instructions; and
>
> (c) to give a test sample if required to do so by the chief executive under section 41; and
>
> (d) to report, and receive visits, as directed by the chief executive; and
>
> (e) to notify the chief executive within 48 hours of any change in the prisoner's address or employment during the parole period; and
>
> (f) not to commit an offence.
>
> (2) A parole order granted by a Parole Board may also contain conditions the Board reasonably considers necessary—
>
> (a) to ensure the prisoner's good conduct; or
>
> (b) to stop the prisoner committing an offence."

A prisoner released on parole is taken to be still serving the sentence imposed on him or her[11] and may travel outside Queensland only with leave.[12] Parole is automatically cancelled if the prisoner is sentenced to another period of imprisonment for an offence committed during the period of the order.[13]

[16] There are two types of parole order: court ordered parole orders[14] and parole orders made by a parole board.[15] The sentencing court must make an order if the period of imprisonment does not exceed three years and does not include a term of imprisonment for a sexual offence; and the prisoner has not been the subject of a previous court ordered parole order which has been cancelled.[16] In other cases, parole orders are a matter for a parole board. Leaving aside exceptional

---

10 [1992] HCA 29 [19]; (1992) 174 CLR 455.

11 *Corrective Services Act 2006*, s 214.

12 *Ibid*, ss 212, 213.

13 *Ibid*, s 209.

14 *Ibid*, s 199.

15 *Ibid*, s 194.

16 *Penalties and Sentences Act*, Part 9 Div 3. There are transitional provisions for cases predating 2006.

circumstances parole,[17] the keystone for a grant of parole by a board is parole eligibility.[18] Only a prisoner who has reached his or her parole eligibility date may apply for parole.[19] Special provision is made for prisoners serving a term of imprisonment for life or for a serious violent offence.[20] Otherwise, pursuant to s 184 of the Act, the date is the date fixed for eligibility by the sentencing judge, or if no date has been fixed, the day on which the prisoner has served half his or her period of imprisonment.

[17] Rehabilitation and mitigation of sentence are not the only functions of the parole system in Queensland. Another function (or perhaps it is an aspect of mitigation) is to provide a vehicle for the performance by sentencing judges of the duty cast upon them by s 13 of the *Penalties and Sentences Act 1992*. That section requires a sentencing judge to take a guilty plea into account and empowers the judge to reduce the sentence by reason of it. A sentencing judge is obliged to consider all mitigating factors in the case, and a prisoner's willingness to facilitate the course of justice by pleading guilty is one such factor.[21] For many years the practice in Queensland has been to make a recommendation, or set an eligibility date, for parole at a point earlier than the statutory half-way mark as the means of performing that duty.[22] Reducing the sentence in this way fulfils an objective set by the Parliament.

[18] It is important that parole boards and the Custodial Operations Directorate ("COD") of QCS recognise the role which parole plays in the whole sentencing system. If a perception were allowed to develop that prisoners routinely would not get parole on court ordered eligibility dates, there would be a risk that pleas of guilty would be recognised by the imposition of suspended sentences rather than early parole eligibility. That would be unfortunate, for in many cases the excellent supervisory work done by parole officers fulfils an important role in protecting the safety of the public.

[19] That role was recognised in a series of cases standing as authority for the proposition that a parole board may not lawfully refuse to grant parole on the basis of a consideration taken into account by the judge who fixed the parole eligibility date. In *Williams v Queensland Community Corrections Board*, the court wrote in relation to the 1988 Act:

> "[24] … The statutory consequence of such a recommendation is that it fixes the date before which a prisoner is not eligible for release on parole; s 166(1) of the *Corrective Services Act* 1988 is made subject to s 157 of the *Penalties and Sentences Act 1992*. But the effect of such a recommendation will ordinarily be greater than that of simply fixing the date before which eligibility for release cannot be considered.

---

17 *Corrective Services Act 2006*, s 194(1)(a).

18 *Ibid*, s 194(1)(b).

19 *Ibid*, s 180.

20 *Ibid*, ss 181, 182. Other particular circumstances are dealt with in ss 183 and 185.

21 See also *Cameron v The Queen* [2002] HCA 6; (2002) 209 CLR 339.

22 *R v Mokoena* [2009] QCA 36 at [12].

> [25] A recommendation for early parole is part of the sentence imposed and mitigates the effect of that part of the sentence which imposes the term of imprisonment. That is not because the prisoner has an absolute entitlement to parole at or about the recommended date. Clearly there is no such entitlement. It is because it is a reasonable expectation, at the time of sentencing, that the offender will become entitled to parole at about the date recommended. That expectation may be falsified or modified because of information gained about the prisoner and his prospects of rehabilitation during the period between commencement of sentence and the eligibility date and it would be unsurprising if, relying on that information, the Board did not grant parole at or about that date. But in the absence of such information placing the Board in a better position to make a judgment on this question than the sentencing judge, there is cause to question whether the refusal by the Board to grant parole at or about the time recommended is the result of some error by it which would justify a review of its decision."[23]

That was written before the decision of the High Court in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*[24] made it clear that in Australia the doctrine of reasonable expectation (or legitimate expectation, the same thing) did not give rise to substantive rights, but only to the right to procedural fairness (ie natural justice).

[20] That this passage recognised a substantive right was made clear by the majority judgment in *R v Maxfield*. After quoting that passage, Davies JA and I wrote:

> "[28] In the present case, the applicant's third proposition depends upon the view that the parole authority may lawfully refuse to grant parole on the basis of a consideration fully taken into account by the sentencing court at the time it makes the recommendation. In this case, such a consideration would be the applicant's history of convictions for escaping from lawful custody. In our judgment, that view is inconsistent with the reasoning in *Williams v Queensland Community Corrections Board*. It is true that there is no rule, policy or guideline which in terms precludes granting parole to a prisoner who has multiple previous convictions for escaping. However that is the combined effect of the policy and guideline referred to above. In these circumstances, what cannot be done directly cannot be done indirectly. Prisoners' rights are not regulated by the writings of Joseph Heller. If this court recommends that the applicant be eligible for release on parole after having served two years of his term, the reasonable expectation thereby created cannot be defeated by imposing upon him a high security classification on the basis of factors considered

---

23 [2000] QCA 75; [2001] 1 Qd R 557 at p 567.

24 [2003] HCA 6; (2003) 214 CLR 1

by the court and then refusing an application for parole at the recommended time on the basis of the classification."[25]

[21] The right was recognised by Parliament in s 139 of the *Corrective Services Act 2000*. That section was effectively repeated as s 192 of the 2006 Act:

> "**192 Parole Board not bound by sentencing court's recommendation or parole eligibility date**
>
> When deciding whether to grant a parole order, a parole board is not bound by the recommendation of the sentencing court or the parole eligibility date fixed by the court under the *Penalties and Sentences Act 1992*, part 9, division 3 if the board—
>
> (a) receives information about the prisoner that was not before the court at the time of sentencing; and
>
> *Example—*
> a psychologist's report obtained during the prisoner's period of imprisonment
>
> (b) after considering the information, considers that the prisoner is not suitable for parole at the time recommended or fixed by the court."

[22] The wording of that section is clumsy. The clumsiness is the result of grafting onto the previous s 139 words intended to cover the system of judicial fixing of parole eligibility dates, a system which replaced the previous system of judicial recommendation of an eligibility date for post-prison community-based release.[26] The section does not literally mean that the Board is not bound by a court fixed parole eligibility date. The Board has no power to change an eligibility date ordered by a court. What the section means is that in the specified circumstances, the Board is not bound to make a parole order on a court ordered date of eligibility, just as it is and was not bound to adopt a recommendation made under the previous system in such circumstances.

[23] Section 192 clearly implies that a parole board is bound to make a parole order if there is no relevant information before it which was not before the sentencing judge.[27]

The Board's reasons in the present case

[24] The Board's findings consist of two paragraphs apparently intended to be bare statements of fact; three paragraphs of what the Board described as "positive factors in the applicant's favour"; and five paragraphs of what the Board described as "negative factors which outweigh the positive factors". The positive and negative factors contain value judgments. There are some serious deficiencies in the findings.

---

25 [2000] QCA 320 at [27]; [2002] 1 Qd R 417 at p 424; see also *R v McMillan* [2005] QCA 93 at [17].

26 The new system was introduced into the *Penalties and Sentences Act 1992* by the insertion of Pt 9, div 3, a process effected by s 497 of the *Corrective Services Act 2006*.

27 The example provided by Parliamentary Counsel is unfortunately worded. A psychologist's report obtained during a prisoner's period of imprisonment would answer the description in cl (a) only if it contained relevant information which was not before the court at the time of sentencing.

[25] The *first finding*, that the applicant is currently serving a period of eight years imprisonment for a range of offences, is potentially misleading and possibly incorrect. According to the Parole Board Assessment Report, the applicant's period of imprisonment was nine years one month one day. The evidence does not allow a determination of which figure is correct. More importantly, the finding obscures the point that at the material time, the applicant was serving terms for only two offences. They were the two offences for which Martin DCJ sentenced him on 15 October 2008. He had been on remand for those offences and 257 days of pre-sentence custody was declared under what is now s 159A of the *Penalties and Sentences Act 1992*.

[26] The *second finding*, that the applicant became eligible to apply for parole on 15 August 2010 pursuant to s 184 of the Act is also deficient. It omits the important fact that the eligibility arose under s 184(3), ie as a result of an order made by the sentencing judge, not as a result of the statutory default provision in s 184(2). That fact was in the material before the Board and it merited a finding. It did so because the judge's order reflected deliberate amelioration of the sentence to reflect four matters. One was the applicant's early plea of guilty, another was the fact that his admissions to the police when arrested afforded strong evidence against him; another was the fact that the committal was a full handup committal; and another was the fact that three months of the custody for which no declaration could be made ought to have been custody in respect of the subject offences. It was important for the Board to have these facts at the forefront of its mind in weighing up whether the judge's order should be rendered futile.

[27] The *third finding*[28] was that the applicant had submitted an acceptable relapse prevention plan. That he had submitted a plan and that it was acceptable were important aspects of the matter. It is unnecessary to elaborate on the merits or otherwise of the plan. The Board might have noted (but said nothing about it in the reasons) that the negative recommendation in the PBAR was in part the result of the fact that the plan was missing from the version of the application supplied to the assessment panel and when questioned about the contents of the plan, the applicant revealed himself to be inarticulate. The omission to note that fact is not important, as the Board did not, at least overtly, place direct reliance on the panel's recommendation.

[28] The *fourth finding* was that the applicant had completed the transition program. The importance of that program was not addressed before me.

[29] The *fifth finding* was that the applicant had responded positively to employment opportunities whilst in custody. That appears to be correct. The Board was presumably aware of the Job Performance Report on the applicant made by a prison trade instructor on 27 March 2010:

> "Prisoner Sweeney is a level 4 in G2D Textile workshop. He has been a polite prisoner who works well with others to meet all the requirements of the workshop, and has the ability to operate all of the machines in the textile shop. Prisoner Sweeney has been producing garments of a high standard. He also can undertake work involving heavy duty canvas etc. Prisoner Sweeney will undertake any task

---

[28] Numbered 4.

> required without hesitation. Because he has taken a keen interest in the work he performs he has been promoted to the level 4 (work shop overseer) position on the P/M shift. He interacts well with Trade Instructors and his peers."

[30] The *sixth finding*[29] related to the applicant's minor breach and incident history during his incarceration. The history consisted of two breaches of prison discipline constituted by unauthorised possession of tobacco and a cigarette lighter. On that basis the Board was concerned that if released the applicant would reoffend. It did not explain in its reasons how those matters led to a conclusion that if released, the applicant would commit further offences of the type for which he was in prison (ie reoffend). The applicant took no point about this, so it is unnecessary to examine it further. In any event, the respondent conceded that these matters dovetailed into the two primary concerns, the failure to complete the CSC program and the failure to have his security classification lowered.

[31] The *seventh finding* concerned the applicant's previous poor response to community-based supervision. That response consisted of a failure to perform work under 18 fine option orders in the period 1995 to 2000 and a failure to "successfully complete" two parole orders sometime in or before 2007 (whatever that meant). These matters led the Board to have concerns about how the applicant would be able to cope in the community whilst subject to supervision. As with the sixth finding, the applicant took no point about this and the respondent's concession covered the situation.

[32] That brings me to the *eighth finding*, which related to the applicant's failure to have completed the CSC program. This is a clinically based program which uses many of the same approaches that are used in cognitive behavioural therapy to target thinking patterns related to violent behaviour. It is conducted at Woodford Correctional Centre, where the applicant was imprisoned. The Board was aware from the PBAR that the applicant wanted to participate in the program and the sequential Making Choices Program but had failed to do so through no fault of his own. Unfortunately, it does not seem to have made any attempt to find out the circumstances surrounding this failure.

[33] Those circumstances were investigated in the evidence before this court. The system for the provision of courses (and I assume that the Board or at least some of its members would have been familiar with this system) was centrally administered by the COD and implemented locally at Woodford by prison staff. The system required that when a prisoner came into jail, he be assessed by psychologists and counsellors to determine whether he needed any of the programs offered by the agency. A recommendation would then be made for his participation in any appropriate program. That should have occurred within a matter of weeks of his arrival at the prison. Provided the prisoner was willing to undertake the program he would be placed on a waitlist by prison staff. Departmental policy was for the program to be delivered as near to the prisoner's parole eligibility date as possible so as to maximise its benefits, so waitlisting occurred within two years of the parole eligibility date. Once on the list, prisoners were not allotted to a program in the order in which they were placed on the waitlist. Rather, they were prioritised within the list according to their parole eligibility dates.

---

[29] Numbered 8.

[34] The applicant's assessment identified criminal and antisocial attitudes (on the basis of a "propensity to use violence" in his crimes, as Ms Battles-Richley put it) and alcohol and drug abuse as his "criminogenic needs". A recommendation was made that he address those needs by participation in the High Intensity Violence Offending Program; his history of violence was indicative of a need to do that program. It comprised the CSCP and the Making Choices Program. Presumably that assessment was made in late 2008. The applicant believed he was then waitlisted and told the Board so in a letter. That is what should have happened, but in fact the applicant was not placed on the waitlist until December 2009. None of the three witnesses from QCS was able to explain that delay. Mr Rawlings, the Director of Offender Intervention Services in QCS and himself a psychologist, testified that the applicant needed to start the HIVO program about a year before his eligibility date, because it took the best part of a year to complete the two elements. The delay in waitlisting the applicant meant that it was impossible for him to complete the program by his eligibility date, and in fact he did not commence the CSC program until late 2010.

[35] The Board's *ninth finding* was that the applicant was currently classified as a high security prisoner and was accommodated in the secure area of the prison. It expressed the opinion that a successful progress to a low security facility would enable him to demonstrate his ability to behave in a less structured environment. That finding reflected the encouragement which the Board had offered the applicant in its letter of 30 August 2010 "to demonstrate positive institutional conduct and progress in the system thereby giving the Board increased confidence in your ability to comply with the requirements of a Parole Order".

[36] That finding was seriously deficient. For it to be rationally useful as a factor in the exercise of the Board's discretion, it was necessary for the Board also to be satisfied that a successful progress to a low security facility was something capable of being influenced by the applicant's conduct within a reasonable timeframe. The applicant had told the Board in September 2010 that he could not get a low security classification because he had not done the recommended programs. He calculated that he could not be reclassified until about 2014. That calculation may have been somewhat pessimistic (his letter of 17 September suggested reclassification might occur in 2011 or 2012), but the Board appears to have ignored it completely.

[37] Finally, the Board's *tenth* finding was that the applicant had a significant criminal history, which gave it cause for concern. That finding was undoubtedly correct.

Conclusions of fact

[38] The evidence before me supports a number of inferences.

[39] I find that the Board did not take into account the fact that the applicant's parole eligibility date had been fixed by the sentencing judge, nor the reasons why the judge fixed that date by way of amelioration of the applicant's sentence.[30] None of these matters is referred to in either the reasons for the decision or the Board's letter of 30 August 2010. It is inconceivable that if the Board had regard to them, they would not have been mentioned in either document.

---

[30] See para [26].

[40] I find that but for the Board's concern that the applicant should complete the CSC program before his release and its desire to see the applicant demonstrate good behaviour in a low security environment, the Board would have made a parole order. That is implicit in the Board's recommendation to the applicant that he successfully complete the program and its consent to his lodging a new application after satisfactorily doing so. Counsel for the Board conceded that these two matters were the Board's primary concerns.

[41] I find that the Board failed to make enquiries about the reason for the applicant's failure to participate in the CSC program. While the Board accepted that this occurred without fault on the part of the applicant, it did not identify the reason for it, namely the prison's failure to waitlist the applicant for the course until December 2009 while telling him that he had been waitlisted in 2008. That was a matter which would have affected the Board's consideration of the application.

[42] I find that the applicant would not be given a low security classification by the COD until he had successfully completed the CSC program. The applicant so asserted to the Board but it made no finding on the matter.[31] It made no finding about how or when the applicant would be able to demonstrate positive institutional conduct and progress in the system to a low classification and appears not to have given any consideration to that issue. It made no attempt to ascertain how long it would take to achieve reclassification after completion of the program.

[43] I find that the Board made no attempt to estimate when the applicant would be able to complete the CSC program. The applicant claimed in a letter to the Board that this process would take until 2011 or 2012. The Board was not obliged to accept this assertion, but there is no evidence that it made any enquiries about the matter. By the time it decided the application in November 2010 it was aware that the applicant would commence the CSC program in the near future. It takes most prisoners five to eight months to complete the program. If the applicant was to be required to complete the companion Making Choices program (as counsel for the Board submitted was the case) a further two or three months would be required.

[44] The Board rejected the application because it considered the applicant an unacceptable risk (of reoffending) to the community. It reached that conclusion on the basis of the negative factors described above which it found outweighed the positive factors described above. In assessing the acceptability of the risk, the Board did not weigh the risk against the risk of danger to public safety which would result if the applicant's assertions about when he would satisfy the Board's concerns were correct. If they were correct, he would eventually be released into the community with little or no time on parole.[32] Nor did the Board weigh the risk against the detriment to the public interest resulting from not granting parole on the eligibility date recommended by the sentencing judge and thereby, depriving the applicant of the amelioration to which he was entitled.

[45] Although the Board did not say why it was not acceptable for the applicant to complete the CSC program in the community, it did not ignore that factor. The omission does not provide a foundation for inferring any lack of good faith.

---

31 In this court the application proceeded on the basis that the applicant's assertion was correct.

32 Compare *Moore v Queensland Parole Board* [2010] QCA 280.

Grounds for judicial review

[46] The grounds relied on by the applicant are set out above.

Breach of the rules of natural justice (procedural fairness) JRA 20(2)(a)

[47] The applicant did not press this ground in his outline of submissions, and he was right not to do so. The evidence does not support a finding of lack of procedural fairness.

Error of law: JRA 20(2)(b)

[48] Had the Board refused the order in the absence of information which was not before the court at the time of sentencing, it would have committed an error of law. The Board submitted that it had such information.

[49] It relied first on the panel finding that the applicant had criminogenic needs and its recommendation that he complete the HIVO program. That finding was based on the applicant's criminal and antisocial attitudes evident in his propensity to use violence. Those matters were known to the sentencing judge. They did not acquire the quality of novelty merely by being rebadged as criminogenic needs by departmental psychologists. No doubt those who assessed the applicant did so in accordance with the techniques of trained psychologists, rather than the judicial technique employed by the sentencing judge. That did not change the underlying information. I reject the submission.

[50] Next the Board relied on the applicant's "minor breach and incident history"[33] during his period of incarceration. It seems to have regarded that history as a cause for concern in the light of the applicant's "poor previous response" to community-based supervision. Although the applicant's response to previous community-based supervision was before the sentencing judge, his breach history during his period of incarceration was not. It constituted new information despite its relative unimportance.

[51] The Board did not make an error of law.

Improper exercise of power: failure to take relevant considerations into account JRA 20(2)(e), 23(b)

[52] I have already found that the Board took into account neither the fact that the applicant's eligibility date was fixed by the sentencing judge nor the judge's reasons for fixing the date he did.[34] I have referred to a number of the reasons why those matters were relevant.[35]

[53] There is another reason. The Minister responsible for corrective services made guidelines in March 2008 regarding the policy to be followed by the Board in performing its functions. Guideline 6.3 provided that the Board should only depart from giving effect to a parole eligibility date made by the court that sentenced the prisoner in specified circumstances. The application of that guideline required

---

33 Unauthorised possession of tobacco and a cigarette lighter.

34 Paragraph [39].

35 Paragraphs [17] - [18].

recognition of the fact that the eligibility date had been fixed by the judge. The specified circumstances reflected s 192 of the Act, but the mere fact that the circumstances were satisfied did not conclude the matter. Whatever the impact of the section, the guideline meant that the Board should have weighed the significance of the new information against the importance of the judge's order.

[54] The Board also did not take into account the fact that the reason that the applicant had not participated in the CSC program was the failure of the COD to waitlist him for the program when he should have been waitlisted. It did not do so because it did not know that this had happened. It ought to have made enquiries to find out why the applicant's participation had been delayed, since it was aware that he claimed to have been willing to participate at all material times. It was not possible to carry out the balancing process which the Board was required to undertake without knowing the reason for the nonparticipation, particularly given the applicant's willingness to undertake the course in the community.

[55] Next, the Board did not take into account the reason why the applicant remained in high security and the time that would elapse before he could be reclassified. He could not be reclassified until he had completed all of the courses which had been recommended for him. Then there would be some period of delay while he made an application and waited for his periodic classification review date to arrive. Then, if he were reclassified, there would be delay while he was transferred to a low security institution or accommodation and a further period of service in the classification sufficient to satisfy the Board's concerns. Those delays are to be weighed against the applicant's full-time release date and all the other relevant factors if the Board's desire to see him perform in a low classification were to be satisfied. It may be that all of this should be characterised as taking an irrelevant consideration (his security classification) into account when in the circumstances it could not rationally bear upon the matter in issue; but I think it preferable to regard this as a failure to consider the full circumstances of the classification.

[56] These omissions in my judgment made good the ground relied upon.

Improper exercise of power: disregard of the merits JRA 20(2)(e), 23(f)

[57] The Act does not in terms identify matters which a Parole Board must or must not take into account when considering an application for a parole order. Such matters may be determined by implication from the subject matter, scope and purpose of the Act.[36] Section 3(1) provides, "The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders." Thus the Act recognises that the twin purposes of community safety and crime prevention are not achieved solely by locking prisoners up. Supervision, not just in prison, and rehabilitation are equally important objectives. Board decisions must take these objectives into account. They must reflect a balancing of the various factors involved in these purposes.[37]

[58] The evidence in this case shows that the Board did not approach its task in this way. It had one ultimate objective: to determine whether the applicant constituted an unacceptable risk (of reoffending) to the community. That approach, or something

---

36 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24 at p 39.

37 Compare *McGrane v Queensland State Parole Board* [2010] QSC 209 at [26] per McMurdo J.

resembling it, may be necessary under s 13 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* and may have been necessary in connection with the previous system of granting remissions under the 1988 Act.[38] It is not required or even permitted by the Act. Acceptability of risk is not the ultimate determinant for making a parole order. Risk and its acceptability are of course important factors in the decision; they bear upon the safety of the community. They are also relevant to crime prevention through containment. But in relation to parole, supervision and rehabilitation are also major considerations.

[59] That constitutes a failure to decide the application on its merits and I infer that the only reason for the failure was a policy of preventing the existence of any unacceptable risk to the community, regardless of other considerations.

Wednesbury unreasonableness: JRA 20(2)(e), 23(g)

[60] It is arguable that a decision to refuse a parole order made after taking into account the considerations which were not taken into account by the Board would satisfy the test for *Wednesbury* unreasonableness. The basis of that argument would be that the true reality of the applicant's disciplinary breaches, even in the light of his criminal history, could not outweigh the positive factors once the considerations relating to noncompletion of programs and security classification are given the minimal weight the circumstances demand that they be given. That argument depends upon a number of assumptions which might or might not be justified on any reconsideration by the Board. It is unnecessary and, given that the matter must be reconsidered by the Board, undesirable that I express an opinion on hypothetical future facts when the order in the present matter cannot be affected by the opinion.

Other grounds

[61] It is unnecessary to deal with other grounds advanced by the applicant.

Utility

[62] It emerged during the hearing that since the Board's decision the applicant has participated in the CSC program, has satisfactorily completed it and has delivered a fresh application for parole to prison officers to forward to the Board. That application has not been forwarded pending a consideration of it by a panel of prison officers and the compilation of a new PBAR. The panel is scheduled to convene on 10 August for the purpose of interviewing the applicant and compiling that report.

[63] I have considered whether the present application should in consequence be dismissed[39] for lack of utility.[40] There is no evidence of how long it is likely to take for this application to reach a determination by the Board. On previous experience there could be substantial delays. Almost a year has already expired since the applicant's parole eligibility date. Further delay is to be avoided. Moreover, given my findings, such an outcome would be, to say the least, unsatisfactory.

---

38 See the cases relied on by the Board: *Gerrits v Chief Executive, Department of Corrective Services* [2003] QSC 281 and *SB v Queensland Community Corrections Board* [2005] QSC 155.

39 *Judicial Review Act 1991*, s 41(1)(a).

40 Compare *Kruck v Queensland Regional Parole Board* [2008] QCA 399 at [28].

[64] I reject that course.

Orders

[65] The decision of the Board to refuse a parole order must be quashed from the day it was made and the matter referred to the Board for reconsideration. That should be done as soon as reasonably possible after the parties have received these reasons for judgment and had time to consider them. On its reconsideration the Board should take into account the fact that the applicant has now successfully completed the CSC program.

[66] There should be liberty to apply in case of unforeseen developments. I assume that the applicant, who was unrepresented, has incurred no costs. If I am wrong he may apply for costs pursuant to that liberty.

[67] The orders of the court are:

1. The decision of the Queensland Parole Board made on 5 November 2010 to decline the application for parole of Michael Shawn Sweeney dated 11 March 2010 is quashed with effect from 5 November 2010.
2. That application is referred to the Board for further consideration.
3. Direct that in giving the matter further consideration the Board take into account the fact that the applicant has successfully completed the Cognitive Self Change Program.
4. Direct that the Board complete such further consideration on or before 19 August 2011.
5. Liberty to apply on two days notice to the other party.