# SUPREME COURT OF QUEENSLAND

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| CITATION: | *TBR v Southern Queensland Regional Parole Board* [2010] QSC 204 |
| PARTIES: | **TBR**<br>Applicant<br><br>v<br><br>**SOUTHERN QUEENSLAND REGIONAL PAROLE BOARD**<br>Respondent |
| FILE NO/S: | 4047/10 |
| DIVISION: | Trial Division |
| PROCEEDING: | Application |
| ORIGINATING COURT: | Supreme Court at Brisbane |
| DELIVERED ON: | 10 June 2010 |
| DELIVERED AT: | Brisbane |
| HEARING DATE: | 24 May 2010 |
| JUDGE: | Ann Lyons J |
| ORDER: | **1. That the decisions of the respondent:**<br>**(a) on 2 December 2009 to amend the applicant's parole order to insert a condition that the applicant is to "complete the Medium Intensity Sexual Offending Program";**<br>**(b) on 12 March 2010 to confirm that the applicant's parole order was amended to insert a condition that the applicant is to "complete the Medium Intensity Sexual Offending Program";**<br>**(c) on 31 March 2010 to indefinitely suspend the applicant's parole order;**<br>**are declared to be invalid, unlawful and of no force or effect.**<br><br>**2. It is declared that the applicant's parole order issued by the respondent on 6 February 2008 has not been amended or suspended and remains in full force and effect.**<br><br>**3. The respondent pay the applicant's costs to be agreed or assessed on a standard basis.** |
| CATCHWORDS: | PROCEDURE – MISCELLANEOUS PROCEDURAL MATTERS – DECLARATIONS – Where the applicant was |

released on parole after serving a term of imprisonment for sexual offences – where the respondent Board amended the applicant's parole order to include a condition that he participate in and successfully complete the Medium Intensity Sexual Offending Program – where no Information Notice nor a reasonable opportunity to be heard was provided to the applicant in accordance with the *Corrective Services Act* 2006 (Qld) before the amendment was made – where the applicant was concerned the Program required him to disclose offending behaviour – where the applicant did not comply with the additional condition and complete the Program – where the respondent indefinitely suspended the applicant's parole order – where the applicant seeks declarations regarding the respondent's decisions – whether amendment and suspension were beyond the power of the board, unlawful or invalid.

*Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors* [2007] QSC 333
*Petrie v Queensland Community Corrections Board* [2006] QSC 188
*SZHWY v Minister for Immigration and Citizenship and Anor* (2007) 159 FCR 1

*Acts Interpretation Act* 1954 (Qld)
*Corrective Services Act* 2006 (Qld)
*Judicial Review Act* 1991 (Qld)
*Uniform Civil Procedure Rules* 1999 (Qld)

COUNSEL: JWJ Fenton for the applicant
DD Keane for the respondent

SOLICITORS: Buckland Criminal Lawyers for the applicant
Crown Law for the respondent

**ANN LYONS J:**

**This application**

[1] The applicant, TBR, was sentenced to a period of six years imprisonment for sexual offences which occurred almost 30 years ago. He was released on parole on 20 February 2008. He did not re-offend during his two years on parole and his conduct whilst on parole was satisfactory. He refused, however, to participate in a Medium Intensity Sexual Offending Program (MISOP). On 31 March 2010, two years after his release on parole, he was returned to gaol when his parole order was suspended by Southern Queensland Regional Parole Board (the Board). His fulltime release date is 17 August 2010. This application relates to the validity of the decisions of the Board first to amend his parole to require him to complete the MISOP and second to suspend his parole for failure to complete the MISOP.

[2] By this application filed on 20 April 2010 the applicant seeks:
1. a declaration that the decisions of the respondent on:

(a) 2 December 2009 and confirmed on 12 March 2010 that amended the applicant's parole order by inserting a condition that the applicant is to "complete the Medium Intensity Sexual Offending Program"; and

(b) 31 March 2010 to indefinitely suspend the parole order granted to the applicant by the respondent under s 205 of the *Corrective Services Act* 2006 (Qld)

are:

(a) infected with jurisdictional error;
(b) unlawful and of no effect;
(c) invalid;
(d) void;
(e) nullities;
(f) *ultra* vires;
(g) not decisions at all; and
(h) illegal.

2. A declaration that the applicant's parole order made by the respondent and commenced on 20 February 2008 has not been suspended or amended.

**Background**

[3] On 18 August 2004 the applicant was arraigned in the District Court on an indictment charging him with 24 counts of sexual offences under the *Criminal Code* 1899 (Qld) (The Code) against two female complainants, K and B. He pleaded guilty to Counts 1 to 17 which occurred over a 10 year period from 1970 to 1980 and related solely to the complainant K. In relation to Counts 18 to 24, which related exclusively to offences against B during the period 1982 to 1988, he pleaded not guilty. He was ultimately found guilty of those seven offences by the jury. He appealed that decision.

[4] In February 2005 the convictions on Counts 18 to 24 were quashed by the Court of Appeal and a retrial was ordered. A nolle prosequi, however, was subsequently entered in relation to those seven counts on the indictment.

**Release on parole on 20 February 2008 subject to 21 conditions**

[5] The applicant is currently serving a period of imprisonment of six years in relation to Counts 1 to 17 which will expire on 17 August 2010. He was granted a parole order by the respondent Board on 6 February 2008 which commenced on 20 February 2008. His release was subject to 21 conditions which included condition (l) which provided that TBR's release was subject to the condition "that he attend courses, programs, meetings, counselling and any other activity at such places and times as directed by a Corrective Services officer".

**The condition requiring attendance at courses**

[6] TBR has not re-offended whilst on parole. It is also clear that the Progress Report of 13 October 2009 indicated that TBR's "overall response to supervision has been satisfactory since his release from prison". The report noted that he had been in fulltime employment since May 2008, that he had stable accommodation and that he was in a stable relationship. The report also referred to the fact he had attended a

session with a psychologist, Peter Nordinck, who had indicated he did not require him to attend further sessions and that he had seen the psychiatrist, Dr Freeman, who had originally prepared a report to the Board when TBR had applied for parole.

[7] TBR commenced a Getting Started sexual offending program on 27 November 2008 and he successfully completed the course on 20 January 2009. The February 2009 Completion Report from that course noted his literacy problems but indicated that he had participated well. That Report, however, noted his denials in relation to the second complainant and stated that he "continues to deny the offences he was charged for" and that "Comments made by TBR throughout the course of the program suggest he has no empathy for the second victim. This is supported with his denial that the offences against her did not occur. Further work in examining the effect of sexual abuse on victims is recommended for the treatment program." The report concluded that:

> "[The applicant] demonstrated a good understanding of the concepts covered in the treatment program and displayed motivation to undertake the treatment program and maintenance program if required. [The applicant] is considered to be in the decision/action stage of change. Although [the applicant] has further work to do in relation to taking responsibility for his offences and victim empathy he made the decision to participate in the Getting Started Program. He is deemed a suitable candidate for the treatment program."

[8] TBR was required to sign a copy of that report which contained those remarks. On 25 February 2009 he signed a direction to attend the Medium Intensity Sexual Offending Program (MISOP), which was to commence on 3 March 2009. The MISOP is described as "group therapy intervention".[1]

[9] The applicant attended the MISOP on 3 March 2009 as directed and completed the group induction. He was also required on that day to sign a document entitled "Consent to Undergo Assessment and Intervention". Paragraphs 2, 3 and 15 of that document set out some of the matters that he was required to agree to as follows:

> "2. Agree to discuss my offending behaviour with facilitators and other group members for the purpose of the program. I realise the disclosure of offending behaviour of which I have not been convicted may place me at risk of further criminal charges being made against me, as facilitators have an obligation to report these circumstances.
> 3. Agree to discuss any aspect of my life that may be relevant to my rehabilitation with program staff and with other members in my rehabilitation group
> ...
> 15. Understand that violation of these conditions may result in suspension or exclusion from the program."

[10] TBR signed that document. He also completed a program called the Sexual Offending Program Assessment (SOPA) which was a three hour interview "conducted with a view to identifying treatment needs and assessing an individual offender's suitability for participation in treatment programs.[2] However, he

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1 Affidavit of C Davis filed 21 May 2010, para 2.
2 Affidavit of C Davis filed 21 May 2010, para 4.

subsequently failed to complete a self assessment questionnaire involving some 300 questions because he was concerned, when he reached page 34 of the 36 page questionnaire, about the questions that were being asked of him. Those questions related to his attitude about sexual relations with children and women.

[11] On 6 March 2009 the applicant was advised that he had been excluded from that MISOP course and he has not attended other courses despite positions being made available to him.

**Communications with the Parole Board**

[12] On 26 October 2009 the respondent Board wrote to the applicant and called on him to "show cause" as to why the Board should not suspend or cancel his parole order because he had failed to attend the Medium Intensity Sexual Offending Program.

[13] On 18 November 2009 the applicant's solicitors wrote to the respondent Board and requested that the respondent disclose the progress report dated 13 October 2009.

[14] On 26 November 2009 the applicant's solicitors wrote to the respondent Board and advised that the applicant had concerns about participating in the MISOP because:

(a) He was questioned and asked to respond to seven allegations that he sexually interfered with a person other than the complainant in the offences to which he pleaded guilty;
(b) Those seven allegations formed the basis of seven counts for which the applicant was convicted at trial;
(c) The conviction on those seven counts was quashed and a retrial was ordered;
(d) The Office of the Director of Public Prosecutions subsequently entered a nolle prosequi in relation to those seven counts; and
(e) The applicant was warned by the organisers of the MISOP that any answers he gave in relation to the questions about the seven counts could be used against him in a subsequent prosecution of those matters.

**The decision of 2 December 2009 to amend the parole order by the addition of condition (v)**

[15] On 2 December 2009 the respondent amended the applicant's parole order to include a condition that the applicant "*participate in and successfully complete* the Medium Intensity Sexual Offending Program as directed by the Corrective Services officer". (my emphasis)

[16] On 4 December 2009 the respondent issued a purported Information Notice pursuant to s 205 of the *Corrective Services Act*, giving the applicant 21 days to make submissions as to why it should change its decision to amend the applicant's parole order by inserting the additional clause.

[17] Submissions were put to the Board by the applicant's solicitors in a letter dated 2 January 2010 that the respondent had erred in issuing the Information Notice because that section required the Information Notice to be issued before the respondent made its decision and it was clear the Information Notice was issued after the respondent made the decision on 2 December 2009. The applicant's

solicitors also argued that the respondent's decision to release the applicant on parole recognised that he was not an unacceptable risk of re-offending when released. The solicitors also pointed out that the applicant had not offended for 28 years and he had not re-offended on parole.

[18] It was also submitted to the Board that an assessment report by Dr Freeman had been misrepresented to the Board and the Board appeared to have failed to consider why it was recommended that the applicant complete the MISOP. The solicitors also noted that the Board had failed to provide to the applicant an opportunity to comment on the material.

[19] The applicant submitted that in the circumstances, as a matter of law, the respondent's power to amend the order had not been enlivened.

**The decision of 12 March 2010 to confirm the 2 December 2009 decision**

[20] On 12 March 2010 the respondent wrote to the applicant and advised that it had confirmed its decision of 2 December 2009 to add the requirement that he successfully complete the MISOP. That decision had been made by the Board on 24 February 2010.

[21] On 31 March 2010 the applicant's solicitors wrote to the Board and submitted that it had not complied with its obligations to provide the applicant with an Information Notice in accordance with the Act. The solicitors submitted that pursuant to s 27(b) of the *Acts Interpretation Act* 1954 (Qld) the Board was required to set out its findings on the material questions of fact and refer to the evidence on which it relied in coming to its decision. The solicitors requested reasons in writing for the decision to amend the parole order.

**The decision of 31 March 2010 to suspend parole**

[22] On 31 March 2010 the respondent suspended the applicant's parole order for an indefinite period as he had failed to comply with condition (v) of the parole order. The notice included an invitation to "show cause" why the respondent should change its position. The applicant surrendered himself to police and is in the custody of the Chief Executive of Queensland Corrective Services.

[23] On 20 April 2010 TBR filed this application seeking declaratory relief. On 22 April the respondent Board invited TBR to make further submissions.

[24] On 17 May 2010 the Board issued TBR with two statements of reasons. The first set of reasons related to the Board's decision of 2 December 2009 to vary the conditions by adding the additional condition.

[25] The second set of reasons related to the decision of the respondent Board of 31 March 2010 to indefinitely suspend the parole order. The Board indicated in the statements of reasons that it would reconsider its decision to suspend the applicant's parole order on the receipt of further submissions.

**Is the 2 December 2009 decision of the Board invalid?**

[26] The applicant argues that the decision to amend the parole order was in breach of the requirements of natural justice which are set out in the *Corrective Services Act.*

The applicant also argues that any requirement that the applicant participate in the MISOP whereby that participation required the applicant to incriminate himself for offences for which he had not been convicted and is in jeopardy of being convicted is irrelevant because it is beyond the subject matter, scope and purpose of the powers conferred on Parole Boards. The applicant also argues that the parole order was amended on a fictitious foundation. The application is not pursuant to the provisions of the *Judicial Review Act* 1991 (Qld) (JR Act) but rather the applicant seeks declaratory relief.

***Corrective Services Act* 2006 (Qld) (The Act)**

[27] Section 200(1) of the *Corrective Services Act* provides that a parole order must contain certain conditions requiring the respondent to be under the chief executive's supervision until the end of the prisoner's period of imprisonment.

[28] Section 200(2) provides that a parole order granted by a Parole Board may also contain conditions the Board reasonably considers necessary to ensure a prisoner's good conduct or to stop a person committing an offence.

[29] Section 200(3) provides that a prisoner must comply with the conditions included in the parole order.

[30] The provisions of the Act in relation to amendment, suspension and cancellation of parole orders are contained in s 205 which provides that the Board may, by written order, amend a parole order by amending or removing a condition which has been imposed under s 200(2) if the Board reasonably believes it is necessary for the purpose set out in that section which is "to ensure a prisoner's good conduct or to stop a person committing an offence" as follows.

> "**205 Amendment, suspension or cancellation**
>
> (1) A parole board may, by written order, amend a parole order—
>
> (a) by amending or removing a condition imposed under section 200(2) if the board reasonably believes—
>
> (i) the condition, as amended, is necessary for a purpose mentioned in the subsection; or
>
> (ii) the condition is no longer necessary for a purpose mentioned in the subsection; or
>
> (b) by inserting a condition mentioned in section 200(2) if the board reasonably believes the condition is necessary for a purpose mentioned in the subsection; or
>
> (c) if the board reasonably believes the prisoner poses a serious risk of harm to himself or herself."

[31] Accordingly s 205(1) (a) and (b) refers to the amendment of a parole order by the amendment, removal or insertion of conditions which are necessary for the purpose mentioned in s 200(2) which is to ensure "good conduct" or to stop the prisoner "committing an offence". Those provisions ensure that the conditions imposed are appropriate and the Board can clearly add extra conditions if the Board "reasonably believes the condition is necessary" for that purpose or delete a condition if it is no

longer required. That section clearly relates to the conditions being adapted to suit the changing requirements of a prisoner.

[32] Section 205(2) however gives the Board further powers of amendment beyond insertion, deletion and removal of conditions and provides that if the Board reasonably believes that a prisoner has failed to comply with a parole order, poses a risk of harm to others, poses an unacceptable risk of committing an offence or is preparing to leave Queensland then the Board can not just amend or insert a condition but can amend, suspend or cancel the parole order as follows:

> "(2) A parole board may, by written order—
>
> (a) amend, suspend or cancel a parole order if the board reasonably believes the prisoner subject to the parole order—
>
> (i) has failed to comply with the parole order; or
>
> (ii) poses a serious risk of harm to someone else; or
>
> (iii) poses an unacceptable risk of committing an offence; or
>
> (iv) is preparing to leave Queensland, other than under a written order granting the prisoner leave to travel interstate or overseas; or
>
> (b) amend, suspend or cancel a parole order, other than a court ordered parole order, if the board receives information that, had it been received before the parole order was made, would have resulted in the parole board that made the order making a different parole order or not making a parole order; or
>
> (c) amend or suspend a parole order if the prisoner subject to the parole order is charged with committing an offence.
>
> (3) If practicable, a parole board must, before amending a prisoner's parole order, give the prisoner an information notice and a reasonable opportunity to be heard on the proposed amendment.
>
> (4) A parole board is not required to give the prisoner an information notice or a reasonable opportunity to be heard if the parole board suspends or cancels the prisoner's parole order.
>
> (5) A written order amending, suspending or cancelling a parole order has effect from when it is made by the parole board.
>
> (6) In this section—
>
> ***information notice*** means a notice—
>
> (a) stating the parole board is proposing to amend the parole order; and
>
> (b) advising the reason for the proposed action; and
>
> (c) inviting the prisoner to 'show cause', by written submissions given to the board within 21 days after the

> notice is given, why the board should not take the proposed action."

[33] Section 205(2)(a)(i) of the Act therefore provides that the Board may amend a parole order if the Board reasonably believes the person has failed to comply with the order.

[34] Section 205(3) requires that if practicable the Board must before amending the parole order give the prisoner an Information Notice and a reasonable opportunity to be heard on the proposed amendment to the parole order.

[35] It is clear, however, that pursuant to s 205(4) an Information Notice and an opportunity to be heard need not be given if the Board is suspending or cancelling the order. It must be remembered however that the Board can only cancel or suspend the order if the Board reasonably believes that one of the factors set out in s 205 (2)(a),(b) or (c) is operating such as a breach of a condition or the further commission of an offence.

[36] An Information Notice is defined in s 205(6) as meaning a notice which states the Parole Board is proposing to amend the order, advising the reason for the proposed amendment and inviting the prisoner to "show cause" why such action should not be taken.

**The amendment of the conditions in relation to TBR**

[37] When TBR was released on a parole order on 20 February 2008 the Board, pursuant to the provisions of s 200(2), included 21 extra conditions from (a)-(u) which were obviously included for the purpose required by the Act which was to "ensure the prisoners good conduct" or "to stop the prisoner committing an offence". Those conditions included condition (l) that he *attend* courses, programs, meetings, counselling and any other activity as directed by a Corrective Services officer.

[38] TBR initially complied with condition (l) and did attend courses as directed. He successfully completed the first course, a sexual offending program called the Getting Started Program. He also attended the next course on 3 March 2009 and underwent induction for the MISOP. He subsequently developed concerns in relation to the course.

[39] When the "show cause" notice was issued to TBR on 27 October 2009 it related to the question of whether his parole order should be suspended or cancelled (rather than amended) on the basis that he had failed to comply with the condition to attend courses. Pursuant to s 205(4) of the Act the Board was not in fact required to give an Information Notice or an opportunity to be heard, but it clearly did so.

[40] TBR's lawyers were then able to make representations on his behalf in relation to whether he had failed to comply with a notice to attend a course in that he had refused to attend the next MISOP. He was being given an opportunity to be heard on the question of why his parole order should not be suspended or cancelled. His lawyers were clearly responding to the "failure to comply" issues in their communications with the Board dated 18 November and 26 November 2009. The solicitors requested an extension of time until 11 December 2009 in which to fully

respond to those issues because they had still not received a copy of the Progress Report of 13 October which the Board had relied on.

[41] All of those submissions were clearly directed at the issue of the suspension or the cancellation of the order. They related to TBR's past actions and his failure to comply with a condition of his parole order.

[42] On 4 December 2009 the Board wrote to TBR advising that a two week extension had been granted in relation to the show cause issue which related to his failure to comply with the conditions of his order. Accordingly, the issue of suspension or cancellation of his parole order was put on hold.

[43] Significantly, however, that letter advised that there would be an amendment to the order as follows:

> "Further, the Board decided to amend the parole order granted to you as per the attached Information Notice dated 4 December 2009."

[44] The Information Notice dated 4 December 2009 stated:

> "Notice is given to you that on 2 December 2009 the Southern Queensland Regional Parole Board *amended* the Parole Order granted to you which commenced on 20 February 2008." (my emphasis)

[45] The reason given for the amendment was that the Board reasonably believed that he had failed to comply with condition (l) in failing to attend the MISOP. The letter continued:

> "To assist in your successful reintegration into the community and enable appropriate parole supervision, it is ordered that the parole order be amended as follows:-
>
> ADD
>
> (v) that the prisoner participate in and successfully complete the Medium Intensity Sexual Offending Program as directed by the Corrective Services Officer."

[46] Accordingly, what the Board in fact did on 2 December was not to cancel or suspend the parole order as that decision was deferred and was not actually made until 31 March 2010. Rather, the Board made a different decision to that which they had foreshadowed in their letter of 26 October because the Board made a decision not to cancel or suspend but to amend the parole order by the insertion of a condition. Whilst an Information Notice and an opportunity to be heard is not required by the Act in relation to suspension or cancellation of a parole order, an Information Notice and an opportunity to be heard is required in my view in relation to any decision to insert an additional condition to a parole order. Whilst the Board was empowered to insert a condition pursuant to s 205(1)(b) which relates to "*inserting a condition mentioned in section 200(2)*" what s 205(3) then required was both the giving of the Information Notice and an opportunity to be heard. The only proviso was that it had to be "practicable". In my view, s 205(3) set out the natural justice requirements in relation to the insertion of new conditions which provided for both notice and an opportunity to be heard.

[47] It is clear that the letter of 4 December contained a document called an Information Notice and it was dated 4 December 2009. The decision to amend was made on 2 December 2009. The Information Notice clearly came after the decision to amend and not before. Section 205(3) provides that if practicable, a Parole Board must, *before amending a prisoner's parole order*, give the prisoner an Information Notice and a reasonable opportunity to be heard on the *proposed* amendment. (my emphasis)

[48] In the present case, I consider that it was clearly practicable for the Board to give TBR an Information Notice and an opportunity to be heard on the proposed amendment by the insertion of an extra condition *before* the amendment was made. The Board had been in contact with the solicitors for TBR about the issue of suspension or cancellation since 18 November 2009 and that decision was currently on hold awaiting further submissions from TBR's lawyers. It would have been a simple matter for the letter of 4 December 2009 to have contained an Information Notice about the *proposed* amendment to insert the condition rather than an amendment already made.

[49] There is absolutely no evidence that it was not practicable to give TBR the opportunity to be heard, particularly given that TBR's alleged failure to attend courses commenced some six months earlier. Whilst they gave him an opportunity to be heard in relation to whether he had in fact breached a condition of the order, they did not give him any opportunity to be heard about the utility of the proposed condition and whether the amended condition fulfilled the purposes set out in s 200(2).

[50] Clearly the Information Notice should have been sent before the amendments and should have contained sufficient information to inform TBR not only of the proposed amendment but also the "reason for the proposed action" as required by s 205(6).

[51] In my view, the requirements of s 205(3) have not been complied with in relation to the 2 December 2009 decision to amend the parole order.

**The confirmation of the 2 December decision on 12 March 2010**

[52] The Board in its 4 December 2009 letter gave notice to TBR that it would give him 21 days to make submissions in relation to that Information Notice. The decision of 2 December was ultimately confirmed on 12 March 2010. Were the requirements of s 205(3) fulfilled with respect to this later decision? Was TBR given a valid Information Notice in relation to the 12 March 2010 decision? In other words whilst the December 4 Information Notice was not a valid Information Notice for the 2 December 2009 decision was it a valid notice for the 12 March 2010 decision?

[53] Section 205 (6) requires an Information Notice to contain certain information which includes notice that the Board is proposing to amend the order and advise the reason for the order.

[54] The Information Notice of 4 December contained the statement that the condition was added to "assist your successful reintegration into the community and to enable appropriate parole supervision". The letter also identified the reason the Board then had advanced for the imposition of the condition, namely, an alleged breach of

condition (l). However, TBR had been given the opportunity after that date to make submissions about that matter. He had not been told of the Board's attitude to his submissions, or the reason current in March for any action by the Board at that time in relation to condition (v). For TBR to have an "opportunity to be heard on the proposed amendment", he should have been told the reasons why the amendment was considered still necessary. That did not occur, and in my view, constituted a breach of natural justice.

[55] He had also then been told what the purpose of the amendment was. Again, he was not told whether that purpose remained current in March. One issue which needed to be addressed was how the addition of the condition that he participate in and successfully complete the program would ensure his good conduct and stop him committing offences. This was particularly relevant in TBR's case because he was currently of good conduct and he had he not re-offended. Furthermore, he was considered to be a "low risk of re-offending" and there was limited time within which he could complete a course before his full time release to the community in August 2010.

[56] Division 4 of the Act deals with "Conditions of Parole" and it is clear that, pursuant to the provisions of the Act, a parole order must contain certain mandatory conditions. Section 220(1) contains the mandatory conditions which must be included in all parole orders. TBR's parole order contained the mandatory conditions.

[57] Section 200(2) then allows the Board to add extra conditions "the Board reasonably considers necessary" to ensure the prisoners good conduct or to stop the prisoner committing an offence. TBR's parole order contained additional conditions (a) to (u) which were outlined to him prior to his release and which he agreed to. It was made clear to him in the letter from the Board of 7 February 2008 that his release on 20 February 2008 was subject to those specific conditions. He agreed that his release was subject to those conditions

[58] Clearly then, the Act requires that a condition added by the Board at the time of release must relate to those purposes and cannot be an arbitrary condition completed unrelated to the purposes set out in s 200(2). The examples given in the section include conditions imposing a curfew, requiring a test sample or a condition about participation in a program.

[59] Similarly, in my view, this requirement necessarily applies to any conditions which are later inserted or amended by the Board. I consider that all conditions contained in parole orders which are conditions the Board adds to the mandatory conditions required by the Act must necessarily comply with the requirement in s 200(2). Accordingly if there is to be an amendment of the conditions after release, then the new or altered conditions should still relate to those purposes set out in s 200(2) except if s 205(1)(c) applies, because there is a serious risk of harm. That is not being argued in this case.

[60] The purpose of the added condition clearly then has to relate to the requirement that it was added to ensure TBR's good conduct or to stop him committing an offence. In my view, the condition could not simply be added to ensure he "reintegrated" or to make parole supervision "appropriate". Accordingly, the reason for the proposed action in the Information Notice should address this purpose. The reason in the

Information Notice dated 4 December 2009 did not in fact address this purpose. The question which arises is that if he had been of good conduct and had not committed any offences how was completing the MISOP "reasonably necessary to ensure" TBR's good conduct or "reasonably necessary to stop" TBR committing an offence? The Information Notice needed to state why this was so.

[61] The addition of further requirements to a parole order post release is therefore a significant additional restriction and in accordance with the Act, the Board should indicate the reason for doing so, as well as indicating the terms of the proposed amendment. TBR should then have been given an opportunity to be heard on the amendment.

[62] I consider that the Board had failed to accord TBR natural justice, as required by the Act, prior to the making of the decision to amend his parole order as no valid Information Notice was ever issued by the respondent. .

[63] I consider the decision of 2 December 2009 to amend the parole order by inserting condition (v) did not comply with the requirements of the Act and is invalid.

[64] I consider the Board's purported confirmation of that decision on 24 February, which was communicated on 12 March 2010, was also invalid.

**The decision of 31 March 2010 to suspend the parole order**

[65] The failure to accord natural justice in this regard has a particular significance, in the circumstances of this case, because it is the failure to comply with additional condition (v) which ultimately forms the basis for the Board's decision that TBR had failed to comply with the parole order. It was the breach of this added condition which was the justification for the suspension of the order. The Board clearly indicated that on 31 March it had:

> "… indefinitely suspended your parole order, as the Board reasonably believed that you have failed to comply with condition (v) of the order, namely, 'that the prisoner participate in and successfully complete the Medium Intensity Sexual Offending program as directed by the corrective services officer.'"

[66] Clearly then, if the insertion of additional condition (v) on 2 December 2009 is in excess of jurisdiction and invalid, then the Board's purported suspension of the parole order on the basis of the breach of that condition on 31 March is also in excess of jurisdiction. As Graham J stated in *SZHWY v Minister for Immigration and Citizenship and Another*:[3]

> "A decision must not involve a failure to exercise jurisdiction or be made in excess of jurisdiction. In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, Gaudron, Kirby and Hayne JJ said at 506:
>
> > 'Thus, if there has been jurisdictional error, because, for example of a failure to discharge, "imperative duties" or to observe "inviolable limitations or restraints" the decision in question cannot be properly be described in the terms used in s 474(2) as a "decision...made under

[3] (2007) 159 FCR 1 at 16.

> this Act" and is, thus, not a "privative clause decision" as defined in s 474(2) and (3) of the Act.'
>
> A decision-maker who exceeds the authority or power given by the Act under which the decision-maker is empowered to act commits jurisdictional error."

[67] I consider therefore that the decision of 31 March 2010 is also invalid.

**Should there be a declaration?**

[68] The applicant seeks declarations that the two decisions are invalid and a further declaration that the parole order made, which had effect from 20 February 2008, has not been suspended or amended.

[69] Counsel for the respondent Board argues that there should have been an application pursuant to the JR Act rather than an application for declarations. Counsel argues that the decision in *Minimax Fire Fighting Systems Pty Ltd v Bremore Engineering (WA Pty Ltd) & Ors*[4] establishes that the JR Act has abolished the prerogative writs and replaced them with a new form of relief. Accordingly, it is submitted that the inherent supervisory jurisdiction of the court is now regulated by "the particular statutory jurisdiction and the inherent powers while not abolished, are to be exercised in conformity with the JR Act".[5]

[70] It is clear that the JR Act reforms the procedure for the granting of prerogative relief in appropriate cases. In the circumstances of this case, however, it is clear that the declarations were sought by way of Originating Application as the matter was urgent. TBR has been in custody since 31 March 2010. His fulltime release date is 17 August 2010.

[71] Declarations may be sought under Part V of the JR Act if it is appropriate to do so "having regard to the nature of the relief sought": s 43(2)(a)(i). If the matter were to proceed by way of an application for order of review then the rules require a directions hearing not less than 14 days after the matter is filed: see Rules 571, 572, 574 of the *Uniform Civil Procedure Rules* 1999 (Qld) (UCPR). By contrast, if the matter is commenced as an Originating Application the matter does not face that constraint.

[72] I am satisfied that, given TBR's liberty is in issue and that the relief sought could be rendered nugatory by delay, an order for review pursuant to the JR Act was not the only appropriate application which should have been made, given the attendant delays which could attach to such an application.

[73] Accordingly, I am satisfied that there should be a declaration that the amendment of the parole order on 2 December 2009, adding the requirement that the prisoner participate in and successfully complete the Medium Intensity Sexual Offending Program as directed by the Corrective Services officer and the subsequent confirmation of that decision on 12 March 2010, is contrary to the Act and invalid.

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4 [2007] QSC 333.
5 [2007] QSC 333 at 38.

[74] There should be a further declaration that the parole order has not been amended or suspended.

**Were the decisions a nullity because the decisions were beyond the power of a Board to require a prisoner to disclose incriminating information?**

[75] Counsel for the applicant also argues that the decisions of the Board were a nullity because the decisions were beyond the power of the Board to require TBR to disclose incriminating information. TBR states he was required to sign a form on 3 March 2009 that required him to disclose offences of which he was not convicted. Counsel argues that the Corrective Services officers were not entitled to require him to sign the form because the Act does not abrogate the right to silence and that, as was made clear in *SZHWY v Minister for Immigration and Citizenship*[6], an administrative decision maker has no right to embark on an inquiry that breaches fundamental common law rights in the absence of an explicit power to do so.

[76] The applicant argues that the privilege against self incrimination is not abrogated by the *Corrective Services Act* either expressly or impliedly and that it is beyond the power of Parole Boards and corrective services officers to embark upon any enquiry about offences for which the applicant was not convicted and is in jeopardy of being convicted. In other words it is beyond the Parole Board to take into account the consequences of TBR's refusal to answer questions about allegations for which he was not convicted.

[77] It is argued by the Board however that paragraph 2 of the agreement TBR signed was in fact a "warning" and that there is no evidence that he was in fact asked to disclose criminal offences that he was not convicted of. Counsel for the respondent argues that the affidavit material from the Corrective Services officers indicates that TBR's rights were not in fact impinged.

[78] It is clear that paragraph 2 of the Agreement required TBR to agree to discuss his "offending behaviour with facilitators and other group members for the purpose of the program". Furthermore, he had to specifically state that he realised that "the disclosure of offending behaviour of which I have not been convicted may place me at risk of further criminal charges being made against me, as facilitators have an obligation to report these circumstances".

[79] I am very concerned that TBR was required to sign such an agreement prior to the commencement of the MISOP. It is clear that there is a substantive right to silence which applies outside of judicial proceedings. Given the factual circumstances surrounding the quashing of seven of TBR's convictions by the Court of Appeal and the subsequent nolle prosequi prior to the retrial, TBR had particular cause for concern in the circumstances which confronted him.

[80] I agree with the submission of Counsel for TBR, that TBR has been placed in a "cruel trilemma". That is, he has to choose between refusing to provide the information in question (thereby risking revocation of his parole), providing the information (possibly furnishing evidence of guilt or tactical advantage to the prosecutor and risking conviction) or lying, which would mean he risks failing the MISOP.

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6 (2007) 159 FCR 1.

[81] Counsel for TBR argues that the central finding that the court is asked to make is that the respondent acted in jurisdictional error. Counsel argues that this is an historical inquiry limited to what the Parole Board did on the information before it. The issue of a breach of the privilege against self-incrimination was raised before the Board made a decision. Counsel argues that the Board chose to ignore that issue and did not seek to investigate it, although it had power to do so under s 242 of the Act. Counsel therefore submits that the Board has no right to place fresh evidence before the court in a procedural review forum where that fresh evidence goes solely to the merits and not the legality of the decision made previously.

[82] Counsel for the Board, however, argues that if a declaration is to be made in this regard, then such a declaration should be based on all the facts available and should not be limited to the facts before the Board at the time. The Board argues that the affidavit material from the probation and parole officers which has been filed in these proceedings indicates that TBR's right to silence was not in fact infringed and that the completion of the questionnaire could not have placed him in jeopardy as it was a multiple choice questionnaire which could not identify victims or uncharged offences. Reliance is placed on the affidavits of Christine Davis, Nicola Martin and Anne Dun to assert that the counselling process in no way impinged on his right to silence. Counsel also asserts that there is a dispute of fact as to whether there was an infringement. As TBR did not complete the MISOP, Counsel for the respondent argues that whether TBR's rights were infringed or not is purely hypothetical and as such should not form the basis of a declaration.

[83] Given the decision I have already made I do not consider that it is necessary to determine this issue.

**Was the condition added on a fictitious basis?**

[84] Counsel for TBR states that the Corrective Services officer supervising TBR wrote to the Board, advising that he had failed to participate in the MISOP. Counsel argues that if the Board wishes to take into account the fact that TBR had not completed the MISOP, then they need to take into account the reason for the MISOP recommendation. In this regard, reliance is placed on the decision of Philippides J in *Petrie v Queensland Community Corrections Board*:[7]

> "Thus, in relation to the two matters relied upon as constituting information not before the sentencing Court, namely that the applicant had not had the opportunity to participate in a sex offender treatment program prior to eligibility for release and the incidents that had resulted in a return to a secure unit, the only view expressed by the Board was that it seemed that the applicant 'may' not be an acceptable risk to the community. The reasons of the Board do not evidence any consideration and determination of the issue of the safety of the community if the applicant were released without having completed the MISOP, other than to simply refer to the 'outcome' of the assessment for that program. It does not appear that, even as at 24 March 2006, the Board had before it or had considered the actual assessment report recommending participation in the MISOP. It is difficult to see how, without a proper consideration of that critical assessment report, the Board was able to determine for

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7 [2006] QSC 188 at [24]-[25].

> itself whether the applicant was unsuitable for release without undergoing the MISOP because he represented an unacceptable risk to the safety of the community.
>
> I note that the reasons of 28 April 2006 referred to the importance of sex offender treatment programs as a 'strategy' to safeguard the community and to assist in the applicant's continued 'development of release prevention motivations'. However, the identifying of generally beneficial purposes of such programs is to be distinguished from the question of whether the treatment needs of the applicant on the present case were such that he was rendered unsuitable for release without undergoing the program."

[85] It is argued by the respondent that the reason why condition (v) was added was the statement by a Corrective Services officer that "Dr Freeman's report indicates that to reduce the parolees (sic) risk of recidivism he would benefit from a course of counselling that would reinforce his relapse prevention plan". Counsel for TBR argues that such a statement is fictitious because the relapse prevention plan was prepared subsequent to Dr Freeman's report. Counsel submits that this is either an error or a failure to consider the reasons for recommending he complete the MISOP.

[86] Once again, I do not consider that it is necessary to determine this issue.

**Orders**

1. The decisions of the respondent:
   (a) on 2 December 2009 to amend the applicant's parole order to insert a condition that the applicant is to "complete the Medium Intensity Sexual Offending Program";
   (b) on 12 March 2010 to confirm that the applicant's parole order was amended to insert a condition that the applicant is to "complete the Medium Intensity Sexual Offending Program";
   (c) on 31 March 2010 to indefinitely suspend the applicant's parole order;

   are declared to be invalid, unlawful and of no force or effect.

2. It is declared that the applicant's parole order issued by the respondent on 6 February 2008 has not been amended or suspended and remains in full force and effect.

3. The respondent pay the applicant's costs to be agreed or assessed on a standard basis.