SUPREME COURT OF QUEENSLAND

CITATION:	*Neyens v President of the Parole Board Queensland* [2023] QSC 296
PARTIES:	**PETER NEYENS** (applicant) **v** **MICHAEL BYRNE KC, PRESIDENT OF THE PAROLE BOARD QUEENSLAND** (respondent)
FILE NO/S:	BS 6185 of 2023
DIVISION:	Trial Division
PROCEEDING:	Application for a Statutory Order of Review
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 December 2023
DELIVERED AT:	Brisbane
HEARING DATE:	23 October 2023
JUDGE:	Bowskill CJ
ORDERS:	**1. The application is dismissed.** **2. Each party bear their own costs of the proceeding.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant was convicted of murdering two people and sentenced to life imprisonment – where the respondent made a "restricted prisoner declaration" in relation to the applicant, pursuant to s 175H of the *Corrective Services Act 2006* (Qld), the effect of which is that the applicant's parole application is taken to be refused and he may not apply for parole while the declaration is in force – where one of the considerations the president must have regard to in making such a decision, under s 175H(2)(b), is "any risk the prisoner may pose to the public if the prisoner is granted parole" – where the applicant contends the decision involved an error of law arising from a misconstruction of s 175H(2)(b), by interpreting that section as not requiring consideration of whether parole conditions or any other matters would mitigate the applicant's risk – whether the error was made ADMINISTRATIVE LAW – JUDICIAL REVIEW – PROCEDURE AND EVIDENCE – COSTS – where the application for review was unsuccessful – where the respondent does not seek its costs, but the unsuccessful

applicant seeks an order that the respondent indemnify him for his costs

Corrective Services Act 2006 (Qld), s 175D, s 175E, s 175F, s 175G, s 175H, s 175I, s 175J, s 180, s193AA, s 200
Judicial Review Act 1991 (Qld), s 49
Police Powers and Responsibilities and Other Legislation Amendment Act 2021 (Qld), part 3

Armitage v Parole Board Queensland [2023] QCA 239, cited
Burragubba v Minister for Natural Resources and Mines (No 2) [2017] QSC 265, cited
Crump v New South Wales (2012) 247 CLR 1; [2012] HCA 20, cited
Minister for Immigration and Ethnic Affairs v Wu Shan Liang (1996) 185 CLR 259; [1996] HCA 6, cited
Minogue v Victoria (2018) 264 CLR 252; [2018] HCA 27, cited
Queensland Parole Board v McGrane [2014] QCA 193, considered
Queensland Parole Board v Pangilinan [2016] 1 Qd R 419; [2015] QCA 35, considered
R v A2 (2019) 269 CLR 507; [2019] HCA 35, cited

COUNSEL: A D Scott KC, with L D Reece, for the applicant
J M Horton KC, with S A Amos, for the respondent

SOLICITORS: Prisoners' Legal Service for the applicant
Parole Board Queensland Legal Services Unit for the respondent

[1] In May 2002, the applicant was convicted of murdering two people and sentenced to life imprisonment. He is a "restricted prisoner" within the meaning of s 175D of the *Corrective Services Act 2006* (Qld).[1] On 3 March 2023, the respondent made a "restricted prisoner declaration" in relation to the applicant, which took effect on 4 March 2023 and continues until 4 September 2026. As a consequence of that declaration, the applicant's application for parole was taken to have been refused[2] and he may not apply for parole again while the declaration is in effect.[3] The applicant seeks judicial review of the respondent's decision on the ground that it involved an error of law.

[2] The application, in so far as it is made under part 3 of the *Judicial Review Act 1991* (Qld), was filed out of time. However, there being no objection from the respondent, it is appropriate to grant the necessary extension and deal with the application.

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1 Under s 175D, a person is a "restricted prisoner" if the prisoner has been sentenced to life imprisonment for (a) a conviction of murder and the person killed was a child; or (b) more than one conviction of murder; or (c) one conviction of murder and another offence of murder was taken into account; or (d) a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder. Unless otherwise indicated, in these reasons reference to a section of an Act is to a section of the *Corrective Services Act 2006*.

2 Section 193AA(4) and 175I(1)(e).

3 Section 175I(1)(d) and s 180(2)(c).

Legislative context

[3] As articulated in s 3(1), "[t]he purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders". Chapter 2 of the Act contains provisions dealing with prisoners; the provisions of chapter 3 deal with breaches of discipline by prisoners; and chapter 4 deals with corrective services facilities. Chapter 5 contains the provisions dealing with parole. Whilst there is no definition of "parole" in the Act:

> "The purpose of parole generally is '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'."[4]

[4] In a general sense, a prisoner may apply for parole if they have reached their "parole eligibility date" in relation to their period of imprisonment (s 180(1)), which may be set by the court when imposing the sentence[5] or be determined by operation of the statute.[6] An application for parole is considered by the parole board, which must decide either to grant or refuse the application (s 193). If the application is granted, a parole order must include certain conditions (s 200(1)) and may contain other conditions the board considers necessary to ensure the prisoner's good conduct or to stop the prisoner committing an offence (s 200(3)).

[5] There is no right or entitlement to release on parole at the point the prisoner reaches their parole eligibility date.[7] The responsibility for the decision whether to grant a prisoner conditional release rests on the executive, to be exercised in accordance with the relevant legislative regime, which may be expected to change over time to reflect changes in government policy and practice.[8]

[6] The relevant provisions for the purposes of this proceeding are found in chapter 5 (parole), part 1AB (parole declarations), division 1 (restricted prisoner declarations) of the *Corrective Services Act*. These provisions were inserted into the Act in December 2021, by part 3 of the *Police Powers and Responsibilities and Other Legislation Amendment Act 2021* (Qld).

[7] There are two kinds of "parole declarations" provided for by part 1AB – "restricted prisoner declarations" and "no cooperation declarations". The latter relates to the "no body no parole" laws, which were first enacted in 2017. The amendment made in 2021 to those laws enabled the board to consider a prisoner's cooperation, and decide whether or not to make a no cooperation declaration, at any time after sentencing. Previously, that consideration was only triggered by the making of a parole application. In both cases, the effect of the declaration being made is that a prisoner's extant application for parole is taken to be, or must be, refused[9] and the prisoner is prohibited

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4 *Crump v New South Wales* (2012) 247 CLR 1 at [28].
5 *Penalties and Sentences Act 1992* (Qld), part 9, division 3; s 184(3) of the *Corrective Services Act*.
6 Sections 181 to 185B.
7 *Minogue v Victoria* (2018) 264 CLR 252 at [17].
8 Ibid, n 4.
9 See s 193AA(4) (in relation to restricted prisoner declarations) and s 193A(2) (in relation to no cooperation declarations).

from applying for parole while the declaration is in force.[10] The power to make a restricted prisoner declaration is conferred on the president of the board; whereas the power to make a no cooperation declaration rests with the board. However, the making of either type of declaration is not a step in determining an application for parole. Rather, it is an antecedent step, separate to the board's consideration of an application for parole, which is essentially concerned with whether, for the policy reasons reflected in the legislation, there should be an additional obstacle or barrier to the prisoner's ability to successfully apply for parole.

[8] Only the "restricted prisoner declaration" is relevant here. In that regard, s 175E confers power on the president of the board to make a "restricted prisoner declaration" about a restricted prisoner. For that purpose, part of the information the president must consider is a "restricted prisoner report" prepared by the chief executive under s 175F.

[9] By s 175F(1):

> "The chief executive may, at any time during a restricted prisoner's period of imprisonment, give the president a restricted prisoner report about the prisoner that includes information the chief executive considers is relevant to any of the matters mentioned in section 175H(2)."[11]

[10] Another context in which such a report may be prepared is when a restricted prisoner has made an application for parole. In that context, unless the president has previously decided not to make a restricted prisoner declaration,[12] s 193AA(2) provides that the parole board must:

(a) give the president a notice stating that the prisoner has applied for parole; and

(b) give the chief executive a notice stating:

(i) the board has deferred deciding the application until the board receives a notice from the president under s 175J(2)(c); and

(ii) under s 175F the chief executive must give the president a restricted prisoner report.

[11] If the chief executive is given such a notice, s 175F(2) requires the chief executive to give the president a restricted prisoner report about the prisoner within 28 days after being given the notice.

[12] Once the president has been given a restricted prisoner report, the president must decide whether to make a restricted prisoner declaration about the prisoner (s 175G(2)(b)), or decide whether to make a new declaration if there is one already in force (s 175G(2)(a)). The president is obliged to give certain information to the prisoner, and the prisoner may make submissions and ask the president to consider relevant material (s 175G(3)).

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10 See s 175G(3)(c) and s 180(2)(c) (in relation to restricted prisoner declarations) and s 175N(2)(c) and s 180(2)(d) (in relation to no cooperation declarations).

11 Underlining added.

12 Section 193AA(3) and s 175J(2)(c).

[13] Section 175H then relevantly provides:

> "**175H Deciding to make restricted prisoner declaration**
>
> (1) The president may make a restricted prisoner declaration about a restricted prisoner if the president is satisfied it is in the public interest to do so.
>
> (2) In considering the public interest the president must have regard to the following matters –
>
> (a) the nature, seriousness and circumstances of the offence, or each offence, for which the prisoner was sentenced to life imprisonment;
>
> (b) any risk the prisoner may pose to the public if the prisoner is granted parole;
>
> (c) the likely effect that the prisoner's release on parole may have on an eligible person[13] or a victim.[14]
>
> (3) Also, in deciding whether to make a restricted prisoner declaration the president must have regard to the following information –
>
> (a) the restricted prisoner report about the prisoner;
>
> (b) if an eligible person has, under section 188, at any time made a submission in relation to a parole application made by the prisoner – the submission;
>
> (c) any relevant remarks made by a court in a proceeding against the prisoner for the offence for which the prisoner was sentenced to a term of life imprisonment;
>
> (d) if the prisoner made a submission under s 175G(3)(d) – the submission.
>
> (4) Without limiting subsections (2) and (3), the president may have regard to any other matter or information the president considers relevant to the public interest. …"

[14] If the president decides to make a restricted prisoner declaration, s 175I(1) provides that the declaration must state:

> (a) the reasons for the decision; and

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13 "Eligible person" is defined in schedule 4 to mean a person included on the eligible persons register, which is a register of persons eligible to receive information about certain prisoners (for example, a person who is the actual victim of the offence, or if the victim is deceased, an immediate family member of the deceased person) (s 320).

14 For the meaning of "victim", s 175H(8) directs attention to s 5 of the *Victims of Crime Assistance Act 2009* (Qld).

(b) the day the declaration takes effect; and

(c) the day the declaration ends; and

(d) that the restricted prisoner may not apply for parole under s 180 while the declaration is in force;[15] and

(e) if the prisoner's application for parole was deferred under s 193AA(2)(b) – that the application for parole is refused.[16]

[15] In deciding the term of the declaration, the president must be satisfied the term is in the public interest and must have regard to the matters mentioned in s 175H(2) (s 175I(4)). The longest the term can be is 10 years (s 175I(3)).

[16] If the president decides *not* to make a restricted prisoner declaration, the president must give notice of that decision to the prisoner, the chief executive and the parole board (s 175J). If the prisoner's application for parole was deferred under s 193AA(2), the matter goes back to the parole board for a decision. For such a prisoner, there is a presumption against parole, with s 193AA(5) providing that the parole board must refuse the application "unless the board is satisfied the prisoner does not pose an unacceptable risk to the public". The hurdle for a restricted prisoner to apply for an exceptional circumstances parole order is even higher (s 176A).

[17] In the explanatory notes to the Bill which became the 2021 amendment Act,[17] the policy objective behind the introduction of the "restricted prisoner declaration" regime is said to be "to limit re-traumatisation of victims' families and friends by introducing a new framework for parole decisions about a life sentenced prisoner who has committed multiple murders or who has murdered a child".

[18] In the explanatory notes, the following is also provided by way of explanation for the new provisions:

> "Both the Premier and Minister [for Police and Corrective Services] Ryan acknowledged the ongoing trauma experienced by victims' families and friends as a result of the crimes committed by these prisoners [restricted prisoners], as well as the need to protect the community from harm.
>
> The Bill introduces a new framework designed to protect the community and reduce the re-traumatisation of victims' families, while ensuring public confidence in the parole system. It does this by authorising the President of the Board to declare that a restricted prisoner must not be considered for parole for a period of up to 10 years (restricted prisoner declaration).
>
> The new framework sets a higher threshold for the granting of exceptional circumstances parole to prisoners subject to a restricted prisoner declaration, given the seriousness of their crimes and the ongoing impact they have on victims' families and friends, as well as the broader community.

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15 See s 180(2)(c).

16 See s 193AA(4).

17 *Police Powers and Responsibilities and Other Legislation Amendment Bill 2021* (Qld).

> Where a restricted prisoner declaration is not made, the new framework creates a presumption against parole, thereby placing the onus on the prisoner to demonstrate they do not pose an unacceptable risk to the community.
>
> These measures are designed to reduce the re-traumatisation of victims' families, while protecting the community and ensuring confidence in the parole process."

[19] Although not expressly adverted to, it might reasonably be inferred that the potential for "re-traumatisation of victims' families" could arise either from the actual release of the prisoner on parole *or* from the need to contemplate their potential release, as a consequence of successive applications for parole (if not at first successful). Although, having regard to s 175H(2)(c), the emphasis seems to be on the potential impact of a prisoner's release. On either basis, as already noted, it is apparent that the provision for a "restricted prisoner declaration" creates an additional hurdle for particular prisoners (restricted prisoners) who wish to apply, or who have applied, for parole. But the process of considering whether such a declaration ought to be made is not part of the process of dealing with the parole application itself.

Factual context

[20] The applicant became eligible for parole on 1 July 2019. In anticipation of that date, he made an application for parole in February 2019. The application was initially refused, but was then the subject of review, submissions and further consideration by the board – particularly in the context of the search for appropriate supported accommodation – over a lengthy period of time. The application had not been finally determined before the new provisions in relation to "restricted prisoners" commenced. The board met to further consider the application on 20 December 2021. As the applicant was now a "restricted prisoner", his application was deferred whilst the respondent considered whether to make a restricted prisoner declaration.

[21] The chief executive (that is, the Commissioner of Corrective Services) provided a restricted prisoner report in December 2021. Dr Sundin, psychiatrist, provided a risk assessment report dated 18 April 2022. She also met with the respondent on 24 May 2022. Earlier reports had been provided to the board when it was considering the applicant's parole application, by another psychiatrist, Dr Kovacevic, in July 2019 and February 2020. In August 2022, the respondent sent a detailed letter to the applicant, outlining the information required by s 175G(3). The applicant, by his legal representative, provided submissions in response.

[22] The applicant emphasises that, in his July 2019 report, Dr Kovacevic said:

> "Based on the structured risk assessment HCR-20, [the applicant] presents as a relatively moderate to high risk of future violence and re-offending, however, as stated earlier in this report, a number of static or historical risk items have diminished in relevance over time, lessening the likelihood of future violence. The ratings on clinical risk items are presently low, which is an indication of a relatively low current risk in the custodial environment. On the other hand, the majority of future risk management items are considered partially or definitely present, indicating potential problems should he be released on parole. Such a

> constellation of risk management items would require careful attention to [the applicant's] community placement, psychological management and a development of a risk management plan. It is of concern that he has no suitable accommodation and that he has limited alternatives in this regard. He has no well-formulated plan to engage with professional interventions and his personal support is tenuous. It cannot be assumed that his improved ability to manage stress and cope in custody would be immediately transferrable to the community environment and therefore a close attention should be paid to potential stressors and destabilizing factors, and in particular his living circumstances.
>
> My overall impression however is that with appropriate psychological treatment and parole supervision [the applicant] could be successfully transitioned into the community and, subject to the approval of his accommodation, his release on parole could be supported from a psychiatric perspective."[18]

[23] In his February 2020 follow up report, Dr Kovacevic said that, if released, the applicant would require level 3 supported accommodation with 24 hour staff presence and assistance.

[24] From Dr Sundin's April 2022 report, the applicant emphasises:

(a) That, using the same instrument, HCR-20, Dr Sundin said the applicant "is at moderate risk for future physical violence". However, she also said that "his institutional record suggests that the actual future risk of violence is moderate to low". Dr Sundin also said that:

> "His risk for future violence is not a product of a treatable psychiatric condition. It arises from inherent factors and as opined by Dr Kovacevic the circumstances which lead to the double homicide are unlikely to be repeated. Nonetheless, [the applicant's] insight remains reduced and his acceptance of responsibility for the offences is suboptimal given that he still opines that the victims in part deserved what happened."

(b) Dr Sundin went on to say:

> "My concerns with respect to future community management of any risk posed by [the applicant] reflect his poorly developed plans for transitioning into the community, his poor problem solving skills combined with his lack of appreciation of the likely difficulties he will face upon release, and his lack of any treatment for sexual offending.
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> …
>
> Should the Board be minded to place him in the community I recommend that he requires very close supervision including GPS monitoring, disclosure clauses and a requirement for

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18 Underlining added.

> abstinence from disinhibiting intoxicants. Attendance at a forensic psychologist to treat his sexual deviance, monitor for signs of emotional instability and to assist with development of pro-social coping strategies would be beneficial.
>
> …
>
> Should the Board be minded to parole [the applicant], the risk for either physical or sexual violence is not imminent. Rising emotional distress/collapse, impulsive behaviours, expressions of anger or resentment and any use of disinhibiting substances would be signs of heightened risk for recidivism."[19]

[25] The applicant also emphasises that, whilst Dr Sundin had expressed concerns about the applicant's accommodation and poorly developed plans for transition to the community, upon being advised that he had an offer of level 3 accommodation, and NDIS support for the community transition, she advised the board on 10 June 2022 that:

> "Given the accommodation issues and transition issues have been resolved, the concerns I raised in my report concerning risk management have been addressed.
>
> This makes me more sanguine in recommending parole to the Board under the usual high level monitoring conditions."

[26] Although a week later, on 17 June 2022, the board was advised that the accommodation provider would not accept the applicant, due to his history of violent offending; that position was later reversed, in November 2022, when the provider advised that it would be supportive of housing the applicant, and would place him on a waiting list.

The decision

[27] On 3 March 2023, the respondent made a restricted prisoner declaration about the applicant. He provided reasons for his decision on 17 March 2023.

[28] The reasons first address the nature, seriousness and circumstances of the relevant offences,[20] including by noting the following:

> "1. The prisoner met the male deceased when they were prison inmates. They were friends in prison and within weeks of the prisoner's release in 1999, he contacted the male deceased who was in the community and met his mother on a number of occasions. He was later introduced to his girlfriend and invited them to stay at his father's house with him for a period of time or until his father returned from hospital.
>
> 2. Within three weeks of the prisoner's release from custody, he killed them. The male deceased was 40 years old, and the female was 29 years old. The prisoner was 37 years old.

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19 Underlining added.

20 See s 175H(2)(a).

3. Their bodies were found in bushland off to the side of Mt Nebo, close to the suburb of The Gap by a family out for a drive. They died from severe head wounds and their identification was made through fingerprints.

…

5. The prisoner pleaded guilty to the murders before Justice Ambrose on 23 May 2002. His Honour's comments capture the seriousness and heinousness of the prisoner's crime when he said:

> *'... The crime was exceptionally violent and brutal. You approached two people with your axe, as they slept in bed. They were asleep. You then killed – substantially, you applied force which killed one while in bed and the other one, the lady, jumped out of bed trying to save her life, but you followed her and killed her with a blow to the head. You then set about to clean up the premises over the next few days and removed the bodies and dropped them on the side of the road in the mountains to the west of Brisbane ...'*

6. I have detailed the full extent of the prisoner's offending in the written notice which further demonstrates the atrociousness of his crime. I consider it important to note the following matters:

    - The prisoner killed his housemates.
    - He attacked them with an axe while they were asleep.
    - They were startled and defenceless after he struck them to the head.
    - His attack was persistent.
    - He dumped their bodies in a location a distance from his home and in furtherance of his crimes, he set fire to the male deceased's vehicle."

[29] The reasons then turn to the next relevant consideration, "any risk the prisoner may pose to the public if the prisoner is granted parole",[21] and include the following:

> "11. The prisoner's legal representatives have submitted that the central issue for me to consider is the prisoner's risk to the community within the meaning of s 175H(2)(b) and it is submitted that the relevant test is whether his risk is unacceptable. This submission cannot be accepted because in my view, it is erroneous. First, my reasons below clearly indicate the prisoner poses a risk of violence and sexual violence to the public. Second, in the case when a prisoner is not subject to a declaration there is a presumption against parole which requires the parole board to refuse parole unless satisfied the prisoner does not pose

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[21] See s 175H(2)(b).

an unacceptable risk to the public. Section 193AA of the Act provides as follows:

> ***193AA Deciding parole applications – restricted prisoner***
>
> *(1) This section applies in relation to a restricted prisoner's application for a parole order.*
>
> *...*
>
> *(4) If the application is deferred under subsection (2)(b) and the president makes a restricted prisoner declaration about the prisoner, the application is taken to have been refused by the parole board on the day the declaration is made.*
>
> *(5) If a restricted prisoner declaration is **not in force** for the prisoner, the parole board must refuse to grant the application **unless the board** is satisfied the prisoner **does not pose an unacceptable risk to the public**.*
>
> (my emphasis)

12. Pursuant to s 193AA(5), in the situation where a declaration is not made, there is a presumption against parole with the onus on the prisoner to demonstrate to the parole board that he does not pose an unacceptable risk to the community. It is not for me to consider here whether any parole conditions or any other factors may mitigate his risk. However, I will make some comment in response to the submissions from the prisoner's legal representatives in relation to plans for release in the community, which have been the primary focus of their submission.

13. In considering the public interest, I have had regard to any risk the prisoner may pose to the public if he is granted parole. I have had regard to the opinions and assessments of experienced consultant psychiatrists who have examined the prisoner from 2000. I rely on the information provided in psychiatric reports, the evidence given in the Mental Health Tribunal and verbal information provided to me."[22]

[30] The respondent referred to the reports and opinions of various psychiatrists who had examined the applicant over the years, including in the context of earlier Mental Health Tribunal proceedings. He also referred to more recent risk assessments undertaken by Dr Kovacevic and Dr Sundin; placing particular emphasis on the opinions and conclusions made by Dr Sundin, "due to the recency of her assessment of the prisoner and the access she had to material and information from all previous psychiatrists who have examined him" (at [27]). After referring at some length to the information provided by Dr Sundin, the respondent said:

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22 Underlining added. References omitted.

"35. Dr Sundin advised me that it is difficult to assess the prisoner's risk. She informed me,

> *'He shows none of the characteristics which might help in risk prediction in that he doesn't have a severe personality disorder, he doesn't meet criteria for psychopathy, and he doesn't have a major mental illness in the form of a psychotic disorder, for example.'*

and

> '*…I think that's one factor [lack of judgment] that you should consider as President of the board. I think that the great difficulty for yourself and the board with respect to this man is what I would call the known unknowns. There are a lot of factors which would ordinarily help in a violence risk assessment, which are just too obscure in this man to be highly confident of any risk assessment. It is, it was and is an unusual story. It was and is an unusual killing, in a man who had an absence of history of violence, it was a prolonged, vicious attack, which he then sought to cover up.'*

36. The most up to date psychiatric information provided to me indicates that the prisoner:

- presents with a moderate to high risk of violent re-offending;
- has an above average risk of sexual violence;
- has outstanding treatment needs;
- lacks insight; and
- lacks judgment.

37. Given the above and considering all information and material before me, I am satisfied that there is a risk the prisoner may pose to the public if he is granted parole."

[31] Finally, the respondent addressed the likely effect the applicant's release on parole may have on an eligible person or victim,[23] concluding by saying:

"41. I have had regard to the vicious circumstances in which the prisoner killed the deceaseds and to the submissions and statements provided by family members, together with information provided to me by Dr Sundin regarding the likely effect the prisoner's release on parole may have on them. On the material before me I am of the view that it is likely that releasing the prisoner on parole may result in the eligible persons or victims

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[23] See s 175H(2)(c).

> re-experiencing the trauma they suffered when the prisoner murdered their family members nearly 24 years ago."

[32] The respondent was satisfied it was in the public interest to make the declaration. He considered the period of three years and six months was warranted having regard to the:

- Brutality inflicted on the unsuspecting victims while they were asleep and the continued and persistent attack upon them after they awoke;
- Risk of violence and sexual offending that the prisoner may pose to the public if released on parole; and
- Ongoing effects of re-traumatisation to eligible persons or victims if the prisoner is released on parole, further amplified by likely coverage of the murders in the media. ([43])

The contended error

[33] The applicant seeks to review the decision of the respondent to make a restricted prisoner declaration, on the ground that his decision involved an error of law. The error is said to arise from a misconstruction of s 175H(2)(b) of the Act, by interpreting that section as not requiring consideration of whether parole conditions or any other matters would mitigate the applicant's risk. This error is said to be demonstrated by the underlined sentence in paragraph 12 of the respondent's reasons (set out above), where the respondent said that "[i]t is not for me to consider here whether any parole conditions or any other factors may mitigate his risk".

[34] The applicant also submits that the respondent's reasons, at [36], contain an error – in that the "most up to date" psychiatric information was not that the applicant presented with a moderate to high risk of violent reoffending. The applicant says the most recent risk assessment was the one carried out by Dr Sundin in 2022, which concluded that he posed a moderate, or even moderate to low risk of violent reoffending; the reference to "moderate to high" came from the earlier assessment of Dr Kovacevic, in 2019. The applicant does not, however, suggest that this is a reviewable error. The respondent says there is no error at all; that when looked at more broadly, all the evidence of Dr Sundin, including the interview she had with the respondent, taken with the recent evidence of Dr Kovacevic, supports the statement in the reasons at [36]. I accept the respondent's submissions in this regard.

[35] Returning to the question of construction, the applicant submits that, having regard to the context of the provision, the words "risk the prisoner may pose to the public if the prisoner is granted parole" in s 175H(2)(b) refer to the risk that the prisoner may pose if released on a parole order subject to any conditions imposed by the parole board under s 200 of the Act. The applicant submits that:

> "Taking that risk into account necessarily requires consideration of the effects that the conditions of any parole order may have on mitigating that risk. Without consideration of that effect then, the 'risk the prisoner may pose to the public if the prisoner is granted parole' is not taken into account. Instead, what is taken into account is the risk that

> the prisoner may pose to the public if the prisoner is released *other than* by grant of parole.
>
> … the Respondent was in error in treating the consideration required by s 175H(2)(b) of the CS Act as a binary question that does not involve consideration of the effect that any parole conditions might have on the Applicant's risk. Section 175H(2)(b) requires the President to 'have regard to … any risk the prisoner may pose to the public if the prisoner is granted parole'. Having regard to that risk does not merely involve answering the binary question whether or not there is a risk. Necessarily, it involves consideration of the factors that contribute to that risk as well as the mitigating effects that parole conditions will have on that risk. Otherwise, the risk, if the prisoner is granted parole, is not considered."

[36] The applicant submits that what s 175H(2)(b) calls for is a qualitative assessment of the risk the particular prisoner poses, having regard to the effect of parole conditions on that risk. In essence, the applicant submits the words "if the prisoner is granted parole" import a requirement to consider the effect of a notional set of parole conditions. He submits the respondent did not undertake that assessment, and merely considered whether he posed a (any) risk to the public if granted parole, as though there were a binary choice between "a risk" and "no risk".

[37] The applicant accepts, however, that the respondent correctly rejected the submission that s 175H(2)(b) requires consideration of whether the risk the prisoner may pose is "unacceptable", because that question arises "at a different stage", namely, if the restricted prisoner declaration is *not* made, and the application for parole is being considered (see s 193AA(5)).

[38] The respondent submits that he made no error as contended. In so far as the underlined sentence in paragraph 12 of the reasons is concerned, the respondent submits that is properly to be understood as part of the explanation for rejecting the submission then made by the applicant's legal representatives (that the relevant test is whether the prisoner's risk is unacceptable), rather than as a separate standalone statement. More broadly, the respondent submits that in exercising the power under s 175H, the president is not considering or determining a parole application. The "touchstone" of the discretionary power conferred by s 175H is the public interest, and each of the considerations in s 175H(2) must be viewed in that context, which is necessarily broader than the context of a parole application. The respondent submits that the words "if the prisoner is granted parole" in s 175H(2)(b) mean no more than "if in the community", so that what the president is required to consider, under the overarching consideration of what is in the public interest, is any risk the prisoner may pose to the public if released from custody into the community. In any event, the respondent submits, having addressed the applicant's submission in paragraphs 11 and 12, he nevertheless went on to address the submissions made as to the applicant's amenability to supervision in the community and the availability of accommodation, which were the focus of the applicant's submissions before him.

Determination of the application

[39] As is well-established, the task in construing a statute is to ascertain the intended meaning of the words used, a process which must be undertaken having regard to the context for the provision – which may include surrounding statutory provisions, extrinsic materials, the legislative history and the general purpose and policy of the provision, in particular the mischief which it is intended to remedy.[24]

[40] Applying these principles to the construction of s 175H(2)(b), in my view the respondent's argument should be accepted. It strains the language of s 175H(2)(b) to read the words "is granted parole" as though they meant "is granted parole on certain conditions" or "is granted parole on particular conditions", importing a requirement for the president to analyse the effect of a possible set of parole conditions in considering "any risk the prisoner may pose to the public if the prisoner is granted parole", which is the effect of the applicant's submission. The words should be understand as meaning that what the president must consider is "any risk the prisoner may pose to the public" if granted conditional release into the community.

[41] Parole is the only circumstance in which a restricted prisoner – that is, one serving a life sentence of imprisonment – may be released into the community. Accordingly, it is rational to read the reference to "is granted parole" as a reference to a grant of conditional release, in the broad sense. Whilst the word "parole" necessarily incorporates the concept of "conditional release" – as opposed to unconditional release, for example, in the case of a prisoner who is released after serving the whole of a fixed period of imprisonment – the word itself does not necessarily incorporate a requirement to consider a particular set of possible conditions.

[42] This point is made plain by the decisions of the Court of Appeal in *Queensland Parole Board v McGrane* [2014] QCA 193 and *Queensland Parole Board v Pangilinan* [2016] 1 Qd R 419, in the context of the board's task of considering a parole application. In *McGrane*, for example, it was held that the board was not required to undertake the task of fashioning conditions for parole, and considering what impact those conditions would have on the prisoner's risk of re-offending, in circumstances where it was open on the evidence for the board to form the view that the prisoner posed an unacceptable risk to the community if released from prison at that time, without having had a graduated release through a low security custodial facility. On the facts in *Pangilinan,* the court took the view that it was relevant to consider the possible imposition of conditions of parole, in determining the parole application. But what those cases demonstrate is that one cannot construe the word "parole" necessarily as incorporating a requirement for consideration of a possible set of conditions. Whether that is required will depend on the particular circumstances of the case.

[43] The construction of the words of s 175H(2)(b) in the manner contended by the respondent is also supported having regard to the context of the provision. Section 175H(2)(b) is one of the mandatory considerations for the making of a decision, in the exercise of a discretionary power to be exercised in the public interest, as a precursor to any consideration of a parole application, the effect of which is to place an additional barrier in the way of an application for parole. The expressed purpose of the relevant provisions is to limit the re-traumatisation of victims' families and friends, as well as to

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[24] *R v A2* (2019) 269 CLR 507 at 520-522 [32]-[37] per Kiefel CJ and Keane J; see also *Armitage v Parole Board Queensland* [2023] QCA 239 at [26]-[27] per Flanagan JA (Mullins P and Boddice JA agreeing).

protect the community from harm. In that context, a broader approach to the consideration of "any risk" posed by the prisoner, if granted parole, is appropriate.

[44] Reading paragraphs 11 and 12 of the reasons together, fairly,[25] the underlined sentence in paragraph 12 is clearly part of the respondent's explanation for rejecting the applicant's submission as to the relevant test (which, as noted, is now accepted as incorrect). The respondent is to be understood as saying, correctly, that he is not considering whether the prisoner "does not pose an unacceptable risk to the public", and in that context it is not for him to consider whether any parole conditions or any other factors may mitigate the risk posed by this particular applicant. The respondent is not to be taken as saying that it is not relevant, as part of considering "any risk the prisoner may pose to the public if [he] is granted parole", to consider the evidence as to the assessment of that risk – and in fact, the following paragraphs of his reasons demonstrate that he did just that.

[45] Nor do the reasons suggest the respondent approached the consideration of risk for the purposes of s 175H(2)(b) in a "binary way" – as though there were only two choices, a risk or no risk. That too is apparent from reading the reasons as a whole, which include a comprehensive consideration of the various assessments of the applicant undertaken by a number of psychiatrists, with a particular emphasis on the evidence of Dr Sundin, being the most recent. That was appropriate, for a consideration of "any risk the prisoner may pose to the public if [he] is granted parole" (s 175H(2)(b)) must necessarily be informed by such material. That is not the same thing as saying that the consideration of risk, for the purposes of this subsection, necessitates consideration of the effect of a particular set of possible parole conditions.

[46] The question of risk to the public if the prisoner is granted parole is one of three considerations the president must take into account in deciding whether to make a restricted prisoner declaration. The weight to be given to each of those factors in the circumstances of any particular case is a matter for the president, in the exercise of the discretionary power conferred on him, as part of a balancing exercise. As submitted by the respondent, it is possible that, in a particular case, the risk to the public may be low, yet the nature, seriousness and circumstances of the offence(s) and the likely effect that the prisoner's release on parole may have on the victims' family may be such that warrants the making of the declaration, in the public interest. This is apparent from the purpose of the provision. The discretion conferred on the president by the "restricted prisoner declarations" provisions is one to be exercised in the public interest, as a separate step antecedent to consideration of any parole application, for the express purpose of limiting re-traumatisation of victims' families *and* community protection. To restrict the meaning of s 175H(2)(b), in the manner contended for by the applicant, strains the language which has been used and is not consistent with the purpose of the provision in its context.

[47] The applicant relied upon the underlined sentence in paragraph 12 to demonstrate error in the construction of s 175H(2)(b). No such error was made. Nor is the contended error demonstrated in any other way on the face of the reasons. The application will therefore be dismissed.

Costs

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25 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272.

[48] At the hearing, the respondent indicated that he would not seek costs against the applicant in the event the application was unsuccessful.

[49] However, it remains necessary to consider the question of costs because the applicant seeks an order under s 49(1)(d) of the *Judicial Review Act 1991* (Qld) that the respondent indemnify him in relation to the costs properly incurred by him in this proceeding.

[50] In considering such an application, s 49(2) instructs that the court is to have regard to:

(a) the financial resources of the applicant;

(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and

(c) whether the proceeding discloses a reasonable basis for the review application.

[51] Those factors are not exhaustive. Another relevant consideration is the manner of disposition of the review application.[26] Subject to s 49, the ordinary rules regarding costs under the *Uniform Civil Procedure Rules 1999* apply (s 49(4)). Relevantly, that includes r 681, which provides that costs are in the discretion of the court, but follow the event unless the court orders otherwise.[27]

[52] As to (a), it may readily be accepted that the applicant is impecunious. He has been assisted in the proceeding by the Prisoners' Legal Service, on referral from Legal Aid Queensland. As to (b), it could be said the proceeding has involved an issue that affects the public interest, given that it is the first time the question of construction of these new provisions has come before the court. As to (c), it is fair to say the application was arguable; but it has ultimately failed.

[53] Factors (a) and (b) support the approach taken by the respondent – not to seek an order for costs against the applicant, notwithstanding the application has failed. However, in that circumstance, on balance, I am not persuaded that it is appropriate to order that the respondent indemnify the applicant in relation to his costs of the proceeding. It seems to me that the circumstances justifying such an order, requiring the successful party to pay the unsuccessful party's costs, must require something more compelling.

[54] I will therefore order that:

(1) The application is dismissed.

(2) Each party bear their own costs of the proceeding.

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26 *Burragubba v Minister for Natural Resources and Mines (No 2)* [2017] QSC 265 at [14].

27 Ibid, at [15].