In the matter of

CLIVE ANTHONY NICHOLSON

(Applicant)

SECTION 193A *CORRECTIVE SERVICES ACT 2006*

PROCEEDING:	An application for parole; objection by Commissioner of Police
DELIVERED ON:	19 June 2019
DELIVERED AT:	Brisbane
HEARING DATE:	7 June 2019
CHAIRPERSON:	Mr Michael Byrne QC, President of Parole Board Queensland
DECISION:	The Board dismisses the objection.

Parole Board | Queensland

Application for parole order where the victim's body or remains have not been located

[1] Clive Anthony Nicholson ('the applicant') has applied for parole pursuant to s 180 of the *Corrective Services Act 2006* (Qld) ('CSA').

[2] The applicant is serving a sentence of life imprisonment for murder.

[3] The body or remains of the victim of the murder offence have not been located.[1]

[4] As the offence of murder is a homicide offence within the meaning of s 193A(8)(a)(iii) of the CSA, the Parole Board Queensland ('the Board') must refuse to grant the application for parole unless it is satisfied that the applicant has cooperated satisfactorily in the investigation of the offence to identify the victim's location.[2]

<u>Application of s 193A of the CSA</u>

[5] Section 193A(7)(a) of the CSA provides that, in determining whether the applicant has '*cooperated satisfactorily'* in the investigation of the offence to identify the victim's location, the Board must have regard to:

(i) a written report of the Commissioner of Police stating whether the applicant has cooperated in the investigation of the offence to identify the victim's location and, if so, an evaluation of:[3]

a) the nature, extent and timeliness of the applicant's cooperation; and

b) the truthfulness, completeness and reliability of any information or evidence provided by the applicant in relation to the victim's location; and

c) the significance and usefulness of the applicant's cooperation; and

(ii) any information the Board has about the applicant's capacity to give the cooperation; and

(iii) the transcript of any proceeding against the applicant for the offence, including any relevant remarks made by the sentencing court.

[6] Further, s 193A(7)(b) of the CSA provides that the Board may have

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[1] *Corrective Services Act 2006* (Qld) s 193A(1).
[2] *Corrective Services Act 2006* (Qld) s 193A(2).
[3] *Corrective Services Act 2006* (Qld) s 193A(7)(a) read in conjunction with s 193A(6).

regard to any other information the Board considers relevant.

Standard of proof[4]

[7] The process of the Board's decision making under s 193A of the CSA is not adversarial. No onus is cast on the prisoner or the Board in making the determination. Arguably, if there is no onus of proof then there can be no standard of proof (which would be the ordinary standard in civil matters; on the balance of probabilities).

[8] The Board is to consider whether it is satisfied the prisoner has cooperated satisfactorily, and the findings of fact will be those that the Board considers necessary for it to make its decision in this regard. In doing so, the Board is to act fairly (including as to processes) and with common sense, and to inform itself by reference to relevant and probative information so as to draw conclusions on matters in issue to its comfortable satisfaction. The Board is to be cognisant of the seriousness of the findings to be made, including with regard to the gravity of the consequences of its decision[5] under s 193A of the CSA and may, depending upon the issue, express greater caution in evaluating the factual foundation for the conclusion to be reached on that point.

Background to the objections by the Commissioner of Police

[9] Under the statutory scheme of the '*no body no parole'* provisions a critical starting point is contained in s 193A(6) of the CSA which provides –

> *The commissioner must comply with the request by giving the parole board, at least 28 days before the proposed hearing day, a written report that states whether the prisoner has given any cooperation as mentioned in subsection (2) and, if so, an evaluation of—*
>
> *a) the nature, extent and timeliness of the prisoner's cooperation; and*
>
> *b) the truthfulness, completeness and reliability of any information or evidence provided by the prisoner in relation to the victim's location; and*
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> *c) the significance and usefulness of the prisoner's cooperation.*

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[4] *Sullivan v Civil Aviation Safety Authority* (2014) 322 ALR 581 at [60]-[62], [98]-[122]; *Kyriackou v Law Institute of Victoria Ltd* (2014) 45 VR 540 at [22]-[30]; *Karakatsanis and Another v Racing Victoria Ltd* (2013) 42 VR 176 at [29]- [40]; *Bronze Wing International Pty Ltd v Safework NSW* [2017] NSWCA 41 at [15], [122]-[127]; *Neat Holdings Pty Ltd v Karajan Holdings ty Ltd and Others* (1992) 67 ALJR 1; *MZZZW v Minister for Immigration and Border Protection* [2015] FCAFC 133 at [58].

[5] In the present case an adverse finding by the Board in relation to the applicant's cooperation has the potential consequence of the applicant spending the remainder of his life in prison.

[10] The legislation then goes on to provide in s 193(A)(7) that –

In deciding whether the parole board is satisfied about the prisoner's cooperation as mentioned in subsection (2), the board—

a) must have regard to—

(i) the report given by the commissioner under subsection (6); and

(ii) any information the board has about the prisoner's capacity to give the cooperation; and

(iii) the transcript of any proceeding against the prisoner for the offence, including any relevant remarks made by the sentencing court; and

b) may have regard to any other information the board considers relevant.

[11] In the present case the Commissioner of Police ('Commissioner') gave two reports for the Board under s 193A(6). Both were adverse to the applicant having cooperated satisfactorily in the investigation of the offence to identify the victim's location.[6]

[12] The nominated police officer submitting the reports, which then came to the Board under the hand of the Commissioner, was Detective Senior Sergeant Christopher Knight.

[13] The applicant was legally represented by Legal Aid Queensland and the Board granted leave to counsel instructed by Legal Aid Queensland to appear before the Board at the hearing of the application on 7 June 2019.[7]

[14] At the request of the applicant's legal representatives the Board issued an attendance notice[8] to Detective Senior Sergeant Knight to attend the hearing on 7 June 2019.

[15] On the afternoon of 6 June 2019 the Board received correspondence from the Commissioner which stated, in part –

I write to you seeking clarification as to the purpose of the Board's requirement for Detective Senior Sergeant Knight to attend the meeting and provide relevant information to the Board.

The Queensland Police Service (QPS) does not take objection to Detective Senior Sergeant Knight attending the parole meeting and providing relevant information if asked by the Board or a member of the Board itself and the information is within his knowledge. However, the QPS does object to any intention by the Board to allow another party to the parole application to put questions to Detective Senior Sergeant

[6] *Corrective Services Act 2006* (Qld) s 193A(2).

[7] *Corrective Services Act 2006* (Qld) s 189, 190.

[8] *Corrective Services Act 2006* (Qld) s 219.

Knight requiring him to give information.

If a party to the parole application wishes to clarify matters provided in the report under the hand of Detective Senior Sergeant Knight, it would be appropriate for the party to provide the issues/questions to the Board. If the Board considered the issues/questions were relevant information, the Board could then ask Detective Senior Sergeant Knight for the relevant information.

The QPS' view is the Act does not provide for a Board meeting to take evidence on oath or otherwise. In addition, the Act does not provide for a party to a parole application at a Board meeting to examine or cross-examine or ask questions of a person, whether or not their attendance has been required by way of an attendance notice.

[16] The Board consented to counsel for the Commissioner appearing before the Board on 7 June 2019.

[17] As the Board understands, the objection relating to Detective Senior Sergeant Knight is that s 219 of the CSA allows the Board to ask questions but not an agent for an applicant even if the Board requires the witness to answer such questions.

[18] Counsel for the Commissioner further submits that it would however be permissible for the applicant or their agent to submit potential questions of a witness to the Board and then for the Board to put such questions to the witness.

[19] The Board rejects both the primary objection and the quite artificial and cumbersome procedure proposed by counsel for the Commissioner.

Discussion

[20] The starting point for consideration is that the Board has wide discretionary powers to allow the full and impartial ascertainment of facts and to afford fairness to the applicant. In the present case, the potential adverse consequence to the applicant amply serves to demonstrate that imperative.

[21] In this regard, the CSA confers the power and discretion in wide terms. Relevantly, reference may be made to –

218 Powers generally

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

230 Conduct of business

Subject to this division, the parole board may conduct its business, including its meetings, in the way it considers appropriate

[22] Accordingly, the Board has formed the view that fairness to the applicant in this case includes allowing counsel for him to ask questions, if necessary, in the form of cross-examination of the author of the adverse statutory report by the Commissioner.[9]

[23] Reference may be made to the authors' commentary regarding the rationale for the doctrine of natural justice in Control of Government Action: Texts, Cases and Commentary 5th Edition 2019 –

> *The procedural rigour involved in conducting a hearing and projecting an air of impartiality is also likely to make the decision-maker more diligent and objective in reaching a decision. When there is a full and impartial consideration of all relevant issues, it is also more likely that there will be public confidence in the decision-making process and the correctness of the decisions. Many administrative decisions adversely affect the property, livelihood and other interests of individuals, and it is appropriate that a modified form of court process – a fair hearing, conducted by an impartial decision-maker, who acts upon probative material – should apply to those functions of government. Finally, the idea of providing people with an opportunity to be heard before a decision affecting them is made is said to reflect basic notions of fairness and respect for human dignity.*[10]

[24] In *McGrane v The Queensland State Parole Board*[11] it was said –

> *The Act gives the respondent a broad discretion in deciding whether to grant or refuse an application. Its terms are unconfined as are the facts relevant to the exercise of that discretion. In McQuire v South Qld RCCB*[12]*, White J (as her Honour then was) observed:*
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> > *There are no express criteria for application by a Board when considering an application for post-prison release. The discretion is unconfined except as the matter and scope of the statutory provisions will dictate what it is that must be kept in mind. An object of the Corrective Services Act 2000 is for 'community safety and crime prevention through humane containment, supervision and rehabilitation', s 3(1). The interests of the public must be a necessary aspect of any decision to grant release.*

[25] Finally, in this regard, one can appreciate the salutary lesson in the words of Megarry J[13] where his Honour said –

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[9] *Ramsay v Australian Postal Commission* (2005) 147 FCR 39 at 47, per Spender J: "*While a right to cross-examination is not necessarily recognised in every case as an incident of the obligation to afford procedural fairness, the right to challenge by cross-examination a deponent whose evidence is adverse, in important respects, to the case a party wishes to present, is.*"

[10] Robin Creyke, Matthew Groves, John McMillan, Mark Smyth, *Control of Government Action: Text Cases and Commentary* (Lexis Nexis Butterworth, 2019) at 647 [11.1.12].

[11] [2012] QSC 350 at [15].

[12] [2003] QSC 414 at [28].

[13] *John v Rees* [1969] 2 All ER 274 at 309.

It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. 'When something is obvious' they may say, 'why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start.' Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded an opportunity to influence the course of events.

[26] It follows that the Board rules that it has power to conduct the hearing by allowing counsel for the applicant to play an active role and that it is necessary and convenient to do so.

Taking Evidence

[27] As earlier set out in paragraph [15] the Commissioner also made the submission that –

The QPS' view is the Act does not provide for a Board meeting to take evidence on oath or otherwise.

[28] Under the CSA the Board may "*have regard to any other information the Board considers relevant*"[14] *and "may defer making a decision until it obtains any additional information it considers necessary to make the decision."*[15]

[29] For the reasons stated earlier the Board is of the view that ss 218 and 230 allow the Board to take evidence, whether that be on oath or otherwise.

[30] Further, as pointed out to counsel for the Commissioner by the Board, s 27 of the *Acts Interpretation Act 1954* (Qld) ('AIA') specifically empowers the course here proposed, it provides –

27 Power to hear and determine includes power to administer oath

A person or body authorised by law, or by consent of parties, to conduct a hearing for the purpose of the determination (by that or another person or body) of any matter has authority—

a) to receive evidence; and

[14] *Corrective Services Act 2006* (Qld) s 193A(7)(b).
[15] *Corrective Services Act 2006* (Qld) s 193(2).

> b) *to examine witnesses, and to administer oaths to witnesses, who have been lawfully called before the person or body.*

[31] As best as the Board can understand the submission by counsel for the Commissioner against the application of s 27 of the AIA is that it does not apply given that s 230 of the CSA refers to "*meeting*" rather than "*hearing*".

[32] The Board rejects that submission and observes that while the terms "*hearing*" and "*meeting*" are not defined in either the CSA or AIA; the Macquarie Dictionary has defined the term "*hearing*" to include "*opportunity to be heard*"[16] and "*meeting*" as "*an assembling, as of persons for some purpose*." In other words, in the present matter the Board is conducting a hearing within the meaning of s 27 of the AIA.

[33] In addition, under the CSA, the procedure for parole applications, both "*standard*" as well as "*no body no parole*" fall within Division 2 of Chapter 5 which is titled –

> *'Hearing and deciding application for parole order'*

[34] Further, for the purposes of the present application, s 193A(5) – (6) of the CSA both refer to the "*hearing day*" for the application.

[35] The Board finds that s 27 of the AIA is applicable to the hearing and determination of applications for parole pursuant to s 193A.

<u>Conclusion</u>

[36] The objections of the Commissioner lack merit and are dismissed.

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[16] See *Corrective Services Act 2006* (Qld) s 189(1).