Federal Court of Australia

DYS21 v Attorney-General (Cth) [2021] FCA 1331

|  |  |
| --- | --- |
| File number: |  |
|  |  |
| Judgment of: | **BROMWICH J** |
|  |  |
| Date of judgment: | 1 November 2021 |
|  |  |
| Catchwords: | **ADMINISTRATIVE LAW** – application for judicial review of Commonwealth Attorney-General’s decision to refuse to grant parole – whether the making of the decision was an improper exercise of the power conferred or a jurisdictional error occurred in connection with the making of the decision – held: decision set aside by reason of improper exercise of power and corresponding jurisdictional error. |
|  |  |
| Legislation: | *Administrative Decisions (Judicial Review) Act 1977* (Cth) ss 5(1)(a), 5(1)(e)  *Crimes Act 1914* (Cth) pt IB div 5 subdiv A, ss 19AKA, 19AL(1)  *Criminal Code*(Cth), contained in the Schedule to the *Criminal Code Act 1995* (Cth) ss 474.19(1)(a)(iiii), 474.20(1)  *Judiciary Act 1903* (Cth) s 39B |
|  |  |
| Cases cited: | *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352  *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576  *Khazaal**v Attorney-General (Cth)* [2020] FCA 448  *Lodhi v Attorney-General (Cth)* [2020] FCA 1383  *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 |
|  |  |
| Division: | General Division |
|  |  |
| Registry: | New South Wales |
|  |  |
| National Practice Area: |  |
|  |  |
| Number of paragraphs: | 41 |
|  |  |
| Date of hearing: | 1 October 2021 |
|  |  |
| Counsel for the Applicant: | G Lewer |
|  |  |
| Solicitor for the Applicant: | JE Justice Legal |
|  |  |
| Counsel for the Respondent: | T Glover |
|  |  |
| Solicitor for the Respondent: | Australian Government Solicitor |

ORDERS

|  |  |  |
| --- | --- | --- |
|  | | NSD 717 of 2021 |
|  | | |
| BETWEEN: | DYS21  Applicant | |
| AND: | ATTORNEY-GENERAL OF THE COMMONWEALTH  Respondent | |

|  |  |
| --- | --- |
| order made by: | BROMWICH J |
| DATE OF ORDER: | 1 november 2021 |

THE COURT ORDERS THAT:

1. The respondent’s refusal of parole decision made on 22 June 2021 be set aside.
2. The respondent reconsider the decision to make, or refuse to make, an order that the applicant be released on parole in accordance with section 19AL of the *Crimes Act 1914* (Cth).
3. The proceeding be adjourned for a case management hearing at 9.00 am on 29 November 2021, or such other date as may be fixed, at which time the respondent:
   1. advise the Court as to whether a decision has been made in accordance with order 2; and
   2. if such a decision has not been made, show cause why an order in the nature of a writ of mandamus should not be made, compelling the respondent to make or refuse to make an order that the applicant be released on parole in accordance with subsection 19AL(1) of the *Crimes Act 1914* (Cth) within a stipulated time, having regard to the terms of that provision.
4. Either party or both parties have leave to approach the associate to Justice Bromwich by email to seek any variation or vacation of order 3.
5. The respondent pay the applicant’s costs of and incidental to the proceeding, including the costs of any future case management hearing.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

BROMWICH J:

## Introduction

1. On 17 April 2019, the applicant, following guilty pleas to federal offences of using a carriage service to solicit child pornography material and of possessing or controlling child pornography material for use through a carriage service contrary to ss 474.19(1)(a)(iiii) and 474.20(1) respectively of the *Criminal Code* (Cth), was sentenced to imprisonment. His aggregate prison sentence was three years and six months, expiring on 16 October 2022, with a two year and three month non-parole period expiring on 16 July 2021.
2. On 22 June 2021 the respondent, the Commonwealth **Attorney-General**, decided in person to refuse the applicant parole. He applies for judicial review of that decision under s 5(1)(a) and (e) of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (***ADJR Act***), alleging an improper exercise of power and a breach of the rules of natural justice, and alternatively under s 39B of the *Judiciary Act 1903* (Cth) by reason of corresponding jurisdictional error.
3. The material that was placed before the Attorney-General revealed that the New South Wales prison authorities, with undoubted expertise in the area of risk management of prisoners, including the use of parole to manage that risk, in substance considered that:
4. there was a low risk of the applicant reoffending during the balance of the term of his prison sentence, necessarily referring to that balance being served on parole in the community; and
5. the grant of parole was essential for the purpose of managing and limiting, and perhaps even practically eliminating, longer term risks to the community by reason of the applicant reoffending after the sentence had been completed when no parole or supervision controls would exist.
6. Despite those views the Attorney-General was entitled, upon being properly informed, to:
7. instead give greater and determinative weight to eliminating the low short term risk of the applicant reoffending during the balance of the term of his prison sentence; and
8. give no determinative weight to parole being used to manage and limit longer term risks to the community.
9. The Attorney-General’s decision was not apparently made on the basis of the differential risk posed by release on parole and release at the end of a sentence with little or no parole having been expressly drawn to her attention. On the material before the Court it seems likely that the Attorney-General was not made aware that this was an important aspect of the decision required to be made. That is because it was not made clear in the covering recommendation memorandum addressed to her, or even in the more detailed analysis of the material provided to her, that this was the view of the New South Wales prison authorities. Instead she was likely to have been actively misled by being told that there was no risk in refusing parole, which could only be true for the balance of the sentence. A key question therefore raised in this proceeding is whether such a fundamental defect in the briefing materials was a legally material deficiency in the information provided to the Attorney-General so as to vitiate her decision to refuse parole as either an improper exercise of power or corresponding jurisdictional error.
10. The applicant raises a narrow judicial review issue, said to involve an improper exercise of power under s 5(1)(e) of the *ADJR Act*; or alternatively a breach of the rules of natural justice under s 5(1)(a) of the *ADJR Act*; or a corresponding jurisdictional error as to either for the purposes of s 39B of the *Judiciary Act*. As counsel for the applicant made abundantly clear, it was not contended that the Attorney-General was in any way compelled to grant parole; but if she refused to do so, the reasons for doing so had to be legally sound and beyond judicial impeachment. In this case, the fault alleged by the applicant lay in the material furnished to the Attorney-General in support of the conclusion reached, said to incurably taint it, rather than any overt error in the reasons given.
11. For the reasons that follow, I am satisfied that a misuse of power and/or jurisdictional error has taken place by reason of material deficiencies in the summary information that was placed before the Attorney-General, in the pleaded sense of the decision lacking an evident and intelligible justification: see *Carrascalao v Minister for Immigration and Border Protection* [2017] FCAFC 107; 252 FCR 352 at [61(a)] and the weighty authorities there cited. That includes the antecedent source authority cited in those cases, such as *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 per Brennan J at 65-66, to the effect that while a Minister may retain power to make a decision while relying on his or her Department to draw attention to the salient facts, if there is a failure in that regard, and the validity of the Minister’s decision depends upon having had regard to such facts, ignorance of those facts does not protect the decision.
12. I am not satisfied that the alternative ground of a denial of procedural fairness has any merit because it arguably seeks to have revealed the mental reasoning processes of the Attorney-General and those advising her: see *Commissioner for Australian Capital Territory Revenue v Alphaone Pty Ltd* (1994) 49 FCR 576 at 591. However, I do not need to finally determine that in light of the applicant’s success for multiple reasons on the related primary ground, any one of which was enough to warrant setting the parole decision aside.

## The legislative scheme for federal parole

1. Part IB, Division 5, Subdivision A of the *Crimes Act 1914* (Cth) provides for the release of federal offenders, inter alia, on parole, with a decision either way being required to be made before the non-parole period for a federal sentence expires. The overall scheme of the legislation is not in doubt: see *Lodhi v Attorney-General (Cth)* [2020] FCA 1383 at [5]-[6].
2. In *Khazaal**v Attorney-General (Cth)* [2020] FCA 448, Wigney J helpfully analysed that statutory scheme as follows at [66]:

The main observation that may be made about the statutory scheme for the making of parole decisions in respect of federal offences is that, unlike the statutory schemes for the grant of parole in many of the States and Territories, there is no prescribed procedure that the Attorney must follow in considering and determining whether to make a parole order. There is certainly no requirement for a hearing, no express requirement for the Attorney to notify the person affected by the decision concerning parole … of any particular information, and no express requirement that the person be given the opportunity to make submissions. There is no doubt, however, that the Attorney must afford procedural fairness to the person affected by the parole decision. As the statutory scheme does not prescribe any procedure, it is entirely a matter for the Attorney to determine a procedure that will afford procedural fairness to the person and avoid any unfairness or injustice.

1. In particular, s 19AKA provides that the purposes of parole are:

(a) the protection of the community;

(b) the rehabilitation of the offender;

(c) the reintegration of the offender into the community.

1. The reference to the protection of the community in s 19AKA(a) is not in terms, or by any reasonable implication, confined to the period of the prison sentence, including in particular any part served on parole. Rather, it extends to the period after a sentence has been served, and the offender is at liberty in the community without any conditions or restrictions associated with that sentence. I did not understand this interpretation of s 19AKA(a) to be in dispute, having raised it at the hearing without any disagreement being expressed by counsel for the Attorney-General.

## The decision-making process and result

1. At the time of making the decision to refuse the applicant parole, the Attorney-General had before her a **recommendation memorandum** from an officer of the Attorney-General’s Department dated 22 June 2021 principally recommending that parole be granted, but also offering the alternative of refusal, and listing the documents that were attached as follows:

• **Attachment A** – Draft parole order

• **Attachment B** – Draft parole refusal notice

• **Attachment C** – Departmental analysis

• **Attachment D** – Sentencing remarks

• **Attachment E** – Statement of agreed facts

• **Attachment F** – Pre-release report

• **Attachment G** – Department’s letter to [the applicant]

• **Attachment H** – Submission package provided on behalf of [the applicant]

1. After describing the offences and sentence, the text of the recommendation memorandum was as follows (emphasis added to the last sentence):

**Key Issues:** On 17 April 2019, the District Court of NSW sentenced [the applicant] to a term of 3 years and 6 months’ imprisonment for one count of possessing or controlling child pornography material for use through a carriage service contrary to subsection 474.20(1) of the *Criminal Code Act 1995* [sic] (the Criminal Code), and one count of using a carriage service to solicit child pornography material contrary to subparagraph 474.19(1)(a)(iiii) of the Criminal Code.

The court specified a non-parole period of two years and three months which expires on 16 July 2021. [The applicant]’s head sentence will expire on 16 October 2022.

The department considers that the purposes of parole, being [the applicant]’s rehabilitation, his successful reintegration into the community and the long-term protection of the community, would best be served by his release on parole at this time. This is consistent with the recommendation of Corrective Services NSW. This would allow him to engage with appropriate treatment and programs and be supervised in the community while subject to appropriate conditions. If released, [the applicant] would be on parole until his head sentence ends on 16 October 2022.

If you disagree with the recommendation to release [the applicant] on parole then the department considers that you may refuse his release on parole on the grounds of the nature and circumstance of the offending, his status as an untreated sex offender and the possible risk to community safety posed by his release. [The applicant] will be considered for release on parole once more before his sentence expires.

**Key Risks and Mitigation:** Based on the information received, the department considers that the risk to the community presented by [the applicant]’s release on parole will be effectively mitigated by parole conditions and supervision. **Alternatively, there are no risks if parole is refused.**

1. The material considered in some detail below reveals that the last sentence above could only be correct if the period under consideration was confined to the period until the conclusion of the head sentence. However, s 19AKA is not so confined. It follows that this sentence is at best dangerously misleading and at worst plainly and dangerously wrong. It is necessary to consider the material that was before the Attorney-General in some greater detail to understand why that is so, as well as to understand how she was also misled by omission.
2. The Attorney-General gave the following reasons for refusing parole:

The order for refusal of parole has been made for the following reasons:

1. I have taken into account the nature and circumstances of the offences to which your sentence relates, namely that you were found in possession of almost 400 items of child abuse material, most of which (70 percent) was in the most serious categories. The material included the abuse of children aged around 4 and 5 years old, and children in their early teens.

2. I have had regard to the findings of the sentencing judge, who noted that you actively sought out and engaged with abhorrent child exploitation material, including seeking access to material that appeared to be a 9 year old boy being raped, and your possession of files with titles that indicated extremely young children were raped.

3. Although you are unlikely to be able to complete a sex offender treatment program in custody, I consider that your release to the community without having engaged in rehabilitative interventions or programs would pose an unacceptable risk to the community.

4. I note the purposes of parole set out in section 19AKA of the *Crimes Act 1914*,being the protection of the community, the rehabilitation of the offender and the reintegration of the offender into the community. I consider that the risk to community safety posed by your release on parole at this time outweighs the benefits which parole would provide to assist in your rehabilitation and reintegration into the community.

1. The Court’s decision in relation to this application largely turns on [3] and [4] of the Attorney-General’s reasons, and the corresponding material in the recommendation memorandum, Departmental analysis and pre-release report from Corrective Services New South Wales (**CSNSW**).
2. In relation to the topic of attendance at a sex offender course, the concluding passages of the CSNSW pre-release report that are particularly relevant to this proceedings are as follows:

**Assessment and recommendation**

**Key reasons for release to parole**

* [The applicant] completed the EQUIPS Foundation program and is not eligible for further developmental programs.
* [The applicant] is unable to complete custody-based sex offender programs due to being assessed as ineligible.
* [The applicant] has demonstrated a positive response to custody; he has complied with routine and incurred no institutional charges. He has engaged in employment when available to him.
* [The applicant] has stable accommodation available to him in the community, along with pro-social family support.
* A Risk Mitigation Plan was developed with … Community Corrections which outlines case management strategies for [the applicant], including psychological interventions and one to one CBT exercises.

**Key reasons against release**

* [The applicant] is an un-treated child sex offender.

**Overall assessment**

[The applicant]’s conviction involved him accessing and soliciting child abuse materials, including victims estimated to have been between the ages of four and early teenage years. While he assumed guilt to some degree, he denied seeking out child abuse images and sought to blame associates of his for introducing him to the materials. He continues to deny any sexual attraction to children and explained his behaviour within the context of his experiences of sexual abuse as a child, which he reported had significantly affected his behaviour as an adult.

Upon entering custody, a CSNSW Psychologist deemed a STATIC assessment as not being required due to the nature of the offences, and as a result he was assessed as ineligible for custodial sex offender programs. He completed the EQUIPS Foundation program in November 2020 which was the only developmental program available to him in custody. While it is considered essential for [the applicant] to engage with intervention to address offending behaviour and mental health issues, he will be unable to access such interventions in a custodial setting.

[The applicant] has stable accommodation available to him upon release with his parents who appear to be pro-social supports. A Risk Mitigation Plan was developed in conjunction with … Community Corrections, which outlines a number of case management strategies to be undertaken upon release.

**Recommendation**

Community Corrections recommends that a Parole Order is made for [the applicant], with the addition of the following conditions:

* 19. You must, if so directed by your Officer, participate in the following intervention: psychological intervention.
* 26. You must not be in the company of a person under the age of 16 years unless accompanied by a responsible adult, as determined by your Officer. You also must not engage in written or electronic communication (including through social media) with any person under the age of 16, other than with those approved by your Officer.
* 27. You must comply with all conditions and requirements of the Child Protection Register.

[name redacted]

Community Corrections Officer

Bathurst Community Corrections

7 April 2021

[Community Corrections Officer]’s recommendation that a Parole Order be issued for [the applicant] is supported, along with the requested additional conditions. Given his satisfactory participation in the EQUIPS Foundation program, together with his ineligibility for further developmental programs including Sex Offender Programs, it would appear that his ongoing incarceration would provide little rehabilitative benefit.

In view of his reasonable behaviour in custody and suitable post release plans including ongoing intervention to assess his risks and needs with an appropriately qualified psychologist, it is considered that [the applicant] could be effectively managed under parole supervision at this time. It is hoped that his pro-social family support will further assist him in adjusting to a lawful community lifestyle upon release.

[name redacted]

Unit Leader

Bathurst Community Corrections

7 April 2021

[The applicant] has responded positively to his period of incarceration and is ineligible for custody-based sex offender programs. He appears to have a supportive environment on release with appropriate community interventions available. As such [Community Corrections Officer]’s recommendation that a Parole Order be made is supported.

[name redacted]

A/Manager

Bathurst Community Corrections

16 April 2021

The recommendation for release to parole is supported. [The applicant] remains ineligible for custodial-based interventions directly targeting his sex offending. His release to the community at this point would afford him the opportunity to appropriately engage in interventions to address his criminogenic needs.

A release to parole at this point will also see [the applicant] receive fifteen months of parole supervision during which time he will be supported to engage in appropriate pro-social activities whilst addressing his criminogenic behaviours. This period of supervision is necessary, when considering community safety, to ensure that [the applicant] is provided with the opportunity to specifically address his offending.

[name redacted]

Director, Western

Community Corrections

24 April 2021

1. As considered in more detail below, the burden of the report’s conclusion and its endorsement by more senior officers was clear. The grant of parole was not only recommended, but was considered necessary to manage risk to the community upon the applicant’s release. It would also ensure that there was close supervision immediately after release, a feature that would be wholly absent if parole was not granted. Necessarily, the shorter the period on parole, the less supervision and compulsory attendance at a sex offender program would be possible. The concern plainly enough extended to the period after the completion of the sentence.
2. The Departmental analysis summarised the legislative scheme and its requirements, the serious nature and circumstances of the offences, and the sentencing judge’s reasons in some detail. The analysis of the sentencing remarks concludes by stating the following:

His Honour considered that [the applicant]’s prospects of rehabilitation were guarded, primarily because [the applicant] continued to deny a sexual interest in children and because of the ‘limited approach that he has taken to undertake treatment in the community.’ His Honour considered that [the applicant] would need ‘an extended period of support and supervision in the community’.

1. It is therefore clear that the sentencing judge considered that parole was of considerable importance to ensure successful rehabilitation, as I have confirmed by reading and considering his Honour’s reasons. However, this concern with rehabilitation on the part of both the sentencing judge and CSNSW did not feature in the recommendation memorandum and stands in stark contrast to the last sentence of that memorandum. Nor did it feature in the Attorney-General’s reasons for refusing parole.
2. The Departmental analysis then turned to the CSNSW pre-release report, also referred to as a parole report. That part of the analysis commenced by noting that the pre-release report recommended the applicant’s release on parole because he was ineligible for sex offender treatment in custody. It is desirable to explain the likely reasons for that ineligibility as I understand them to be, as I raised at the hearing of the application, and with which issue was not taken. This is not determinative of this application, but provides some context and better understanding of why it is likely that the applicant was ineligible without fault on his part.
3. It has long been the case in New South Wales and in other jurisdictions that there is a shortage of places in sex offender courses in prison. Contact offending, involving sexually assaulting a victim, is generally regarded as having the highest risk of reoffending in that way, especially in relation to recurring child sexual assault. The applicant was not charged, or even suspected, of having engaged in contact offending. However, it is clear from the pre-release report that an escalation of offending in this way was seen to be a risk that needed to be addressed and managed. The pre-release report did not, however, make it clear whether the non-contact nature of the offending, combined with the low risk of reoffending, was what made the applicant ineligible for the sex offender courses on offer, although this seems likely. In any event, it is clear that it had nothing to do with the applicant, by the time he was in custody, retaining his prior reluctance to participate that was identified by the sentencing judge, or otherwise being responsible for his ineligibility.
4. The following further relevant passages in the Departmental analysis addressing the pre-release report were as follows (footnotes imbedded in square brackets):

[31] The parole report notes [the applicant] regrets his offending, and states that it was ‘underpinned by his own experiences of sexual abuse as a child.’ The parole report notes [the applicant] denies actively seeking out child abuse material, and instead blamed his acquaintances for introducing him to the material. The parole report notes that this is inconsistent with the police facts. The parole report notes that [the applicant] was able to articulate the impact of his offending on the victims of child abuse material, and was able to identify long-term psychological effects on the victims.

[32] The parole report notes that [the applicant] had denied a sexual interest in children during sentencing, and observes the comments in the sentencing remarks that did not accept this. The parole report notes that [the applicant] maintains this denial, and claims he became ‘complicit’ with online acquaintances who introduced him to child abuse material to him. [The applicant] stated ‘the images would invoke uncomfortable thoughts and beliefs related to his experiences of abuse, including questioning whether it was his fault, and whether he enjoyed the experiences.’

[33] The parole report references the assessment completed by Dr Collins for sentencing, and noted that Dr Collins identified ‘his unprocessed abuse and the instability around his sexual identity and boundary setting with others’ was a factor needing to be addressed.

[34] [The applicant] reported a history of depression, and the assessment completed by Dr Collins included ‘flashbacks, dreams and intrusive recollections of abuse’ which are symptoms of acute distress disorder. [The applicant] stated he intends to seek professional support in the community to deal with his ongoing mental health issues.

*Conduct in prison*

[35] [The applicant] is at the C2 classification, and is not yet eligible for pre-release leave programs. [The applicant] has been well behaved in custody, and has not incurred any institutional misconduct charges. He has been compliant and engaged with corrections officers.

[36] [The applicant] has not completed any educational courses during his time in custody. He has been employed in custody in grounds and in office work since March 2020, with positive work reports.

*Programs*

[37] [The applicant] has been assessed as a low risk of general reoffending according to the Level of Service Inventory – Revised (LSI-R) [The LSI-R is an actuarial assessment tool designed to identify an offender’s risks and needs with regard to recidivism. The LSI-R seeks to classify an offender’s risk of reoffending, as well as to identify their particular criminogenic needs.]. Due to the nature of his offences, an assessment using the STATIC-99 [The STATIC-99 is an actuarial assessment for use with adult male sex offenders. It assesses an individual’s risk of sexual reoffending, however is not generally used for offenders convicted solely of child abuse material offences (possession or solicitation where this does not involve dealing with an actual child).] is not reliable and has not been completed.

[38] In September 2020 [the applicant] was deemed ineligible for sex offender programs in custody due to the nature of his offences. [The applicant] has completed the EQUIPS Foundation program in custody, a generalist offender program targeted at helping offenders to understand themselves, their behaviour, their emotions and their offences. The parole report notes that he engaged ‘fully’ in the program and demonstrated a good understanding of the content and concepts.

[39] [The applicant] is motivated to engage with a psychologist to address ongoing issues in relation to his own experience of abuse, and continue exploring the motivations for his offending. The parole report notes that [the applicant] ‘has demonstrated compliance and engagement with Community Corrections through the preparation of the report, including undertaking individual cognitive behavioural therapy (CBT) exercises to explore the offence, attitude and victim impact.

*Post-release plans*

[40] [The applicant] intends to live with his parents in the community. This accommodation has been assessed as suitable by CSNSW. [The applicant] intends to resume seeing a psychologist upon his release from custody, and get a job.

[41] CSNSW intends to manage [the applicant] at the low supervision level. If released, he will have weekly contact with his parole officer for the first 6 weeks, and a home visit in the first 2 weeks. He will then be required to report to his parole officer every 4 weeks, with a home visit every 12 weeks. This can be revised at any time if deemed necessary.

[42] CSNSW will refer [the applicant] to a CSNSW psychologist upon his release. He will undergo an assessment and the psychologist will consider his eligibility for forensic treatment. [The applicant] will be required to work with the psychologist to develop case management strategies to manage his offending. [The applicant] will also be referred to a GP for a mental health care plan.

[43] CSNSW will engage with [the applicant]’s family, police and other relevant agencies to ‘monitor reintegration, compliance and adverse behaviour’. [The applicant] will also undertake CBT on a one-on-one basis with his parole officer to assist him to manage his risk factors (managing environment – high risk situations, self-awareness and pro-social lifestyle).

…

[52] [The applicant] was advised that due to his assessed low risk of reoffending, he was not eligible for a sex offender treatment program in custody. He was advised that there was no information to indicate he intended to undertake sex offender treatment in the community, and the department noted the remarks of the sentencing judge about the ‘limited approach’ he had taken to treatment in the community while on bail. [The applicant] was advised that given his status as an untreated sex offender and a lack of information about sex offender treatment in the community, his release may pose an unacceptable risk to the community.

[53] [The applicant] advises that ‘I have been assessed by a professional and my risk of re-offending was low with also my static 99 not applicable score which left me ineligible for programs. This was determined and concluded by a trained physiologist (sic) professional, trained in this field.’

[54] [The applicant] notes that he could only attend 4 sessions with a psychologist while on bail because he became sick with pneumonia, which lasted 4-5 months. He claims that his doctor told him to rest, not to go to work and to avoid large crowds and he was not fit to attend more sessions, even though more sessions were booked. He advises the psychologist was located some distance (75 minutes) from his home. [The applicant] notes that he found the sessions difficult at times as he had to discuss his own childhood experiences, but it helped to understand his own behaviour. [The applicant] notes that he intends to re-engage with the same psychologist upon release, and he will further discuss whether he can engage in a group sex offender program run by the same firm.

[55] The letter from [a psychologist] provides information about the ‘Men Taking Responsibility’ program run by the Pastoral Counselling Institute. The program is designed to address child sexual offending. Prior to starting the program, offenders undergo an intake process which is 3-4 individual appointments with [the psychologist] to gather background information and allow the program to be tailored to the offender. [The psychologist] has confirmed that [the applicant] would be able to commence this immediately upon release. [The psychologist] notes the cost of the program is dependent on employment status. [The psychologist] notes ‘Discussions with Corrective Services staff would indicate that we are taking a similar approach by developing individual treatment plans for each man.’

[56] The program is in either a group or individual environment depending on the offender, and generally consists of 76 sessions. Group sessions are two hours each week, and individual sessions are one hour each fortnight. The program is facilitated by 2 therapists, and at least one is registered with the NSW Child Sex Offenders Counsellor Accreditation Scheme. The program will take between 2½ and 3 years to complete, as it does not meet during holiday periods or school holidays. The program is not restricted to those convicted of child sex offences – individuals charged and awaiting sentencing or those that feel they are at risk of child sex offending can also participate.

[57] [The applicant’s barrister] notes the conclusion by the sentencing judge that [the applicant] will need an extended period of support and supervision in the community upon his release on parole. [The applicant’s barrister] notes the conclusion of CSNSW that [the applicant] could be effectively managed under parole supervision, and that a period on parole would assist [the applicant] in engaging in further treatment.

1. The Departmental analysis discussed the material that had been summarised under headings drawn from s 19AKA:

[69] Section 19AKA of the Crimes Act defines the purposes of parole as the protection of the community, the rehabilitation of the offender and the reintegration of the offender into the community. These interrelated and mutually reinforcing factors should guide your decision as you consider [the applicant]’s suitability for release on parole.

*Rehabilitation of the offender*

[70] It is unfortunate that, through no fault of his own and as a result of an assessed low risk of reoffending, [the applicant] will not be able to undertake sex offender treatment in custody.

[71] [The applicant] is clearly an offender with outstanding rehabilitative needs, noting his continued denial that he has a sexual interest in children which was not accepted by the sentencing judge. The parole report notes that [The applicant] continued to deny a sexual interest in children during his parole interview, and [the applicant] did not specifically respond to this when it was put to him as an adverse matter, although he did note that he believed his own experience of abuse was a contributing factor and his use of child abuse material was a way to answer ‘unanswered questions’. This indicates that his insight into his offending requires further development, and he needs further treatment to enable him to develop strategies to identify and manage risks that place him at risk of reoffending.

[72] It appears that [the applicant] is willing to engage in sex offender treatment in the community, and he has developed solid plans to engage with the psychologist he was seeing while on bail. Engaging in sex offender treatment in the community, continuing to engage with a psychologist regarding his own experiences of child sexual abuse and working with a GP to develop a Mental Health Care Plan are all positive factors that indicate [the applicant] is committed to further rehabilitation. This is particularly important in circumstances where there is no further rehabilitative benefits to [the applicant] remaining in custody.

[73] [The applicant] completed the EQUIPS Foundation program, which is the only recommended program that he can complete in custody. [The applicant] engaged well in the program, and the parole report indicates that he did get some benefit from it. It bodes well for [the applicant]’s rehabilitative progress that he has successfully completed the EQUIPS program, and provides a positive indication about the likelihood that he will successfully complete sex offender treatment in the community.

[74] The sentencing judge expressed some doubt about [the applicant]’s commitment to his own rehabilitation, citing the limited number of sessions [the applicant] undertook with his psychologist while on parole. [The applicant] provided further explanation about this by elaborating on his illness during this time, and reiterating that he was committed to further engagement with his psychologist. In addition, the information provided by [the applicant]’s family and friends indicates that they are committed to ensuring that he engages in rehabilitation in the community.

[75] These are all matters which the department recommends that you take into consideration in favour of [the applicant]’s release on parole. However, the department notes that it is open to you to consider that [the applicant]’s status as an untreated sex offender weighs against his release into the community at this time.

*Reintegration of the offender into the community*

[76] [The applicant] has support from family and friends, and this support has endured during his time in custody. [The applicant]’s family and friends appear pro-social, and have provided strong statements of support for [the applicant]’s release on parole.

[77] As outlined above, [the applicant] has detailed and specific plans to engage in rehabilitation in the community. While he intends to seek some form of employment, preferably with his previous employer, his focus is on rehabilitation. His family has provided assurances that they will provide whatever support he needs upon release, including financial support, and [the applicant]’s friends have offered to assist him to engage in volunteer work to build and develop his job skills.

[78] [The applicant] was on bail in the community for some time prior to being incarcerated. [The applicant] complied with his bail conditions, and has behaved well in prison. An offender’s conduct in prison is generally considered to be an indicator as to how they may behave if released in the community. All of the information available indicates that he is willing and able to comply with the conditions of a parole order.

[79] It is concerning that [the applicant] is proposing to return to a somewhat similar environment to that which existed when he committed the index offending. However, [the applicant] has proposed a robust professional support network to assist him to deal with his own experiences of child sexual abuse, and has indicated a willingness to work with CSNSW to access sex offender treatment in the community. These are all measures which were not in place when he committed the offences.

[80] Taking the above matters into consideration, the department recommends that you consider that reintegration is a factor that weighs in favour of [the applicant]’s release on parole at this time.

*Protection of the community*

[81] [The applicant] was found in possession of almost 400 items of child abuse material, most of which (70 percent) was in the most serious categories. The material included the abuse of children aged around 4 and 5 years old, and children in their early teens. The sentencing judge noted that [the applicant] actively sought out and engaged with abhorrent child exploitation material, and referred to several examples including his engagement with an unknown third party seeking access to material that appeared to be a 9 year old boy being raped, and his possession of files with titles that indicated extremely young children were raped.

[82] The sentencing judge concluded that [the applicant]’s offending was above the mid-range of objective seriousness but did not fall within the high range of objective seriousness, noting this was partly due to the short timeframe in which his offending occurred, the relatively small amount of child exploitation material for which he was convicted, and the limited number of conversations [the applicant] had with others which formed the basis for the offence of soliciting.

[83] As noted above, [the applicant] has well-developed plans for his rehabilitation in the community, and he appears to be well placed for reintegration into the community with a comprehensive social support network in place. [The applicant]’s compliance with and engagement in further treatment in the community can be monitored and enforced through his parole conditions.

[84] The department notes that [the applicant]’s sister has 5 children, and notes that her affidavit states they are looking forward to seeing him. It is reasonable to assume that [the applicant] will engage with or otherwise have interactions with these children in the community. The department also notes that [the applicant’s friend] has 2 young children, and given [the applicant’s friend] has maintained a long term friendship with [the applicant] and has confirmed that he will provide post-release support, it is reasonable to assume that [the applicant] will also have some sort of engagement with these children upon release. No information has been provided by [the applicant’s sister] or [the applicant’s friend] that indicates there will be safety measures put in place to protect these children from [the applicant].

[85] [The applicant] will be subject to strict parole conditions upon his release, including conditions which will restrict [the applicant] from having contact (physical or electronic) with any children unless an approved adult is present, and will require him to report to his parole officer any associations or personal relationships with anyone who has responsibility for a child. [The applicant] will not be able to reside in any areas where children are likely to congregate, and he will not be able to join or associate with any group or organisation that promotes activities involving children without the approval of his parole officer. CSNSW has also confirmed that [the applicant] will be subject to the requirements of the NSW child protection register upon his release from custody. In circumstances where [the applicant] is likely to comply with parole conditions the department considers that you should conclude that the risk of [the applicant] having access to these children is appropriately mitigated.

[86] The department recommends that overall, you should conclude that the protection of the community does not weigh against [the applicant]’s release on parole at this time. However, the department notes that it is open to you to conclude that, due to the nature and circumstances of [the applicant]’s offending, the protection of the community weighs against his release on parole.

***Recommendation***

[87] Taking all relevant factors into account, it is appropriate to consider his release on parole at this time.

[88] If you agree with that it is appropriate to grant parole to [the applicant], the department recommends that you agree to release him upon the expiry of his non-parole period on 16 July 2021.

1. The Departmental analysis then set out in some detail the conditions suggested to be appropriate, with a particular emphasis on sex offender treatment. That was followed, at [93], with an alternative recommendation that should the Attorney-General disagree with the primary recommendation to make a parole order, “*the only ground of refusal open to you is on the basis of the nature and circumstances of* [the applicant]*’s offending, and the fact that he is an untreated sex offender*”.
2. As noted above, the express purposes of parole stipulated by s 19AKA of the *Crimes Act* are protection of the community, the rehabilitation of the offender and the reintegration of the offender into the community. The applicant, expressly for no fault on his part, was not eligible to participate in sex offender courses that are run in New South Wales prisons. There was no option for the applicant – and just as importantly, the community at large – to obtain the benefit of him attending a sex offender program while in custody, in aid of minimising his risk of reoffending. Importantly, as already noted, a key statutory purpose informing the decision to grant or refuse parole is protection of the community both during the balance of the sentence after the non-parole period has been served, and after the sentence has been completed and parole supervision and conditions can no longer exist.
3. The pre-release report from CSNSW made it clear that for those very reasons it was considered to be in the interests of community safety that the applicant participate, or at least commence participating, in a sex offender course before he concluded his sentence and was then beyond the reach of conditions or supervision. This was endorsed by the writer’s chain of command up to a very senior level. The only way in which that could be *required* to take place, so as to make it reasonably certain that it *would* take place during the balance of the sentence, and *more likely* to continue to take place voluntarily after the conclusion of the head sentence, was if attendance and related measures were a condition of parole.
4. If the applicant was never released on parole, and simply served his full sentence, participating in such a course upon his release would be entirely voluntary. This is despite such a course being likely to be challenging and confronting, such that it would not be an unreasonable assumption to make that, without the compulsion of parole requirements, such a course may either never be commenced, or if commenced, not successfully completed. Moreover, there would be no post-release supervision at all. If parole was to be granted closer to the time of the completion of the sentence, any supervision and compulsion to at least commence a sex offender course would necessarily be of shorter duration, and less likely to be effective in managing risk.
5. The Attorney-General was legally entitled to take the decision to refuse parole in these circumstances notwithstanding the potentially greater risk to community safety posed by that course. She was entitled to conclude that elimination of risk to the community in the short term was more important than managing risk to the community in the longer term going well beyond the duration of the sentence. However, it was most important that she was informed that this was the true nature of the dichotomy that she was faced with based on the material that was before her. It was only fair to her that such a decision was properly informed, or at least not actively misinformed.

## Consideration

1. Consideration of the Attorney-General’s reasons for refusing parole, in the context of the advice provided and in part clearly followed as to the alternative recommendation that parole be refused, commences with the conclusion to the recommendation memorandum. As noted above, the recommendation memorandum passage reproduced above concludes by stating:

Based on the information received, the department considers that the risk to the community presented by [the applicant]’s release on parole will be effectively mitigated by parole conditions and supervision. Alternatively, there are no risks if parole is refused.

1. The following observations may be made about that paragraph. The reference in the first sentence to the risk to the community being effectively mitigated by release on parole fails either to acknowledge, or to dispute, the views of CSNSW that parole conditions and supervision would not just mitigate risk to the community during the parole period, but be more likely to reduce the risk to the community in the long term. To that extent, the Attorney-General made her decision based on misleading information.
2. The second sentence then seriously compounds the problem. It focuses on elimination of risk for the balance of the sentence of imprisonment by ensuring that most, if not all of it, would be served in custody. It simultaneously, albeit not obviously, ignores or perhaps overlooks what might then follow after the sentence was concluded when there was no mechanism for conditions or supervision upon release. The Attorney-General was free to make a decision upon that basis, and take that risk, but it had to be one that was properly informed. Otherwise the false statement in the second sentence above might well have been taken literally by her, there being little by way of context to suggest she should approach it otherwise. That is, she might reasonably have understood that she was being told that there was no risk at all in refusing parole, when that was only true for the balance of the sentence to be served. It was plainly not the case when the period after completion of the sentence was taken into account, a temporal dimension that was wholly overlooked or ignored, or perhaps simply not understood.
3. There was no evident and intelligible justification for the final statement in the recommendation memorandum that there was no risk in refusing parole. It is not a sentence that is assisted by a beneficial reading because of the real risk of it being misunderstood. While that was not repeated in the reasons given by the Attorney-General for refusing parole, it is impossible to separate it from the reasons that were given, because of the importance of that obviously material error. At the very least it helps to explain why [4] of those reasons made no reference to the risk to community safety in not granting parole.
4. The problem is compounded if the Attorney-General went beyond the sparse lines of the recommendation memorandum and also considered the Departmental analysis. For that purpose it is only necessary to consider a small number of key paragraphs among those reproduced above at [24]-[25] containing not dissimilar material errors, misdescriptions or omissions.
5. In relation to [75] of the Departmental analysis reproduced above at [25], which concluded the portion dealing with rehabilitation (s 19AKA(b)) and characterised this as favouring release on parole, the last sentence states that in the alternative it was open to consider that the applicant’s status as an untreated sex offender weighed against release on parole “*at this time*”. This alternative found an important degree of expression in [3] of the Attorney-General’s reasons for refusing parole. Given that parole did not have to be considered again until the final months of the sentence remained to be served, that sentence at best obscures the fact that the inability (not refusal or unwillingness) to receive treatment while in custody made treatment on parole all the more important. It was the only means of compulsorily ensuring attendance at such treatment, at least at the critical commencement stage. It creates an absurd situation where, if the applicant had committed more serious offences and was at a greater risk of reoffending, then he probably would have been eligible to attend a sex offender course and this would not have been a consideration able to be raised as a reason to refuse parole.
6. The last sentence of [75] of the Departmental analysis reproduced above contributed to one of the limited reasons given for refusing parole, and as such the ultimate conclusion cannot be meaningfully separated from it. It follows that I consider that this sentence renders that conclusion tainted so as to render the refusal of parole an improper exercise of power and a corresponding jurisdictional error lacking an evident and intelligible justification.
7. In relation to [86] of the Departmental analysis, which concluded the portion dealing with protection of the community (s 19AKA(a)), and characterised this as favouring release on parole, the last sentence states that in the alternative it was open to conclude that due to the nature and circumstances of the offending the protection of the community weighed against release on parole. This alternative, when combined with the ultimate alternative recommendation at [93] that “*the only ground of refusal open to you is on the basis of the nature and circumstances of* [the applicant]*’s offending, and the fact that he is an untreated sex offender*” found an important degree of expression in [4] of the Attorney-General’s reasons for refusing parole. That is, the risk to community safety posed by release on parole at that time outweighed the benefits which parole would provide in relation to rehabilitation and reintegration into the community.
8. The problem with this apparent source of that conclusion, and the conclusion itself, is that it is tainted by the failure to acknowledge or otherwise recognise that the information before the Attorney-General did not reflect risk to the community only in the grant of parole, but also risk, and arguably greater risk, to the community in not granting parole, given the loss of conditions and supervision directed to managing and reducing the risk of reoffending that would otherwise be available. It follows that I consider that this aspect of the Attorney-General’s reasons, so clearly connected to defective recommendations, renders that conclusion tainted so as to be an improper exercise of power and a corresponding jurisdictional error, lacking an evident and intelligible justification.
9. For the foregoing reasons, there are three separate vitiating errors in the advice provided to the Attorney-General flowing through to the decision to refuse parole. The Attorney-General’s decision must therefore be set aside and an order made that it be reconsidered according to law. This means that the legal obligation imposed upon the Attorney-General by s 19AL(1) of the *Crimes Act* to either make, or refuse to make, an order directing that the applicant be released on parole before the expiry of the non-parole period has not been discharged as it should have been by 16 July 2021. It is undesirable that a writ in the nature of mandamus to discharge that obligation be made unless it is really necessary, especially as I have not yet heard from the Attorney-General on that issue. Accordingly, the proceeding will be adjourned for 28 days, to give the Attorney-General sufficient time to either make a fresh parole decision or show cause why a writ in the nature of mandamus should not issue to compel that taking place within a stipulated period of time, necessarily by then of short duration.
10. The Attorney-General must pay the applicant’s costs of and incidental to this proceeding.

|  |
| --- |
| I certify that the preceding forty-one (41) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Bromwich. |

Associate:

Dated: 1 November 2021