

ASIDE ON APPEAL AFTER THE COMMENCEMENT OF THAT ACT, THE OFFENDER MAY STILL BE SENTENCED UNDER THE STATUTORY PROVISIONS WHICH WERE IN FORCE WHEN HE WAS ORIGINALLY SENTENCED: MARR V. ROWBOTTOM (1984) 39 A CRIM R 113."

136. HANSARD OF HOUSE OF ASSEMBLY, S.A., THURSDAY 21 APRIL 1994, PAGE 921
2ND READING FOR 'STATUTES AMENDMENT (TRUTH IN SENTENCING) BILL'
PAGES 921, 922 AND 923

137. "REMISSIONS CANNOT SIMPLY BE ABOLISHED — THE CONSEQUENCES OF THEIR ABOLITION NEED TO BE DEALT WITH.

UNDER SECTION 12 OF THE CRIMINAL LAW (SENTENCING) ACT 1988 COURTS ARE REQUIRED TO TAKE ACCOUNT OF REMISSIONS WHEN FIXING A SENTENCE OR A NON-PAROLE PERIOD." [PAGE 922].

138. "THE GOVERNMENT BELIEVES THAT IT WOULD BE UNDESIRABLE FOR THERE TO BE TWO GROUPS OF PRISONERS, PRE-AMENDMENT PRISONERS WHO CONTINUE TO BE ELIGIBLE FOR REMISSIONS AND POST-AMENDMENT PRISONERS NOT BEING ELIGIBLE FOR REMISSIONS. SUCH A SITUATION WOULD BE CONFUSING FOR BOTH PRISONERS AND PRISON OFFICERS." [PAGE 922].

139. "THIS ALL CHANGED WHEN THE 1983 LEGISLATION WAS ENACTED. INSTEAD OF RETAINING A MINIMUM SENTENCE THE COURTS WERE NOW REQUIRED TO FIX A NON-PAROLE PERIOD, AT THE END OF WHICH A PRISONER WOULD BE AUTOMATICALLY RELEASED BUT THE NON-PAROLE PERIOD DID NOT REPRESENT THE PERIOD THE PRISONER WOULD BE REQUIRED TO SERVE. REMISSIONS OF UP TO A THIRD OF THAT ~~NON~~ NON-PAROLE PERIOD COULD BE GRANTED ADMINISTRATIVELY FOR GOOD BEHAVIOUR." [PAGE 922].

140. HANSARD OF HOUSE OF ASSEMBLY, S.A., WEDNESDAY 3 JUNE 2015,
2ND READING FOR 'CORRECTIONAL SERVICES (PAROLE) AMENDMENT BILL'
"HON. A. PICCOLO
141. THE 'NO BODY, NO PAROLE' CHARGES COMPEL THE PAROLE BOARD TO GIVE CONSIDERATION TO THE
DEGREE TO WHICH LIFE SENTENCED PRISONERS WHO HAVE APPLIED FOR PAROLE RELEASE
HAVE COOPERATED WITH AUTHORITIES IN THE INVESTIGATIONS OF THE OFFENCE.
142. THE WAY IT DOES THIS IS BY INSERTING PROVISIONS INTO THE ACT THAT REQUIRE THE PAROLE
BOARD TO OBTAIN AND CONSIDER A REPORT FROM THE COMMISSIONER OF POLICE
PROVIDING AN EVALUATION OF THE SIGNIFICANCE AND USEFULNESS OF THE PRISONER'S
COOPERATION IN INVESTIGATIONS. THE BILL PROVIDES THAT THE BOARD MUST
NOT RELEASE THE PRISONER ON PAROLE UNLESS THE BOARD IS SATISFIED THAT THE
PRISONER HAS SATISFACTORILY COOPERATED IN THE INVESTIGATION OF THE
OFFENCE.
143. IT IS VERY SIMPLE % NO COOPERATION MEANS NO PAROLE.
144. THE BILL MAINTAINS THE ROLE OF THE PAROLE BOARD AT THE FIRST STAGE OF DETERMINING
RELEASE ON PAROLE FOR LIFE SENTENCED PRISONERS; THE BOARD WILL UNDERTAKE
DETERMINATIONS MUCH AS IT DOES NOW, ALBEIT WITH THE ADDITIONAL CONSIDERATION
OF WHETHER OR NOT A PRISONER HAS COOPERATED WITH AUTHORITIES IN LOCATING
THE REMAINS OF THEIR VICTIM(S) IN RELEVANT CIRCUMSTANCES.
145. IN KEEPING WITH THAT APPROPRIATE FOCUS ON COMMUNITY SAFETY, IN THE EVENT THE
BOARD MAKES A DECISION TO RELEASE A LIFE SENTENCED PRISONER ON PAROLE,
THE BILL PROVIDES A RIGHT TO SEEK REVIEW OF THE DECISION BY:
• THE ATTORNEY-GENERAL;
• THE COMMISSIONER OF POLICE; AND
• THE COMMISSIONER ~~BE~~ FOR VICTIMS' RIGHTS.
146. IF NONE OF THE PARTIES LODGE SUBMISSIONS ^{WITHIN} ~~THE~~ ~~REVIEW~~ ~~PERIOD~~, THE PRISONER
IS RELEASED ON PAROLE SUBJECT TO THE CONDITIONS DETERMINED BY THE PAROLE BOARD.
147. SHOULD AN APPLICATION FOR REVIEW BE LODGED BY ANY OR ALL OF THE RESPONSIBLE INDIVIDUALS
SEEKING ADDITIONAL CONDITIONS OR AMENDMENTS TO THE RELEASE CONDITIONS, THE
BILL PROVIDES FOR THIS CONSULTATION TO BE UNDERTAKEN THROUGH CONFERENCE WITH

(REF. 29.)

148. THE APPLICANT(S) AND THE PAROLE BOARD IN ORDER TO REACH A SETTLEMENT.
149. THE PRISONER IS REPRESENTED IN THESE PROCEEDINGS BY THE PAROLE BOARD.
149. IF THE APPLICATION IS FOR A REVIEW OF THE PAROLE BOARD'S DECISION, NOTIFICATION
WILL BE MADE TO THE PRISONER, THE PAROLE BOARD, THE APPLICANT(S) AND EACH
OF THE OTHER PERSONS ABLE TO MAKE APPLICATION FOR REVIEW, AND A FULL
REVIEW WILL BE UNDERTAKEN.
150. AT THE CONCLUSION OF THE REVIEW, THE COMMISSIONER MAY AFFIRM OR VARY THE
DECISION OF THE PAROLE BOARD. THE COMMISSIONER MAY ALSO SET ASIDE THE
DECISION OF THE PAROLE BOARD, AND EITHER SUBSTITUTE THEIR OWN DECISION, OR
SEND THE MATTER BACK TO THE PAROLE BOARD WITH DIRECTIONS OR RECOMMENDATIONS.
151. THE BILL SEEKS TO CHANGE THAT PROVISION TO LIFE ON PAROLE FOR LIFE SENTENCED
PRISONERS.
152. FINALLY, THE BILL CONTAINS TRANSITIONAL PROVISIONS INDICATING THAT THE AMENDMENTS
DO NOT APPLY TO LIFE SENTENCED PRISONERS WHO HAVE ALREADY HAD A DECISION
MADE ABOUT THEIR RELEASE ON PAROLE BY THE PAROLE BOARD OR THE GOVERNOR
IN EXECUTIVE COUNCIL.
153. AN AMENDMENT IS ALSO INCLUDED TO THE FREEDOM OF INFORMATION ACT 1991 TO
INCLUDE THE PAROLE ADMINISTRATIVE ~~REVIEW~~ REVIEW COMMISSIONER AS AN
EXEMPT AGENCY, CONSISTENT WITH CURRENT PROVISIONS FOR THE PAROLE
BOARD. 99

EXPLANATION OF CLAUSES

154. PART 2 - AMENDMENT OF CORRECTIONAL SERVICES ACT 1982
155. 6 - AMENDMENT OF SECTION 67 - RELEASE ON PAROLE BY APPLICATION TO BOARD.
PROVISIONS ARE ALSO INSERTED INTO THE SECTION PROVIDING THAT THE BOARD
CANNOT RELEASE ON PAROLE A PRISONER SERVING A SENTENCE OF LIFE IMPRISONMENT
FOR AN OFFENCE OF MURDER UNLESS THE BOARD IS SATISFIED THAT THE PRISONER
HAS SATISFACTORILY COOPERATED IN THE INVESTIGATION OF THE OFFENCE (AND THE
COMMISSIONER OF POLICE MAY PROVIDE A REPORT ON THE COOPERATION).
156. 8 - AMENDMENT OF SECTION 69 - DURATION OF PAROLE
THIS AMENDMENT PROVIDES THAT A PRISONER SERVING A SENTENCE OF LIFE

IMPRISONMENT WHO IS RELEASED ON PAROLE AFTER THE COMMENCEMENT OF THIS SUBSECTION WILL, UNLESS THE RELEASE IS CANCELLED OR SUSPENDED, OR THE SENTENCE IS EXTINGUISHED, REMAIN ON PAROLE FOR THE REMAINDER OF THE SENTENCE.

157. 10 - AMENDMENT OF SECTION 71 - VARIATION OR REVOCATION OF PAROLE CONDITIONS.
THE ATTORNEY-GENERAL, THE COMMISSIONER OF POLICE AND THE COMMISSIONER FOR VICTIMS RIGHTS ARE GIVEN A RIGHT TO APPLY TO THE BOARD FOR A VARIATION OR REVOCATION OF CONDITIONS RELATING TO PAROLE FOR A PERSON SERVING A SENTENCE OF LIFE IMPRISONMENT. THEY ARE ALSO GIVEN A RIGHT TO PUT SUBMISSIONS ON ANY VARIATIONS OR REVOCATIONS TO CONDITIONS PROPOSED TO BE EFFECTED PURSUANT TO AN APPLICATION OF THE PERSON OR ON THE BOARD'S OWN MOTION.

158. II - INSERTION OF PART 6 DIVISION 4

NEW DIVISION 4 OF PART 6 IS INSERTED :

DIVISION 4 - REVIEW OF RELEASE ON PAROLE OF LIFE PRISONERS

159. 77A - INTERPRETATION

DEFINITIONS FOR THE PURPOSES OF THE DIVISION ARE INSERTED. A KEY DEFINITION IS THAT OF REVIEWABLE DECISION.

160. 77F - EFFECT OF REVIEW PROCEEDINGS ON BOARD'S DECISION

A DECISION OF THE BOARD TO RELEASE A PRISONER SERVING A LIFE SENTENCE ON PAROLE IS STAYED PENDING ANY REVIEW PROCEEDINGS.

A PRESCRIBED REVIEWABLE DECISION (SUCH AS A DECISION TO IMPOSE A PARTICULAR CONDITION ON THE PAROLE OF A LIFE PRISONER) IS NOT AUTOMATICALLY STAYED, BUT THE COMMISSIONER MAY STAY THE OPERATION OF THE DECISION IF IT IS JUST AND REASONABLE TO DO SO.

161. 77G - PROCEEDINGS TO BE HEARD IN PRIVATE

PROCEEDINGS FOR THE REVIEW OF A REVIEWABLE DECISION BEFORE THE COMMISSIONER MUST BE HEARD IN PRIVATE.

162. HANSARD OF HOUSE OF ASSEMBLY, S.A., WEDNESDAY 17 JUNE 2015,

ADJOURNED DEBATE ON SECOND READING FOR 'CORRECTIONAL SERVICES
(PAROLE) AMENDMENT BILL'

(CONTINUED FROM 3 JUNE 2015.)

"HON. MR GARDNER (MURIALTA)

163. ...PERHAPS IT MIGHT BE MORE CORRECTLY DESCRIBED AS 'NO COOPERATION MEANS NO
PAROLE'. THE THRESHOLD QUESTION IS WHETHER THE POLICE COMMISSIONER IS
SATISFIED THAT A MURDERER WHO HAS COMMITTED A MURDER MIGHT BE WITHHOLDING
INFORMATION DELIBERATELY, AS THE MINISTER DESCRIBED IN THE SECOND READING,
FURTHER TRAUMATISING GRIEVING FAMILIES AND LOVED ONES. THE COMMISSIONER
MUST BE SATISFIED THAT THE PERSON HAS UNDERTAKEN COOPERATION WITH THE POLICE
TO ASSIST IN FINDING A BODY BEFORE THE MATTER IS TAKEN TO THE PAROLE BOARD.

164. FOR THE PURPOSES OF THAT SUBSECTION (6) IT STATES :

"THE BOARD MUST TAKE INTO ACCOUNT ANY REPORT TENDERED TO THE BOARD FROM THE
COMMISSIONER OF POLICE EVALUATING THE PRISONER'S COOPERATION IN THE INVESTIGATION
OF THE OFFENCE, INCLUDING —

- A) THE NATURE AND EXTENT OF THE PRISONER'S COOPERATION; AND
- B) THE TIMELINESS OF THE COOPERATION; AND
- C) THE TRUTHFULNESS, COMPLETENESS AND RELIABILITY OF ANY INFORMATION OR
EVIDENCE PROVIDED BY THE PRISONER; AND
- D) THE SIGNIFICANCE AND USEFULNESS OF THE PRISONER'S COOPERATION."

165. AT CLAUSE 10 IS THE FOURTH PART OF THE BILL AND THAT CONCERNS THE THREE PEOPLE —
WHO WE WILL TALK ABOUT A BIT FURTHER — THE ATTORNEY-GENERAL, THE
COMMISSIONER OF POLICE AND THE COMMISSIONER FOR VICTIM'S RIGHTS — WHO WILL
HAVE SIGNIFICANTLY ENHANCED ROLES IN THE APPLICATION OF THIS LAW. THOSE
THREE PEOPLE WILL HAVE THE RIGHT UNDER THIS LEGISLATION TO SEEK VARIATION
OR REVOCATION OF PAROLE CONDITIONS BY APPLICATION TO THE PAROLE BOARD AT
ANY TIME AFTER THE PERSON HAS BEEN RELEASED ON PAROLE.

166. THE PAROLE BOARD UNDERTAKES ITS PROCESSES. IF A DETERMINATION IS TO APPROVE
RELEASE UNDER PAROLE SUPERVISION THEN, UNDER THE METHOD PRESCRIBED IN THE

(REF. 32.)

BILL, THE DETERMINATION IS THEN STAYED AT THAT POINT FOR 90 DAYS. WITHIN THE FIRST 60 DAYS OF THAT 90-DAY PERIOD AN APPLICATION FOR A REVIEW BY THE COMMISSIONER MAY BE LODGED BY, FIRST, THE ATTORNEY-GENERAL ON BEHALF OF THE GOVERNMENT, SECOND, THE POLICE COMMISSIONER ON BEHALF OF SAPOL, OR THE VICTIMS OF CRIME COMMISSIONER ON BEHALF OF VICTIMS.

IF NO APPLICATION FOR REVIEW BY A COMMISSIONER IS LODGED BY ANY OF THOSE THREE PEOPLE THEN THERE IS NO REVIEW. THE PRISONER IS RELEASED PER THE DETERMINATION OF THE PAROLE BOARD ONCE THE 90-DAY PERIOD HAS ELAPSED AND REMAINS UNDER THE SUPERVISION OF THE PAROLE BOARD FOR THE REST OF THEIR SENTENCE, UNLESS, OF COURSE, THAT SENTENCE IS OVERTURNED IN SOME WAY.

SECONDLY, THE ATTORNEY-GENERAL, THE POLICE COMMISSIONER, OR THE VICTIMS OF CRIME COMMISSIONER CAN OPPOSE RELEASE, WHICH AGAIN IS REFERRED TO THE PAROLE ADMINISTRATIVE REVIEW COMMISSIONER. THE PAROLE ADMINISTRATIVE REVIEW COMMISSIONER THEN REVIEWS THE MATTER. THE COMMISSIONER CAN AFFIRM THE PAROLE BOARD DECISION, AND THE PRISONER IS RELEASED ACCORDINGLY; IT CAN AMEND THE CONDITIONS IN THE PAROLE BOARD'S DECISION, AND THE PRISONER IS RELEASED ACCORDINGLY; OR THEY CAN SET ASIDE THE PAROLE BOARD'S DECISION, IN WHICH CASE THE PRISONER REMAINS IN CUSTODY AND IS ELIGIBLE TO REAPPLY IN 12 MONTH'S TIME."

"HON. M^S CHAPMAN (BRAGG)

I TOO HAVE TAKEN THE VIEW THAT IF IN THE PAST THE EXECUTIVE COUNCIL HAS DECLINED TO ACCEPT A PAROLE BOARD RECOMMENDATION, THE VERY LEAST THEY SHOULD HAVE DONE ON THE REFUSALS (ONE AFTER ANOTHER) IS TO CONFIRM FOR THE PAROLE BOARD CHAIR (OVER THE LAST 13 YEARS) THE BASIS UPON WHICH THEY HAVE ACTED.

I APPRECIATE THEY HAVE HAD THE POWER TO DO IT, BUT WHAT IS THE POINT OF TAXPAYERS PAYING THE PAROLE BOARD TO SIT THERE AND HEAR THESE APPLICATIONS, CONSIDER THE SUBMISSIONS, MAKE DETERMINATIONS, SEND THEM UP TO THE EXECUTIVE COUNCIL TO PRESENT THEM TO THE ATTORNEY-GENERAL TO TAKE THEM TO CABINET, JUST TO HAVE THEM OVERTURN IT? WHAT IS THE POINT OF PAROLE BOARD CHAIR FRANCES NELSON QC, MEMBERS OF HER BOARD AND OTHER STAFF SPENDING HOURS AND

DAYS TO DO ALL OF THIS WORK SIMPLY TO HAVE IT EXTINGUISHED BY THE FLASH OF A PEN BY THE EXECUTIVE COUNCIL AND TO HAVE NO FEEDBACK WHATSOEVER AS TO WHETHER SHE SHOULD EVEN CONSIDER IT NEXT YEAR, WHICH SHE IS LEGALLY OBLIGED TO DO IF THE PRISONER APPLIES EVERY 12 MONTHS, WHICH THEY ARE LEGALLY ENTITLED TO DO? WHAT IS THE POINT IN WASTING HER TIME, YEAR AFTER YEAR AFTER YEAR, AND THE TIME OF THE PAROLE BOARD, WHEN, FRANKLY, IT IS BEING COMPLETELY UNDERMINED BY THE CONDUCT OF THE CABINET?"

"HON. MS REDMOND (HEYSON)

175. I HAVE LONG ARGUED AND LONG HELD THE VIEW THAT IT IS NOT APPROPRIATE FOR GOVERNMENTS OF ANY PERSUASION TO MAKE THE FINAL DECISION AS TO WHO SHOULD BE IN GAOL AND WHO SHOULD NOT. IT OFFENDS THE SEPARATION OF POWERS.

176. I AM NOT GOING TO GO INTO THE MAGNA CARTA, WHICH I SPOKE ABOUT LAST NIGHT, BUT IT SEEMS TO ME TO BE ENTIRELY INAPPROPRIATE FOR ANY GOVERNMENT TO HAVE THE ABILITY TO DECIDE WHO WILL BE PRISONERS BECAUSE THEY ARE INDEED THEN POLITICAL PRISONERS. PRISONERS SHOULD NOT BE THERE BY WAY OF EXPEDIENCY FOR POLITICAL PURPOSES. I NOTE THAT ON 31 MAY IN THE SUNDAY MAIL THERE WAS A STATEMENT, AND I QUOTE THAT STATEMENT:

"... PAROLE BOARD CHAIRWOMAN, FRANCES NELSON QC, AND JUSTICE ADVOCATES HAVE LONG ARGUED THAT THIS PROCESS MEANT DECISIONS ABOUT PAROLE FOR LIFE SENTENCE PRISONERS HAVE BEEN BASED ON POLITICS RATHER THAN THE MERITS OF THE CASE."

177. FOR INSTANCE, IF SOMEONE IS LEGITIMATELY INNOCENT BUT THEY ARE CONVICTED ANYWAY — AND IT HAS BEEN KNOWN TO HAPPEN — THEIR FAILURE TO SHOW THAT THEY ARE REMORSEFUL, AND THEIR FAILURE TO IDENTIFY WHERE THE BODY IS, COULD WELL BE EXPLAINABLE."

"HON. A. PICCOLO (LIGHT)

178. THE BILL IMPLEMENTS THE GOVERNMENT'S 'NO BODY, NO PAROLE' ELECTION COMMITMENT, DESIGNED TO BRING CLOSURE TO VICTIMS' FAMILIES BY PREVENTING RELEASE ON PAROLE FOR MURDERERS WHO DO NOT COOPERATE WITH AUTHORITIES IN RELEVANT INVESTIGATIONS. THIS WILL STOP MURDERERS FROM EVER GETTING PAROLE IF

THEY WITHHOLD THIS INFORMATION WHICH HAS THE POTENTIAL TO FURTHER
TRAUMATISE GRIEVING FAMILIES AND LOVED ONES. ”

179. HANSARD OF LEGISLATIVE COUNCIL, S.A., THURSDAY 18 JUNE 2015,
2ND READING FOR ‘CORRECTIONAL SERVICES (PAROLE) AMENDMENT BILL’
” HON. G. GAGO

180. THE ‘NO BODY, NO PAROLE’ CHANGES COMPEL THE PAROLE BOARD TO GIVE CONSIDERATION TO
THE DEGREE TO WHICH LIFE SENTENCED PRISONERS WHO HAVE APPLIED FOR RELEASE
ON PAROLE HAVE COOPERATED WITH AUTHORITIES IN THE INVESTIGATION OF THE
OFFENCE.

181. THE BILL PROVIDES THAT THE BOARD MUST NOT RELEASE THE PRISONER ON PAROLE UNLESS THE
BOARD IS SATISFIED THAT THE PRISONER HAS SATISFACTORILY COOPERATED IN THE
INVESTIGATION OF THE OFFENCE.

182. IT IS REALLY VERY SIMPLE — NO COOPERATION MEANS NO PAROLE.

183. THE ESTABLISHMENT OF THE COMMISSION AND THE RIGHT OF REVIEW PROCESS WILL
PROVIDE THE APPROPRIATE OVERSIGHT OF DECISIONS MADE BY THE PAROLE BOARD FOR
THE RELEASE OF LIFE SENTENCED PRISONERS.

EXPLANATION OF CLAUSES

184. PART 2 — AMENDMENT OF CORRECTIONAL SERVICES ACT 1982

185. II — INSERTION OF PART 6 DIVISION 4

NEW DIVISION 4 OF PART 6 IS INSERTED :

DIVISION 4 — REVIEW OF RELEASE ON PAROLE OF LIFE PRISONERS.

186. 771 — PARTIES

THE APPLICANT AND THE BOARD ARE THE PARTIES TO A REVIEW, AND THE OTHER
PERSONS WHO HAVE A RIGHT TO APPLY FOR A REVIEW MAY ALSO APPEAR AND BE
HEARD ON A REVIEW. ”

187. HANSARD OF LEGISLATIVE COUNCIL, S.A., THURSDAY 30 JULY 2015,
ADJOURNED DEBATE ON SECOND READING FOR ‘CORRECTIONAL SERVICES
(PAROLE) AMENDMENT BILL’
(CONTINUED FROM 18 JUNE 2015.)

“HON. R. BROKENSHIRE

188.

WHAT HAPPENED JUST A FEW YEARS AFTER LABOUR GOT INTO OFFICE FROM 2002 WITH THE THEN PREMIER, THE HON. MIKE RANN, WAS THAT HE DECIDED THAT IT WAS POLITICALLY BENEFICIAL FOR HIM TO PICK AND CHOOSE WHETHER OR NOT HE AGREED WITH THE RECOMMENDATIONS OF THE PAROLE BOARD, TAKING INTO CONSIDERATION NONE OF THE ASSESSMENTS AND WORK THAT WAS DILIGENTLY DONE BY THE PAROLE BOARD BUT RATHER WHAT WOULD MAKE A GOOD HEADLINE IN THE MEDIA THAT NIGHT.

189.

THEREFORE, WHAT HAPPENED WAS THAT, FOR A PERIOD OF TIME, FOR SEVERAL YEARS IN FACT, WE HAD PRISONERS, SOME OF WHOM MAY HAVE WELL AND TRULY DESERVED PAROLE, BEING DENIED PAROLE TIME AFTER TIME, NOTWITHSTANDING THE FACT THAT THE PAROLE BOARD HAD PUT RECOMMENDATION AFTER RECOMMENDATION UP FOR THAT PARTICULAR PRISONER SHOULD HAVE BEEN RELEASED ON PAROLE.”

190.

“HON. T. FRANKS

I RAISE THOSE CONCERNS TODAY, ON BEHALF OF THE ALRM OF SOUTH AUSTRALIA. CLAUSE 6(1)(6) AND (7) REQUIRES THE PAROLE BOARD NOT TO GRANT PAROLE TO A PERSON CONVICTED OF MURDER UNLESS SATISFIED THAT THE PRISONER ‘HAS SATISFACTORILY COOPERATED IN THE INVESTIGATION OF THE OFFENCE’ EITHER BEFORE OR AFTER THEY WERE CONVICTED OF THE OFFENCE.

191.

THE ALRM HAS RAISED A QUESTION IN REGARD TO THIS CLAUSE. THEY ASK, ‘HOW CAN HE OR SHE COOPERATE IN RELATION TO A CRIME HE OR SHE GENUINELY KNOWS NOTHING ABOUT?’ COULD THE MINISTER PLEASE CLARIFY WHAT THE PROCESS IS FOR SOMEONE WHO CANNOT COOPERATE WITH THE INVESTIGATING AUTHORITIES IN THIS SITUATION?

192.

THE ALRM HAS ALSO RAISED THE FOLLOWING WITH MY OFFICE :

ONLY A JUDGE OF SUPREME COURT STATUS IS ABLE TO SENTENCE A PRISONER FOR MURDER; ONLY A RETIRED JUDGE OF THAT STATUS SHOULD SIT AS THE PROPOSED COMMISSIONER. IT WOULD BE INAPPROPRIATE (FOR EXAMPLE) TO HAVE A RETIRING LICENCING, OR INDUSTRIAL JUDGE

(REF. 36.)

SITTING AS COMMISSIONER WITHOUT THE BENEFIT OF ANY EXPERIENCE
IN CRIMINAL LAW SENTENCING OR PENOLOGY. ”

193.

“ HON. G. GAGO

THE BOARD WOULD SATISFY THEMSELVES THAT THEY HAD BEEN COOPERATIVE. THEY
CAN ACCESS A NUMBER OF REPORTS THAT THEY WOULD CONSIDER; FOR INSTANCE,
A REPORT FROM THE COMMISSIONER OF POLICE ALONG WITH OTHER REPORTS
LIKE THE COMMUNITY SAFETY REPORTS UNDER SECTION 3A, AND SECTION 4,
AND OTHER MATTERS CONTAINED UNDER SECTION 7 AND SECTION 6. ”

194.

WATSON V. THE STATE OF SOUTH AUSTRALIA [2010] SASCF 69 (9 DECEMBER 2010)

“ PARA. 11: THE FACT THAT THE NON-PAROLE PERIOD IS PART OF THE SENTENCE IS IMPLICIT
IN THE OBSERVATIONS OF THE HIGH COURT IN PNJ V THE QUEEN [2009] HCA 6;
(2009) 83 ALJR 384 at [11],

PARA. 16: IF THE BOARD REFUSES AN APPLICATION BY THE PRISONER FOR RELEASE ON
PAROLE, IT MUST GIVE THE PRISONER WRITTEN REASONS FOR THE REFUSAL: THE CSA
S 67(4).

PARA. 21: I EMPHASISE THIS POINT BECAUSE IT LEADS TO A SIGNIFICANT DIFFERENCE IN
THE REGIME FOR A PRISONER SERVING A LIFE SENTENCE. IN RELATION TO SUCH A
PRISONER THE BOARD HAS NO POWER TO ORDER RELEASE. ITS ONLY FUNCTION IS TO
CONSIDER AN APPLICATION FOR RELEASE ON PAROLE AND EITHER TO REFUSE THE APPLICATION
OR RECOMMEND TO THE GOVERNOR THAT THE PRISONER BE RELEASED ON PAROLE, SECTION
67(6) OF THE CSA...

IN THIS RESPECT THE REGIME FOR A PRISONER SERVING A SENTENCE OF LIFE
IMPRISONMENT IS QUITE DIFFERENT.

PARA. 24: IF THE PAROLE BOARD HAS RECOMMENDED RELEASE, THE GOVERNOR WILL CONSIDER
THE RECOMMENDATION ~~BY THE~~ AND MAY ORDER RELEASE. ...

IT IS IMPLICIT IN THE PROVISION THAT THE GOVERNOR MAY DECLINE TO ORDER THE RELEASE
OF A PRISONER.

PARA. 25: THE CSA DOES NOT IN TERMS REQUIRE THE GOVERNOR TO GIVE REASONS FOR
A DECISION ON A RECOMMENDATION BY THE BOARD. NOR DOES IT REQUIRE REASONS FROM
THE BOARD, BECAUSE IN SUCH A CASE THE BOARD HAS NOT REFUSED AN APPLICATION FOR

(REF. 37.)

RELEASE ON PAROLE. THE BOARD IS REQUIRED TO GIVE REASONS ONLY IF IT REFUSES AN APPLICATION FOR RELEASE ON PAROLE: THE CSA s 67(9).

PARA. 28: MR MEAD BASED HIS SUBMISSION IN PART ON PROVISIONS WHICH EMPOWER A COURT TO INCREASE OR TO NEGATE A NON-PAROLE PERIOD ON APPLICATION BY THE DIRECTOR FOR PUBLIC PROSECUTIONS (DPP) OR BY THE ATTORNEY-GENERAL. THIS SUBMISSION IS ~~A WIDER~~ AN ASPECT OF A WIDER SUBMISSION THAT THE COURTS ARE THE PRIMARY ARBITER OF THE TIME THAT MUST BE SPENT IN CUSTODY, BECAUSE IT IS THE COURTS THAT CAN FIX OR VARY A SENTENCE OR FIX, VARY OR NEGATE A NON-PAROLE PERIOD.

PARA. 31: MR WATSON WAS SENTENCED TO LIFE IMPRISONMENT ON 6 MAY 1986. ON 29 AUGUST 1986 THE SENTENCING JUDGE FIXED A NON-PAROLE PERIOD OF 24 YEARS COMMENCING ON 8 SEPTEMBER 1985, WHEN MR WATSON WAS ARRESTED. THE NON-PAROLE PERIOD WAS RECALCULATED AT 16 YEARS 4 MONTHS 7 DAYS UNDER THE STATUTES AMENDMENTS (TRUTH IN SENTENCING) ACT 1994 (SA). THE NON-PAROLE PERIOD EXPIRED ON 24 JANUARY 2002.

PARA. 39: NO APPLICATION HAS BEEN MADE BY THE DPP PURSUANT TO s 32(6) OF THE SENTENCING ACT FOR AN ORDER EXTENDING MR WATSON'S NON-PAROLE PERIOD. NO APPLICATION HAS BEEN MADE BY THE ATTORNEY-GENERAL UNDER s 33A OF THE SENTENCING ACT TO HAVE MR WATSON DECLARED TO BE A DANGEROUS OFFENDER.

PARA. 41: FIRST, THAT THE DECISION BY THE GOVERNOR IN COUNCIL IS SUBJECT TO JUDICIAL REVIEW.

PARA. 43: THIRD, THAT THE LEGISLATIVE SCHEME PROVIDES FOR THE RELEASE ON PAROLE OF LIFE SENTENCED PRISONERS AND THAT THE LEGISLATION MAKES THE COURTS THE PRIMARY ARBITERS OF THE TIME TO BE SPENT IN CUSTODY BY SUCH PRISONERS.

PARA. 44: FOURTH, THAT s 67(7) OF THE CSA GIVES THE GOVERNOR A DISCRETION BUT THAT THE DISCRETION IS NOT UNFETTERED.

PARA. 45: FIFTH, THAT THE DECISION BY THE GOVERNOR IN COUNCIL CAN BE REVIEWED BY THIS COURT ON THE BASIS OF ~~ILLEGAL~~ ILLEGALITY, ON THE BASIS OF IRRATIONALITY AND ON THE BASIS OF "PROCEDURAL IMPROPRIETY".

PARA. 46: SIXTH, THAT THE COURT CAN MAKE AN ORDER REQUIRING THE GOVERNOR TO ORDER THE RELEASE OF ~~MR WATSON~~ MR WATSON, IF (AS IT SHOULD BE), IT IS SATISFIED

(REF. 38.)

THAT THERE IS NO RELEVANT CONSIDERATION WHICH WOULD JUSTIFY DECLINING TO SO ORDER. IN THE ALTERNATIVE, THE COURT CAN MAKE A DECLARATION THAT MR WATSON IS ENTITLED TO BE RELEASED.

PARA. 48: I ACCEPT THE FIRST SUBMISSION. IN *FAL INSURANCE LIMITED v WINNEKE* (1982-1983) 157 CLR 342 GIBBS CJ SAID AT 349:

THE FACT THAT THE GOVERNOR IN COUNCIL IS THE AUTHORITY WHICH GRANTS THE APPROVAL PROVIDES NO GROUND FOR EXCLUDING THE RULES OF NATURAL JUSTICE. IN EXERCISING THE POWER GIVEN BY S 72 THE GOVERNOR DOES NOT ACT PERSONALLY OR AS A REPRESENTATIVE OF THE CROWN EXERCISING ANY OF ITS PREROGATIVES. HE ACTS ON THE ADVICE OF HIS MINISTERS, AND IT IS TO BE EXPECTED THAT SUCH ADVICE WILL BE BASED UPON THE RECOMMENDATION OF THE MINISTER IN CHARGE OF THE DEPARTMENT CONCERNED. IT WOULD BE TO CONFUSE FORM WITH SUBSTANCE TO HOLD THAT THE RULES OF NATURAL JUSTICE ARE EXCLUDED SIMPLY BECAUSE THE POWER IS TECHNICALLY CONFIDED IN THE GOVERNOR IN COUNCIL. I CAN SEE NO REASON IN PRINCIPLE WHY THE RULES OF NATURAL JUSTICE SHOULD NOT APPLY TO AN EXERCISE OF POWER BY THE GOVERNOR IN COUNCIL, WHO IS OF COURSE NOT ABOVE THE LAW.

...

ALL MEMBERS OF THE COURT PROCEEDED ON THE BASIS THAT THE GOVERNOR'S DECISION WOULD BE MADE IN ACCORDANCE WITH CONSTITUTIONAL CONVENTION WHICH REQUIRES THE GOVERNOR TO ACT UPON THE ADVICE OF THE GOVERNOR'S MINISTERS; SEE, FOR EXAMPLE, MASON J AT 354.

PARA. 49: THE LATER DECISION OF THE HIGH COURT IN *THE STATE OF SOUTH AUSTRALIA v O'SHEA* (1987) 163 CLR 378 PROCEEDS ON THE SAME BASIS. THAT IS, THAT THE GOVERNOR IN COUNCIL IS AMENABLE TO PROCEEDINGS BY WAY OF JUDICIAL REVIEW, AND THAT THE VESTING OF A STATUTORY DECISION MAKING POWER IN THE GOVERNOR IN COUNCIL IS NOT OF ITSELF SUFFICIENT TO EXCLUDE CONDITIONS OR LIMITATIONS ON THE SCOPE AND EXERCISE OF THE POWER OF A KIND THAT WOULD EXIST WERE THE POWER TO BE ~~EXE~~ EXERCISED BY A MINISTER.

(REF. 39.)

PARA. 56: ... MOREOVER, MR RANN WAS AND IS ONLY ONE MEMBER OF CABINET. ONE CANNOT INFER THAT OTHER MEMBERS OF CABINET SHARED HIS OPINION, WHATEVER OPINION THAT WAS.

PARA. 61: THE POWER UNDER S 67(7) OF THE CSA IS CONFERRED ON THE GOVERNOR, TO BE EXERCISED ON ADVICE WHICH HAS THE SUPPORT OF A DECISION BY CABINET. IN SUBSTANCE, THE DECISION WILL BE MADE BY CABINET. THE DECISION BY THE GOVERNOR IS THE FORMAL EXPRESSION OF THE CABINET'S DECISION.

PARA. 62: ... GLEESON CJ AND GUMMOW J SAID AT [61]:

[61] ... AT THE SAME TIME, THE MINISTERS' EXERCISE OF STATUTORY POWERS IS SUBJECT TO THE RULE OF LAW, AND THE FORM OF ACCOUNTABILITY WHICH THAT ENTAILS...

PARA. 64: IN HOT HOLDINGS PTY LIMITED v CREASY [2002] HCA 51; (2002) 210 CLR 438 GAUDRON, GUMMOW AND HAYNE JJ MADE SOME OBSERVATIONS ABOUT THE ROLE OF POLICY IN A DECISION WHEN THE DECISION MAKER IS A MINISTER. THEY SAID AT [51]:

[51]. THAT IS NOT TO DENY, OF COURSE, THE IMPORTANCE OR APPLICATION OF THE ~~WELL-EST~~

WELL-ESTABLISHED GROUND FOR THE GRANT OF CERTIORARI FOR "FRAUD" (CRAIG v SOUTH AUSTRALIA (1995) 184 CLR 163 AT 175-176), A GROUND IN WHICH "FRAUD" IS TO BE UNDERSTOOD IN A BROAD SENSE AND AS ENCOMPASSING MATTERS SUCH AS ACTING FOR AN IMPROPER PURPOSE. IT IS EVIDENT THAT THERE WILL BE CASES IN WHICH THAT, RATHER THAN "BIAS" OR APPREHENSION OF BIAS, WILL BE THE BETTER CHARACTERISATION OF WHY CERTIORARI WILL ~~BE~~ LIE.

PARA. 65: ... EQUALLY, IT WAS OPEN TO THE PREMIER TO SAY, AS HE DID, THAT THE CABINET WOULD MAKE ITS OWN DECISION, AND TO EMPHASISE THAT IT WOULD NOT HESITATE TO DEPART FROM A RECOMMENDATION BY THE BOARD.

... OF COURSE, AS IS ACKNOWLEDGED IN THE CITATIONS ABOVE, THE POWER UNDER S 67(7) MUST BE EXERCISED LAWFULLY.

PARA. 66: THE OTHER TWO BASES ADVANCED BY MR MEAD RAISE A QUESTION AS TO THE FUNCTION OF THE GOVERNOR IN COUNCIL UNDER S 67(7) OF THE CSA. IN PARTICULAR,

TO WHAT MATTERS MAY THE GOVERNOR HAVE REGARD IN MAKING A DECISION UNDER S 67(7)?

PARA. 68: ... UNDER THE STATUTORY ~~SCHEME~~ SCHEME A NON-PAROLE PERIOD CAN BE EXTENDED OR NEGATED (SEE ABOVE). A COURT WILL DECIDE THESE MATTERS. BY IMPLICATION, ALTHOUGH NOT SPelt OUT IN HIS SUBMISSIONS, THE DPP OR THE ATTORNEY-GENERAL ARE INTENDED (BY PARLIAMENT) TO INVOKE THE POWERS REFERRED TO IF A PRISONER IS NOT FIT FOR RELEASE ON PAROLE, OR IF THE PRISONER'S BEHAVIOUR OR THE PROTECTION OF THE COMMUNITY (S 32(7) OF THE SENTENCING ACT) OR THE ~~PROTECTION~~ ^{SAFETY} OF THE COMMUNITY (S 33A(7) OF THE SENTENCING ACT) CALL FOR A LONGER NON-PAROLE PERIOD OR THE NEGATION OF THE NON-PAROLE PERIOD. IN THAT CONTEXT, IF THE NON-PAROLE PERIOD HAS ~~NOT~~ NOT BEEN ALTERED, AND ITS EXPIRY IS APPROACHING, PARLIAMENT INTENDED THAT IF THE BOARD RECOMMENDS RELEASE THE GOVERNOR WILL ACT ON THE RECOMMENDATION UNLESS THERE IS GOOD REASON NOT TO DO SO, OR UNLESS THE BOARD HAS FAILED TO CONSIDER ALL RELEVANT MATTERS. ALTERNATIVELY, AS THE EXPIRY OF A NON-PAROLE PERIOD APPROACHES, A BOARD RECOMMENDATION FOR RELEASE SHOULD ORDINARILY BE ACTED UPON, BECAUSE IF IT WAS NOT APPROPRIATE TO DO SO, THE STATUTORY ~~SCHEME~~ MECHANISM FOR EXTENDING OR NEGATING A NON-PAROLE PERIOD COULD AND SHOULD HAVE BEEN INVOKED.

PARA. 69: THIS SUBMISSION TREATS THE POWER OF THE GOVERNOR UNDER S 67(7) OF THE CSA AS A CONFINED POWER.

PARA. 70: MR MEADS OTHER MAIN SUBMISSION IS THAT THE THOROUGH CONSIDERATION GIVEN BY THE BOARD TO THE QUESTION OF RELEASE, THE ABSENCE OF ANY RELEVANT MATERIAL NOT ADVERTED TO BY THE BOARD, THE REPEATED DECISIONS NOT TO RELEASE MR WATSON, COUPLED WITH THE FAILURE BY THE DPP TO APPLY FOR AN EXTENSION OF THE NON-PAROLE PERIOD AND THE FAILURE OF THE ATTORNEY-GENERAL TO APPLY FOR AN ORDER THAT WOULD HAVE THE EFFECT OF NEGATING THE NON-PAROLE PERIOD, ALL COMBINE TO INDICATE THAT THE DECISION WAS UNREASONABLE OR IRRATIONAL, AND SO INVALID.

PARA. 80: FIRST, THERE IS NOTHING IN THE TERMS OF S 67(7) OF THE CSA, OR S 67 AS A WHOLE, THAT LIMITS THE SCOPE OF THE POWER CONFERRED ON THE GOVERNOR.

(REF. 41.)

ON ITS FACE, IT IS A BROAD POWER.

PARA. 94: MY CONCLUSION IS THAT THE POWER CONFERRED ON THE GOVERNOR BY S 67(7) OF THE CSA IS A BROAD AND GENERAL POWER, NO LESS BROAD THAN THAT EXERCISED BY THE BOARD IN DECIDING UPON RELEASE ON PAROLE OR IN RECOMMENDING RELEASE ON PAROLE, AND PROBABLY BROADER. I MAKE THE LATER POINT BECAUSE SUBS (3A) AND SUBS (4) OF S 67, WHICH IDENTIFY THE MATTERS THAT THE BOARD MUST CONSIDER, DO NOT APPLY IN TERMS TO THE GOVERNOR, AND BECAUSE THE CONFERRAL OF THE POWER ON THE GOVERNOR ACTING ON THE ADVICE OF EXECUTIVE COUNCIL SUGGESTS THAT THE GOVERNOR IN MAKING A DECISION IS ENTITLED TO TAKE INTO ACCOUNT FAIRLY BROAD CONSIDERATIONS IN DECIDING WHAT IS IN THE PUBLIC INTEREST.

PARA. 96: IT FOLLOWS FROM THIS THAT THE SECOND BASIS FOR ATTACKING THE VALIDITY OF THE DECISION BY THE GOVERNOR FAILS. IT IS NOT NECESSARY FOR MR HINTON TO DEMONSTRATE GOOD REASON FOR THE GOVERNOR TO REJECT THE RECOMMENDATION BY THE BOARD. NOR IS IT NECESSARY FOR HIM TO SHOW THAT THE BOARD FAILED TO CONSIDER ALL RELEVANT MATTERS. NOR IS THE MATTER TO BE APPROACHED ON THE BASIS THAT THE GOVERNOR SHOULD ORDINARILY ACCEPT THE ADVICE OF THE BOARD.

PARA. 98: IN CONSIDERING THIS SUBMISSION IT IS NECESSARY TO BEAR IN MIND THE FUNCTION OF THE COURT. THE COURT IS CONCERNED WITH THE LEGALITY OF THE GOVERNOR'S DECISION. IT IS NOT CONCERNED WITH THE MERITS. THAT IS, THE COURT IS NOT CONCERNED WITH WHETHER THE GOVERNOR'S DECISION IS RIGHT OR WRONG ON THE FACTS, OR SOUND OR UNSOUND. IN ATTORNEY-GENERAL (NSW) V QUINN (1990) 170 CLR 1, AT 35-36, BRENNAN ~~SAME~~ J SAID:

THE DUTY AND JURISDICTION OF THE COURT TO REVIEW ADMINISTRATIVE ACTION DO NOT GO BEYOND THE DECLARATION AND ENFORCING OF THE LAW WHICH DETERMINES THE LIMITS AND GOVERNS THE EXERCISE OF THE REPOSITORY'S POWER. IF, IN SO DOING, THE COURT AVOIDS ADMINISTRATIVE INJUSTICE OR ERROR, SO BE IT; BUT THE COURT HAS NO JURISDICTION SIMPLY TO CURE ADMINISTRATIVE INJUSTICE OR ERROR, THE MERITS OF ADMINISTRATIVE ACTION, TO THE EXTENT THAT THEY CAN BE DISTINGUISHED FROM LEGALITY, ARE FOR THE REPOSITORY OF THE RELEVANT POWER AND, SUBJECT TO POLITICAL CONTROL, FOR THE REPOSITORY ALONE.

(REF. 42.)

PARA. 100: TO THE EXTENT THAT A TEST OF LEGALITY OF A DECISION UNDER AN ACT INVOLVES THE CONCEPT OF "UNREASONABLENESS" THE COURT MUST TAKE CARE TO OBSERVE THIS LINE BETWEEN LEGALITY AND MERITS. IN PARTICULAR, THE COURT MUST BE MINDFUL OF THE MANNER IN WHICH THIS TERM CAN BE USED.

PARA. 101: MR HEAD'S SUBMISSION INVOKES WHAT MAY BE TWO DIFFERENT BASES FOR JUDICIAL REVIEW, OR TWO DIFFERENT APPROACHES TO THE ISSUE OF LEGALITY — UNREASONABLENESS ON THE ONE HAND AND ILLOGICALITY OR IRRATIONALITY ON THE OTHER HAND. THERE ARE A NUMBER OF OBSERVATIONS IN RECENT DECISIONS BY THE HIGH COURT SUGGESTING THAT UNREASONABLENESS (IN THE SENSE EXPLAINED) IS THE RELEVANT TEST OF LEGALITY WHEN THE ATTACK IS ON THE LEGALITY OF THE EXERCISE OF A DISCRETION, AND IRRATIONALITY OR ILLOGICALITY MAY BE THE RELEVANT EXPRESSION WHEN THE ATTACK IS ON A DECISION BASED ON FINDINGS OF FACT OR REASONING FROM FACTS TO A CONCLUSION.

PARA. 102: ... THE TOPIC IS CONVENIENTLY SUMMARISED BY CRENNAN AND BELL JJ IN MINISTER FOR IMMIGRATION AND CITIZENSHIP V SZMDS [2010] HCA 16; (2010) 290 CLR 611... THEIR HONOURS SAID:

[124] MORE RECENTLY IT HAS BEEN SUGGESTED THAT STATUTORY TRIBUNALS MUST NOT ONLY ACT REASONABLY AS INTENDED BY THE LEGISLATURE, THEY MUST ALSO ACT RATIONALLY.

... IT APPEARS CLOSELY ALLIED ALSO TO THE REQUIREMENT IN AVON DOWNS THAT EXTRANEIOUS REASONS SHOULD NOT BE TAKEN INTO CONSIDERATION BUT RELEVANT CONSIDERATIONS MUST BE. IT APPEARS TO BE ALLIED AS WELL TO THE PRINCIPLE THAT FACT FINDING MUST BE BASED ON PROBATIVE MATERIAL, ONE CORRELATIVE OF WHICH IS THAT A DECISION BASED ON NO EVIDENCE DISPLAYS JURISDICTIONAL ERROR.

PARA. 103: THE PRESENT CASE, IN MY OPINION, INVOLVES AN ATTACK ON THE EXERCISE OF A BROAD POWER. IT IS NOT A CASE IN WHICH THE GOVERNOR WAS OBLIGED TO MAKE PARTICULAR FINDINGS OF FACT, JURISDICTIONAL OR OTHERWISE. HE WAS REQUIRED TO EXERCISE A BROADLY EXPRESSED POWER. IT MAY BE THAT NOT MUCH MORE CAN BE SAID ABOUT THE POWER IN GENERAL TERMS THAN WAS SAID BY FRENCH CJ IN K-GENERATION PTY LIMITED V LIQUOR LICENSING COURT [2009] HCA 4; (2009) 237 CLR 501 AT [59]. THAT IS, THAT THE POWER:

[59] ... IS SUBJECT TO THE MINIMUM CONSTRAINT APPLICABLE TO THE EXERCISE OF ANY STATUTORY POWER NAMELY THAT IT MUST BE EXERCISED IN GOOD FAITH AND WITHIN THE SCOPE AND FOR THE PURPOSES OF THE STATUTE.

PARA. 112: ... THE ISSUE IS THE SCOPE OF THE POWER TO BE EXERCISED BY THE GOVERNOR. ONCE THAT IS DECIDED, THE ISSUE IS WHETHER THE DECISION MADE IS ~~VALID~~ INVALID BECAUSE IT HAS NOT BEEN MADE WITHIN THE LIMITS OF THE POWER.

PARA. 115: ... THE CONTRAST BETWEEN THE OBLIGATION OF THE BOARD UNDER S 67(9) OF THE CSA TO GIVE REASONS FOR REFUSING AN APPLICATION FOR RELEASE ON PAROLE, AND THE ABSENCE OF ANY SUCH OBLIGATION ON THE PART OF THE GOVERNOR IS STRIKING AND SIGNIFICANT.

... AND IN PUBLIC SERVICE BOARD OF NEW SOUTH WALES V OSHOND (1984-1985) 159 CLR 656, IN A PASSAGE WHICH HAS BEEN ACCEPTED AS STATING THE LAW OF AUSTRALIA, GIBBS CJ SAID AT ~~671~~ 662-663:

THERE IS NO GENERAL RULE OF THE COMMON LAW, OR PRINCIPLE OF NATURAL JUSTICE, THAT REQUIRES REASONS TO BE GIVEN FOR ADMINISTRATIVE DECISIONS, EVEN DECISIONS WHICH HAVE BEEN MADE IN THE EXERCISE OF A STATUTORY DISCRETION AND WHICH MAY ADVERSELY AFFECT THE INTERESTS, OR DEFEAT THE LEGITIMATE OR REASONABLE EXPECTATIONS, OF OTHER PERSONS. THAT THIS IS SO HAS BEEN RECOGNIZED IN THE HOUSE OF LORDS... AND THE PRIVY COUNCIL; IN THOSE CASES, THE PROPOSITION THAT THE COMMON LAW DOES NOT REQUIRE REASONS TO BE GIVEN FOR ADMINISTRATIVE DECISIONS SEEMS TO HAVE BEEN REGARDED AS SO CLEAR AS HARDLY TO WARRANT DISCUSSION. MORE RECENTLY, IN CONSIDERED JUDGMENTS, THE COURT OF APPEAL IN ENGLAND HAS HELD THAT NEITHER THE COMMON LAW NOR THE RULES OF NATURAL JUSTICE REQUIRE REASONS TO BE GIVEN FOR DECISIONS OF THAT KIND.

PARA. 116: IT WOULD BE DIFFICULT TO INTERPRET S 67 OF THE CSA AS, BY IMPLICATION, REQUIRING THAT THE GOVERNOR GIVE REASONS FOR A DECISION DECLINING TO RELEASE A PRISONER ON PAROLE.

PARA. 117: THERE MIGHT BE AN ARGUMENT TO THE CONTRARY. IN O'SHEA THE HIGH COURT ACCEPTED THAT THE DECISION MAKING POWER CONFERRED ON THE GOVERNOR WAS NOT CONFERRED IN TERMS THAT WHOLLY EXCLUDED THE RULES OF

(REF. 44.)

PROCEDURAL FAIRNESS: THE ISSUE WAS WHICH OF THOSE RULES APPLIED, HAVING REGARD TO THE STATUTORY SCHEME, THE TERMS OF THE POWER AND THE MANNER IN WHICH THE DECISION WAS MADE, AND THE CONTENT OF THE DECISION.

PARA. 118: IN OSMOND CJ SAID AT:

IT REMAINS TO CONSIDER WHETHER, NOTWITHSTANDING THAT THERE IS NO GENERAL OBLIGATION TO GIVE REASONS FOR AN ADMINISTRATIVE DECISION,

THAT OBSERVATION RAISES THE QUESTION OF WHETHER IN THE CIRCUMSTANCES OF THIS CASE APPLICABLE RULES OF ~~PROCEDURAL~~ PROCEDURAL FAIRNESS REQUIRE REASONS TO BE GIVEN. POSING THE QUESTION THIS WAY ASSUMES THAT THE RULES OF PROCEDURAL FAIRNESS HAVE NOT BEEN WHOLLY EXCLUDED BY S. 67. THAT IS AN ASSUMPTION THAT I AM PREPARED TO MAKE, IN LIGHT OF THE DECISION IN O'SHEA, PARA. 133: THE SOLICITOR-GENERAL SUBMITS THAT BECAUSE THE LEGISLATION POSITIVELY REQUIRES THE BOARD TO GIVE REASONS, THE ABSENCE OF SUCH AN EXPRESS REQUIREMENT IN RELATION TO THE EXECUTIVE COUNCIL MANIFESTS A LEGISLATIVE INTENTION THAT REASONS ARE NOT REQUIRED IN THE EVENT OF A REFUSAL. I RECOGNISE THE FORCE BOTH OF THAT SUBMISSION AND OF THE MATTERS REFERRED TO BY DOYLE CJ IN RELATION TO THE USUAL POSITION OF CABINET CONFIDENTIALITY AND ITS HIGH IMPORTANCE. LIKE HIS HONOUR, I SIMPLY SUGGEST THE POSSIBILITY THAT THERE MIGHT BE AN ARGUMENT TO THE CONTRARY.

PARA. 135: WHEN GIBBS CJ COMMENTED IN OSMOND THAT "IT IS DIFFICULT TO SEE HOW THE FAIRNESS OF AN ADMINISTRATIVE DECISION CAN BE AFFECTED BY WHAT IS DONE AFTER THE DECISION HAS BEEN MADE" IT SEEMS TO ME THAT THE APPARENT DIFFICULTY STEMMED FROM THE FACT THAT IN THE NORMAL CASE OF AN ADMINISTRATIVE DECISION DETERMINES A MATTER WITH A DEGREE OF FINALITY SUCH THAT IT CAN ~~BE~~ PLAUSIBLY BE SAID THAT THE SUBSEQUENT GIVING OF REASONS FOR THE DECISION CANNOT CHANGE OR MITIGATE THE EFFECTS OF THAT DECISION. HOWEVER, I CAN AT LEAST ENVISAGE THE POSSIBILITY OF A CONTENTION THAT THE PRESENT CASE IS "SPECIAL" BECAUSE HERE THERE IS A CHALLENGED DECISION WHICH IS NOT THE END OF THE PROCESS BUT RATHER PART OF A CONTINUING PROCESS OF SUCCESSIVE APPLICATIONS FOR PAROLE IN

(REF. 45.)

CIRCUMSTANCES WHERE THE VERY FAILURE TO PROVIDE REASONS MAY HAVE SOME IMPORTANCE MOVING INTO THE FUTURE.

PARA. 139: THE WORDS OF MASON CJ IN *KIOA V WEST*⁹ ARE WELL KNOWN. THEY ADDRESS FUNDAMENTAL ASPECTS OF NATURAL JUSTICE AND MAKE IT CLEAR THAT WHEN THE MEANING OF "A RIGHT OR INTEREST" IS UNDER CONSIDERATION, PERSONAL LIBERTY STANDS AT THE TOP OF THE LIST. HIS HONOUR STATED:¹⁰

IT IS A FUNDAMENTAL RULE OF THE COMMON LAW DOCTRINE OF NATURAL JUSTICE EXPRESSED IN TRADITIONAL TERMS THAT, GENERALLY SPEAKING, WHEN AN ORDER IS TO MADE WHICH WILL DEPRIVE A PERSON OF SOME RIGHT OR INTEREST OR THE LEGITIMATE EXPECTATION OF A BENEFIT, HE IS ENTITLED TO KNOW THE CASE SOUGHT TO BE MADE AGAINST HIM AND TO BE GIVEN AN OPPORTUNITY OF REPLYING TO IT. ... THE REFERENCE TO "RIGHT OR INTEREST" IN THIS FORMULATION MUST BE UNDERSTOOD AS RELATING TO PERSONAL LIBERTY, STATUS, PRESERVATION OF LIVELIHOOD AND REPUTATION, AS WELL AS TO PROPRIETARY RIGHTS AND INTERESTS.¹¹

195. *R v. SMITH* (1987) 44 SASR 587.

196. *TELFORD v. SEVERIN AND ANOR* [2007] HCA TRANS 427 (9 AUGUST 2007)

"MR WAIT: ... SO IT IS VERY DIFFERENT, OF COURSE, YOUR HONOUR, TO A CASE WHERE THERE MIGHT BE A PROSPECTIVE CHANGE BY REFERENCE TO A PAST EVENT WHICH WOULD THEN, WE SAY, BRING INTO PLAY THE RELEVANT PRINCIPLES ABOUT THE PRESUMPTION AGAINST RETROSPECTIVE OPERATION. WE SAY THIS ACT SIMPLY HAS NO RETROSPECTIVE OPERATION."¹²

197. *R v. ANDERSON* [2006] SASC 108 (13 APRIL 2006).

"PARA 11: ... HE SUBMITTED THAT A SENTENCING COURT IS REQUIRED TO TAKE INTO ACCOUNT THE SENTENCING REGIME AND THE STANDARDS WHICH APPLIED AT THE TIME AN OFFENCE WAS COMMITTED."¹³

198. *R v. STAFFORD* [2009] QCA 407

"PARA. 151: IN THE LIGHT OF THE RECENT DECISIONS OF THE HIGH COURT TO WHICH I HAVE REFERRED, IT CAN NOW BE SEEN THAT THE FOCUS OF THE MAJORITY OF THE COURT IN 1997 ON THE SUBSTANTIVE EFFECT OF THE "FRESH/NEW EVIDENCE" OBSCURED THE

(REF. 46.)

POINT THAT THE PROCEDURAL DEFECT WHICH GAVE RISE TO A MISARRIAGE OF JUSTICE INVOLVED IN THE PRESENTATION BY THE CROWN OF A SCENARIO SUBSTANTIAL ELEMENTS OF WHICH WERE, AS THE NEW EVIDENCE SHOWED, APT TO MISLEAD THE JURY IN PERFORMING THEIR FUNCTION.

PARA. 152: THE TRIAL WAS UNFAIR IN A WAY WHICH WAS APT TO DEPRIVE MR STAFFORD OF THE CONSIDERATION BY THE JURY OF THE REAL CASE WHICH COULD FAIRLY BE MADE AGAINST HIM 34 (2005) 224 CLR 300 AT 317 [45], 39 RATHER THAN A THEORETICAL CASE IMPORTANT ASPECTS OF WHICH WERE NOT SUSTAINABLE ON A FAIR VIEW OF THE EVIDENCE. IN MY RESPECTFUL OPINION, IN THIS CASE THERE WAS A SIGNIFICANT DENIAL OF PROCEDURAL FAIRNESS IN THAT THE CROWN CASE WAS PRESENTED TO THE JURY IN A WAY WHICH CAN BE SEEN IN RETROSPECT TO HAVE UNFAIRLY DEPRIVED MR STAFFORD OF "THE CHANCE TO HAVE THE FAVOURABLE RESPONSE OF THE JURY" 35 ON THE QUESTION OF HIS GUILT. "

199. INDEPENDENT COMMISSIONER AGAINST CORRUPTION ACT 2012, S. A.

SECTION 5. CORRUPTION, MISCONDUCT AND MALADMINISTRATION

200. "5.(2) IF THE COMMISSIONER SUSPECTS THAT AN OFFENCE THAT IS NOT CORRUPTION IN PUBLIC ADMINISTRATION (AN INCIDENTAL OFFENCE) MAY BE DIRECTLY OR INDIRECTLY CONNECTED WITH, OR MAY BE A PART OF, A COURSE OF ACTIVITY INVOLVING THE COMMISSION OF CORRUPTION IN PUBLIC ADMINISTRATION (WHETHER OR NOT THE COMMISSIONER HAS IDENTIFIED THE NATURE OF THAT CORRUPTION), THEN THE INCIDENTAL OFFENCE IS, FOR SO LONG ONLY AS THE COMMISSIONER SO SUSPECTS, TAKEN FOR THE PURPOSES OF THIS ACT TO BE CORRUPTION IN PUBLIC ADMINISTRATION. "

201. "5.(5) WITHOUT LIMITING OR EXTENDING THE CONDUCT THAT MAY COMPRISE CORRUPTION, MISCONDUCT OR MALADMINISTRATION IN PUBLIC ADMINISTRATION, THIS ACT APPLIES TO CONDUCT THAT —

(C) COMPRISES A FAILURE TO ACT; OR "