SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Buckby* [2018] QSC 139
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (Applicant) **v** **DESMOND GEORGE BUCKBY** (Respondent)
FILE NO:	BS No 11102 of 2006
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	4 June 2018, *ex tempore*
DELIVERED AT:	Brisbane
HEARING DATE:	4 June 2018
JUDGE:	Bowskill J
ORDERS:	**1. Pursuant to section 30(1) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 the decision, made on 12 April 2007, that the respondent, Desmond George Buckby, is a serious danger to the community in the absence of a Division 3 order, be affirmed.** **2. Pursuant to section 30(3)(a) of the Act, it is ordered that the respondent continue to be subject to the continuing detention order made on 7 December 2007.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – application for review of a continuing detention order under s 27 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 – where the respondent, a 70 year old man, has a serious criminal history including multiple convictions for sexual offences committed against children – where the respondent has been subject to a continuing detention order since December 2007 – where the respondent demonstrates minimal insight and strongly denies his prior sexual offending – where the respondent also now suffers from a neurocognitive disorder (likely dementia), and there is evidence that he would not be able to recall the conditions of a supervision order, and would not be able to comply with the conditions of such an order,

because of the severity of his memory impairment and associated executive dysfunction – where there is no available suitable closely supervised and supported aged care facility – whether the respondent should continue to be subject to the continuing detention order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), ss 27 and 30

COUNSEL: J Rolls for the applicant
S Robb for the respondent

SOLICITORS: Crown Law for the applicant
Legal Aid Queensland for the respondent

[1] Mr Buckby is a 70 year old man who is in custody under a continuing detention order under the *Dangerous Prisoners (Sexual Offenders) Act* 2003. The order was first made in December 2007 and has been confirmed following annual reviews since then, most recently on 30 March 2017. The application before me today is a further review, as required under section 27 of the Act.

[2] Mr Buckby has a serious criminal history that includes multiple convictions for sexual offences committed against children, with the first such conviction of indecent assault dating back to 1981 in Victoria, followed by convictions in 1990 (for indecent dealing), 1995 (for unlawful carnal knowledge and a range of indecent treatment of a child under 12 offences), and 2004 (in relation to indecent treatment offences and offences of attempting to and administering a drug for the purpose of a sexual act) in Queensland. I refer to the summary of the respondent's criminal history in *Attorney-General v Buckby* [2007] QSC 370 at [11] to [16] in the decision of White J.

[3] Insofar as the 1995 offences are concerned, it is recorded in White J's reasons at [13] that:

> "The respondent had known two of the children's parents for some years. He was friendly with the parents of all of the children concerned. He had taken them on outings. He took photographs of the children. Some of the young girls slept over in his caravan on many occasions. It was alleged that he had shown them pornographic videos, had attempted to administer a stupefying drug and sodomised one of the children who was 15."

[4] Mr Buckby was originally sentenced to 10 years' imprisonment for the unlawful carnal knowledge, but this was reduced to seven years following an appeal.

[5] In relation to the 2004 offences, White J's reasons record at [14] and [15]:

> "After he had served that sentence and had been out in the community for about a year, he offended again against children and in July 2004 was convicted of indecent treatment of two children under the age of 16 with a circumstance of

> aggravation, of administering a drug for the purpose of a sexual act and of attempting to administer a drug for the purpose of a sexual act. The head sentence imposed was four years ...
>
> Those offences involved two girls aged 11 and eight who had been permitted by their parents to stay overnight in the caravan in which the respondent was living. In the course of the night, he fondled the children's genitals, took photographs of them in their underwear and aggravated the offences by the use or attempted us of sedative drugs to produce a state of passivity or altered consciousness, as described by Professor James in his report dated 24 March 2007."

[6] As recorded by White J at [16], "[t]he respondent has maintained a strong stance of denial with respect to the 1995 and 2004 sexual offences"; although he pleaded guilty to both sets of offences.

[7] As Mr Buckby was approaching the end of his sentence for the 2004 offences, an application was made that he be subject to a division 3 order under the Act. On 12 April 2007, Atkinson J made an order for his release, subject to a supervision order under section 13(5)(b) of the Act. See *Attorney-General v Buckby* [2007] QSC 200.

[8] Mr Buckby was so released on 14 May 2007. As might be expected, one of the conditions of the supervision order was that he not have any supervised or unsupervised contact with children under the age of 16.

[9] Within a matter of months, on 4 October 2007, he was taken back into custody after being found with five children under the age of 16 in his unit. Consistent with his previous pattern, he had befriended the man who was living in the unit next door, who was the father of the five children, who were at times living in that unit next door. The facts are set out in White J's reasons, [2007] QSC 370 at [19] to [25]. There was interaction between the respondent and the children in this context, including the giving of presents and food to the children, which was described as grooming conduct consistent with his previous modus operandi.

[10] As a consequence of that contravention, by order made by White J on 7 December 2007, the supervision order was rescinded and an order made that Mr Buckby be detained in custody for an indefinite term for control, care and treatment.

[11] That order was first reviewed by Mullins J on 9 June 2009: see *Attorney-General v Buckby* [2009] QSC 146. In her Honour's reasons, Mullins J records that a difficulty the respondent had in undertaking rehabilitation programs whilst in prison, both whilst serving his original terms of imprisonment and whilst subject to the continuing detention order, "is that he strongly denies the offending conduct". As Mullins J said at page 6 of her reasons:

> "During the many statements that the respondent made during the hearing today, he maintained his denial of sexual offending. Dr Harden referred to it as

> 'minimisations' and 'rationalisations'. They are good descriptions of the approach of Mr Buckby to his offending. He minimises what he has done to child victims by comparing his touching to what rapists do to children or what other offenders do by way of torturing victims."

[12] Justice Mullins said at page 10 that she was not satisfied the respondent's state of denial of his prior sexual offending makes him suitable for a supervision order and that she was not satisfied, in light of the psychiatric evidence, that appropriate conditions could be formulated for a supervision order that will address the need to ensure the adequate protection of the community. The continuing detention order was affirmed.

[13] A similar conclusion was reached by Ann Lyons J on 21 May 2010: see *Attorney-General v Buckby* [2010] QSC 174. In her Honour's reasons, at [18] to [19], she also records that on 11 January 2010 the respondent was convicted of 20 further indecent treatment offences, which had occurred contemporaneously with the offending for which he was convicted in 2004.

[14] The continuing detention order has subsequently been confirmed on 16 May 2011 (*Attorney-General v Buckby* [2011] QSC 157); 18 June 2012; 30 September 2013; 27 August 2015 (*Attorney-General v Buckby* [2015] QSC 251); and most recently on 30 March 2017 (*Attorney-General v Buckby* [2017] QSC 46).

[15] By the time of the 2015 review, Mr Buckby had completed the High Intensity Sexual Offending Program. However, as recorded in [14] of the reasons of Burns J ([2015] QSC 251) the completion report noted that he "repeatedly reiterated that he had not offended, sexually or otherwise, maintaining this for the duration of the program", and that he is considered to have demonstrated minimal insight into his offending.

[16] The theme of denial continued at the time of the review in December 2016, but by this time Mr Buckby was also demonstrating a decline in his cognitive functioning, both in terms of memory and practical functioning ability. Those deficits were accepted by Boddice J as likely to present significant challenges for Mr Buckby if released into the community without a high level of functional supervision on a daily basis (see [2017] QSC 46 at [52]). At [55] of that decision Boddice J said:

> "I accept the opinions expressed by Dr Sundin and Dr Harden as to the real likelihood that the respondent's cognitive impairment will restrict his ability to comply with the terms of a supervision order. Strict compliance with the supervision order is essential, having regard to the risk of sexual re-offending in the future posed by the respondent in the context of paraphilic, predatory, sexual offending which is highly entrenched longitudinally and accompanied by denial as to the nature and wrongness of his offending behaviour."

[17] For the purposes of the current review of the continuing detention order, further reports have been obtained from Dr Harden and Dr Sundin, psychiatrists.

[18] In her report dated 18 December 2017, Dr Sundin expressed the opinion that the risk that Mr Buckby poses is unchanged from previous reports. Dr Sundin says at page 13 of her report that:

> "Mr Buckby's increasing age and his completion of the High Intensity Sexual Offending Programme are both factors which have lowered his overall risk for sexual offending within the community. His risk has been lowered despite his intransigent failure to acknowledge responsibility for past sexual offending.
>
> In my opinion, the key issue is whether or not Mr Buckby could be compliant to a supervision order, appreciating the requirements of that supervision order and remember the clauses so that he could give an accurate report to QCS managers."

[19] Dr Sundin recommended that an updated occupational therapy assessment be undertaken to determine whether Mr Buckby would be someone who could be safely managed in the community.

[20] In his further report dated 10 May 2018, Dr Harden likewise expressed the opinion that the risk posed by Mr Buckby has not changed significantly since he completed the High Intensity Sexual Offending Program. Dr Harden said that Mr Buckby's future unmodified risk of sexual reoffence remains at high. Dr Harden notes that he has previously said the risk was extremely high, but considers the reduction to high has been associated with Mr Buckby's development of some limited insight, completion of the HISOP program and ability to identify the simple need to avoid all contact with children lifelong. Consistently with his past reports, in this report, Dr Harden says it is still his view that "it is possible that [Mr Buckby] might meaningfully participate in a supervision program to reduce his risk", but notes that the potential risk reduction would "depend entirely on the effectiveness of the supervision program in preventing" contact with children and that this would "require a degree of compliance on his part". Dr Harden also considered it would be useful to have an assessment by an occupational therapist of Mr Buckby's competence with regard to activities of daily living.

[21] Such an occupational therapy assessment has since been carried out by Dr Kieran Broome, who produced a report dated 20 May 2018. That is expressly recorded as having been done at the request of Professor Gerard Byrne, a psychiatrist briefed by Legal Aid to prepare a report in relation to Mr Buckby for the purposes of this review. Professor Byrne's report is dated 5 May 2018.

[22] By reference to various cognitive assessments of Mr Buckby, Professor Byrne says at page 11 that "his current cognitive function on multiple tests was clearly within the cognitively impaired range, his attention and concentration were impaired. His executive function was impaired, and his delayed recall was severely impaired".

[23] Professor Byrne expressed the opinion that Mr Buckby is suffering from a neurocognitive disorder, saying that "[o]n several tests of cognitive function, he scores within the range normally associated with major neurocognitive disorder or dementia" (p 11). Professor

Byrne notes that the main area of continuing uncertainty in relation to whether Mr Buckby is suffering from dementia, as opposed to mild cognitive impairment, is his capacity to undertake "instrumental activities of daily living" (which are things such as managing finances, managing medication, shopping, cooking, using the phone, using public transport, driving a car and using a computer), as opposed to "basic activities of daily living" (which includes things like showering, dressing, walking and toileting).

[24] In relation to this, I note that Dr Broome expresses the opinion that Mr Buckby is independent in basic activities of daily living but is likely to need a support person or support services to successfully complete more complex instrumental activities of daily living.

[25] Professor Byrne comments that Mr Buckby functions in the prison environment but considers that prison appears to be compensating for his impaired attention and concentration, executive function and memory, and says he is concerned he would have difficulty managing outside of an institutional setting. Professor Byrne says that if Mr Buckby were to be released, he would need a supervised and supportive aged care facility, that he would not be able to live unsupported or unsupervised (p 12).

[26] Significantly, Professor Byrne also expresses the following opinion, in relation to whether Mr Buckby's cognitive impairment might cause him difficulty understanding or complying with a supervision order (at page 14):

> "I think Mr Buckby might be able to understand some of the conditions in a supervision order if these were written in plain English and carefully explained to him.
>
> I do not think he would be able to recall the conditions of a supervision order because of the severity of his memory impairment.
>
> I do not think he would be able to comply with the conditions of a supervision order because of the severity of his memory impairment and associated executive dysfunction."

[27] Both Dr Harden and Dr Sundin have commented on the reports of Dr Broome and Professor Byrne. Dr Harden, in a further reported dated 31 May 2018, says consideration of these reports has resulted in a "significant alteration to some of my previous opinions". At page 3 of this report, Dr Harden says:

> "I accept the expert opinion of Professor Byrne that Mr Buckby will be unable to retain enough information regarding his supervision order to comply with the conditions of the order. This means that any risk reduction via the supervision order will only occur with those conditions that do not rely on Mr Buckby's compliance by recalling his need to comply with the order (GPS monitoring and similar). It might be, based on my previous interactions with him that he might

> recall that he is not allowed to have any contact with children, however, the report of Professor Byrne makes it clear that this is not to be relied upon.
>
> Therefore in the absence of other measures, release on a supervision order will still leave the risk of sexual recidivism in the moderate to high (above average) range."

[28] Dr Harden says release on supervision to an appropriate supported facility might result in reduction of the risk to the moderate (average) range but notes that due to the combination of his aged care support needs and his risk of recidivism associated with his paraphilia, Mr Buckby might require a significantly more restrictive facility, and he notes that, unfortunately, such accommodation is not readily available.

[29] Dr Sundin has also prepared a further report, dated 1 June 2018. Dr Sundin says, in relation to the updated material:

> "...in light of Mr Buckby's offending and breach history, that his risk of recidivism and thus the risk to the community can [only] be safely managed if he is placed in long term, closely supervised accommodation with GPS monitoring, disclosure clauses, exclusion zones and curfews.
>
> There should be an absolute non-contact order concerning children."

[30] I note that Dr Sundin confirmed, in response to a question from me today, that the word "only" is appropriately included in this expression of her opinion.

[31] The material also includes an affidavit from Ms Cowie, who is the Acting Director of the High Risk Offender Management Unit within Queensland Corrective Services. She addresses the issue of accommodation that might or might not be available to a person in Mr Buckby's position. The material supports the conclusion that there is not presently available accommodation suitable to Mr Buckby's circumstances.

[32] As described by Dr Sundin in giving brief oral evidence today, a locked dementia ward may be suitable. But on the basis of Mr Buckby's physical requirements, as opposed to the requirements he otherwise poses due to the risk of sexual offending recidivism, the evidence from Ms Cowie is that he would not, on the basis of his physical requirements, be somebody who would be assessed as appropriate for being accommodated in such a locked dementia ward.

[33] The contingency accommodation otherwise provided by Queensland Corrective Services does not meet the requirements posed by Mr Buckby, as these contingency precincts are not secure facilities, and the persons housed within them are expected to live independently.

[34] Dr Sundin suggested today that an alternative facility, in terms of a correctional facility, may be the Palen Creek correctional facility, but there is no material before the Court in

terms of whether Mr Buckby would be able to be accommodated in that facility as opposed to where he is currently incarcerated.

[35] Having regard to the evidence before the Court, submissions on behalf of Mr Buckby state that he is not in a position to oppose the affirmation of the continuing detention order, and it seems to me that that is an appropriate and reasonable position to have adopted, having regard to all of the material.

[36] For the purposes of this review hearing, the Court is required to have regard to the matters in section 13(4) of the Act, which includes the reports from the psychiatrists and the occupational therapist which have been referred to. Having regard to Mr Buckby's criminal history, there is information in the material before the Court indicating that there is a propensity on his part to commit serious sexual offences, being sexual offences against a child, in the future. He has diagnoses of paedophilia, personality disorder with narcissistic and obsessive-compulsive antisocial features and cognitive deficits. There is a pattern of offending behaviour on his part involving befriending the adult carers of children and grooming. The efforts undertaken by Mr Buckby to address his offending behaviour have been referred to, and I note in this regard that, consistently with what has been said before, Mr Buckby was also described by Professor Byrne as minimising the significance of his sexual offences. The position has not really changed in terms of the opinions expressed regarding the effect of rehabilitation programs on Mr Buckby, although Dr Harden did indicate that Mr Buckby now appreciates he should not have contact with female children, but it is only if he were able to achieve this that the risk he poses would be mitigated.

[37] Significantly, in terms of Mr Buckby's cognitive impairment, Professor Byrne expresses the opinion that he would not be able to recall the conditions of a supervision order and would not be able to comply with the conditions of such an order.

[38] The material before the Court is acceptable and cogent evidence, on the basis of which I am satisfied to a high degree of probability that the respondent, Mr Buckby, remains a serious danger to the community in the absence of a division 3 order. I therefore affirm the decision previously made by this Court to that effect.

[39] The question, then, is how to exercise the discretion under section 30(3). Should the respondent continue to be subject to the continuing detention order or be released from custody, subject to a supervision order?

[40] The reality, which is accepted by the respondent in the submissions made on his behalf, is that he could only be released to a closely supervised and supported aged care facility. Such a facility is not available. I agree with the observation of the Chief Justice in *Attorney-General v Guy* [2017] QSC 105 that it is deeply troubling that people who could be managed with appropriate support and accommodation must instead be imprisoned due to the lack of availability of any other option.

[41] However, the paramount consideration is the need to ensure adequate protection of the community. The material before the Court overwhelmingly supports the conclusion that adequate protection of the community would not be ensured by the release of the respondent on a supervision order other than in the context of closely supervised and supported accommodation, and in those circumstances, he must continue to be subject to the continuing detention order.

[42] I note that I have been provided with a draft order which, in order 1, records that the decision made on 12 April 2007 that the respondent is a serious danger to the community in the absence of a division 3 order be affirmed, and, in order 2, ordering that the respondent continue to be subject to the continuing detention order made on 7 December 2007. For the reasons I have just articulated, it is appropriate to make an order in those terms, which I will initial and place with the file.