SUPREME COURT OF QUEENSLAND

CITATION:	*Thompson v Attorney-General (Qld)* [2018] QCA 172
PARTIES:	**PAUL THOMPSON** (appellant) **v** **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (respondent)
FILE NO/S:	Appeal No 10881 of 2017 SC No 13108 of 2016
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2017] QSC 79
DELIVERED ON:	31 July 2018
DELIVERED AT:	Brisbane
HEARING DATE:	13 April 2018
JUDGES:	Fraser and McMurdo JJA and Mullins J
ORDERS:	**1. Application for extension of time to appeal granted.** **2. Appeal dismissed.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – GENERALLY – where the respondent was successful in obtaining an order for the appellant to be detained on the conclusion of his sentence pursuant to division 3 of part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether the trial judge erred in being satisfied that the appellant is a serious danger to the community in the absence of a division 3 order – where the appellant argued the trial judge failed to give enough weight to the low level of his sexual offending, his health problems and the benefit he gained from completing a prison program *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 13 *Attorney-General (Qld) v Francis* [2007] 1 Qd R 396; [2006] QCA 324, considered *Attorney-General (Qld) v Thompson* [2017] QSC 79, related
COUNSEL:	The appellant appeared on his own behalf

B H P Mumford for the respondent

SOLICITORS: The appellant appeared on his own behalf
G R Cooper, Crown Solicitor for the respondent

[1] **FRASER JA:** I agree with the reasons for judgment of Mullins J and the orders proposed by her Honour.

[2] **McMURDO JA:** I agree with Mullins J.

[3] **MULLINS J:** Mr Thompson who appears for himself appeals against the finding made by the learned trial judge on 12 May 2017 that he is a serious danger to the community in the absence of an order pursuant to division 3 of part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act) and the order that he be the subject of a continuing detention order under the Act: *Attorney-General (Qld) v Thompson* [2017] QSC 79 (the reasons). As his notice of appeal was filed outside the period of time to appeal as of right, he also applies for an extension of time for leave to appeal.

[4] The ground of appeal set out in the notice of appeal is that the trial judge erred in being satisfied to the requisite standard that Mr Thompson is a serious danger to the community in the absence of a division 3 order. The errors identified in supporting affidavits and further written material filed in the court by Mr Thompson can be summarised as:

(a) he was disadvantaged by his legal representatives having only three days to prepare for the hearing before the trial judge which precluded adequate challenge of the evidence adduced by the Attorney-General (the respondent) and the engagement of a psychiatrist to prepare a report on his behalf;

(b) the gravity of Mr Thompson's sexual offending was low level and, taken in conjunction with his health problems, did not support the finding that he is a serious danger to the community in the absence of a division 3 order;

(c) the three psychiatrists who produced reports on receiving instructions from the respondent were biased against him and produced reports that contained numerous errors;

(d) the trial judge failed to give sufficient weight to the benefit Mr Thompson gained from completing the Getting Started Preparatory Program (GSPP).

[5] Mr Thompson prepared all materials on his own behalf for the appeal.

Mr Thompson's background and criminal history

[6] Mr Thompson was 68 years old at the hearing before the trial judge.

[7] Mr Thompson trained as a teacher and worked in various private schools teaching English, mathematics and, occasionally, music. He was last employed as a teacher in about 2003.

[8] The trial judge summarised Mr Thompson's criminal history at [14] of the reasons:

> "He has numerous previous convictions for acts of public exhibitionism such as 'streaking' at sporting venues and in other public places, and an array of other convictions including for offences of dishonesty and relatively minor acts of violence. Of primary concern though on the hearing of this application are his previous convictions for sexual assaults on adolescent males. These offences followed a pattern – the respondent would contrive a scenario to justify searching the person of his victims and, whilst doing so, would indecently assault them. Each of these assaults involved sexual touching or fondling; none escalated to oral, vaginal or anal intercourse. The respondent was interfered with in the same way, and after the same pretence, when he was nine years of age. The respondent persists in euphemistically referring to his past offending in this regard as 'searches' and has very little (if any) insight into the serious potential for psychological harm that can be caused by such assaults."

[9] Mr Thompson's criminal history commenced in New South Wales in 1971 with a conviction for wilful and obscene exposure. There were another 16 convictions in New South Wales for that offence between 1975 and 1994. He was also convicted of commit indecent act on a male person in 1971, 1975, 1976 and 1978; indecent exposure in 1971 and 1983; indecent assault in 1972 and 1978; common assault in 1977 and 1985; cause serious alarm (undressing in a motor vehicle) in 1980; cause serious alarm (exposing his penis) in 1981; offensive behaviour (exposing his genitals) in 1986; commit act of indecency on a person aged under 16 in 1992; and indecent act in 1994. There were other minor offences for which he was convicted that were not of the same nature as the majority of his offending in New South Wales for exhibitionism and indecent assault of males.

[10] Mr Thompson was convicted in the Northern Territory on the one occasion in 1996 for indecent exposure, offensive behaviour in a public place, and indecently dealing with a child under 15 years of age.

[11] Mr Thompson's Western Australian criminal history began in 1989 with a conviction for wilful exposure. Apart from minor offending that was not sexually related, he was convicted of seven counts of aggravated indecent assault in 1991 and failure to comply with child offender reporting obligations in 2006.

[12] Mr Thompson's criminal history in Queensland commenced in 2009 with two convictions for failing to comply with reporting obligations in July 2007 and January 2008 under the *Child Protection (Offender Reporting) Act* 2004 (Qld). There were four breaches of the *Bail Act* 1980 (Qld) in 2009 and 2010, shoplifting offences on three occasions between 2009 and 2010, various street offences under the *Summary Offences Act* 2005 (Qld) between 2009 and 2011, common assault in 2010, creating a disturbance/nuisance on a train/railway/other passenger vehicle operated by the railway in 2010, and assaults occasioning bodily harm in 2010.

[13] The trial judge summarised in detail at [20] to [23] of the reasons Mr Thompson's history of offending that immediately preceded the index offences in addition to the index offences:

"[20] On 10 May 2012, the respondent was sentenced in the Brisbane Magistrates Court for one offence of serious assault on 5 January 2012 (assaulting a security officer at the RBWH) and one offence of assault occasioning bodily harm on 22 November 2011 (assaulting a nurse in the mental health ward at the RBWH). He was sentenced to 125 days imprisonment, with immediate release on parole. A total of 125 days of pre-sentence custody, between 6 January 2012 and 9 May 2012, was declared as time already served under those sentences. When the sentencing Magistrate informed the respondent that he would be released from custody that day, he removed all of his clothes and turned to a group of schoolgirls who were present in the gallery before saying, 'Get a load of this, girls'. The respondent told Dr Grant that he acted in this way in protest at not being sent back to prison because he had nowhere to live if he was released. He then assaulted a Corrective Services officer to make doubly sure he achieved his objective. In consequence of these acts, the respondent was charged with one offence of committing an indecent act in a place to which the public have access and one offence of serious assault on a Corrective Services officer. He was remanded in custody. On 14 January 2013, he was sentenced for those offences in the Brisbane Magistrates Court. He was imprisoned for 12 months, suspended after serving 250 days, with an operational period of 18 months. A total of 250 days of pre-sentence custody (between 10 May 2012 and 14 January 2013) was declared as time already served under that sentence. He was therefore released from custody on the same day (14 January 2013).

[21] Eleven days later, the respondent was charged with three offences of wilful exposure so as to offend or embarrass. The circumstances of those offences were that, on 25 January 2013, the respondent exposed his genitals to three boys aged 10, 11 and 12 at a public swimming pool in Southport. On 4 December 2013, the respondent was sentenced in the Southport Magistrates Court for those offences. The suspended sentence imposed on 14 January 2013 was activated in full. He was sentenced to 12 months imprisonment with parole release on 4 December 2013. A total of 314 days of pre-sentence custody (between 25 January 2013 and 4 December 2013) was declared as time already served under the sentences. He was therefore released again from custody on the same day (4 December 2013).

[22] Within two weeks of his release, the respondent reoffended, and in a serious way. That occurred over two days (13 and 14 December 2013) when the respondent committed four offences of indecently dealing with two 11-year-old boys. The circumstances were these:

(a) On 13 December 2013, the complainant was with friends at the Broadwater Parklands. He was getting

changed in a public toilet when the respondent asked to come in. The complainant opened the door for the respondent, who asked the complainant whether he had seen $5.00. The complainant replied that he had not. The respondent said 'you look like a very honest boy' and asked whether he could search the complainant, who agreed. The respondent first searched the complainant's pockets, then placed his hand inside the complainant's shorts and squeezed the complainant's bottom, tickling the complainant near his anus (Count 1). He then 'went around the other side' and felt the complainant's penis for about 10 seconds (Count 2). The complainant subsequently complained to a friend, as well as to his mother when he arrived home;

(b) On 14 December 2013, the second complainant was with friends at the Broadwater Parklands. He was in a public toilet when the respondent asked if there was any loose change. The complainant said there was none and, when he opened the door, the respondent blocked the complainant from leaving. The respondent told the complainant that he looked like an 'honest person' and searched the complainant's pocket. The respondent put his hand up the complainant's left groin and squeezed the complainant's bottom, feeling around his buttocks (Count 3). The respondent then squeezed the complainant's penis (Count 4).

[23] The respondent was apprehended later on 14 December 2013 and placed under arrest. He declined to be interviewed. He was sentenced in the District Court at Southport on 27 March 2015 by her Honour Judge Dick SC. On each count he was sentenced to three years' imprisonment, to be served concurrently, with a parole eligibility date of 20 June 2015. A total of 312 days, between 20 May 2014 and 26 March 2015, was declared to have been time already served under the sentence."

[14] The trial judge summarised Mr Thompson's medical and psychiatric history at [10] to [13] of the reasons. At the time of the hearing, his ailments included vertigo, peripheral oedema and polyuria (frequent urination).

Hearing before the trial judge

[15] Until shortly before the hearing before the trial judge, Legal Aid Queensland was acting for Mr Thompson and had briefed Ms Bryson of counsel. Immediately prior to the hearing, solicitor Mr Peter Saggers commenced acting for Mr Thompson and Mr T A Ryan of counsel was briefed to appear. At the outset of the hearing Mr Ryan informed the trial judge of his instructions. They were to cross-examine the three psychiatrists about the threshold issue of whether Mr Thompson was a serious danger to the community in the absence of a division 3 order, make submissions that Mr Thompson was not a person to whom the Act applied, but not

otherwise submit against the making of a continuing detention order. That was confirmed by the written submissions of Mr Thompson's counsel:

> "The respondent's instructions are to contest the finding that the Court would be satisfied that he is a serious danger to the community in the absence of a Division 3 Order (s 13(1) *Dangerous Prisoners (Sexual Offenders) Act 2003*).
>
> In the event the Court were to be satisfied that he is a serious danger to the community in the absence of a Division 3 Order and in the event the Court decides against making no Order, the respondent's instructions are to not contest the making of a Continuing Detention Order.
>
> In the event the Court makes a Continuing Detention Order, the respondent is desirous of participating in individual psychiatric and/or psychological treatment in order to better prepare him for release under a Supervision Order in the future."

[16] Mr Thompson made no complaint about the conduct of the case on his behalf during the hearing before the trial judge.

The psychiatrists' evidence

[17] Psychiatrist Dr Harden interviewed Mr Thompson on 20 May 2016 and prepared a risk assessment report for the purpose of a potential application under the Act. Dr Harden scored Mr Thompson using a number of assessment instruments which measure static risk factors which will not change regardless of any intervention or improvement in the person. Mr Thompson scored 6 on STATIC 99R that placed Mr Thompson in the high risk category relative to other adult male sex offenders. Mr Thompson had a score of 20 out of a possible score of 26 on the Stable 2007 which placed him in the high needs group in terms of dynamic risk. On the Sex Offender Risk Appraisal Guide (SORAG), Mr Thompson scored 19 which placed him in category 6 for which people in that category in the study populations had a 58 per cent risk of violent or sexually violent reoffending at seven years and a 76 per cent rate at 10 years. On the Hare Psychopathy Checklist, Mr Thompson had an overall score of 30 which was the cut off for psychopathic personality features. On the SVR-20, Mr Thompson was positive for 13 items out of 20 which placed him generally in a high risk category on this measure of Sexual Violence Risk.

[18] Dr Harden diagnosed Mr Thompson as having a severe personality disorder with marked histrionic, narcissistic, antisocial and obsessional features, exhibitionism, and paedophilia (nonexclusive, attracted to boys). The trial judge quoted from the opinion section of Dr Harden's report at [36] of the reasons. In summary, Dr Harden assessed Mr Thompson's unmodified risk of sexual reoffence in the community in the high range and noted that his greatest risk factors were his paedophilic interest in boys, his impulsivity and his fixed personality issues. Dr Harden considered that if Mr Thompson were placed on a supervision order in the community, the risk of sexual recidivism would be reduced to low to moderate.

[19] For the purpose of the hearing, Mr Thompson was assessed by another two psychiatrists, Dr Grant and Dr Phillips. Prior to giving evidence at the hearing, Dr Harden was provided with the reports of Dr Phillips and Dr Grant and additional medical and correctional material. (All the medical and correctional material which

the psychiatrists were asked to consider was before the trial judge.) As a result of reviewing the additional material, Dr Harden also reviewed his opinion and his evidence was set out at [38] of the reasons. In summary, Dr Harden remained of the view that Mr Thompson's unmodified risk of sexual reoffence in the community by contact offending against boys is high, but that successful supervision of Mr Thompson in the community might be difficult, due to the pattern of accommodation difficulties reflected in the medical records, and that might make the supervision order less effective at reducing risk. In particular, Dr Harden noted that Mr Thompson's persistent and significant accommodation difficulties called into question how well Mr Thompson would cope on a supervision order in living with other people in the precinct accommodation. Dr Harden was of the view, however, that he was "slightly less pessimistic than both Dr Grant and Dr Phillips" about Mr Thompson's possibility of success on the supervision order, as the structure imposed by the supervision order would make it much more difficult for Mr Thompson to offend.

[20] Dr Grant interviewed Mr Thompson on 21 March 2017 and prepared an assessment report for the purpose of the hearing. Dr Grant's scores for Mr Thompson on the formal risk assessment instruments were similar to those of Dr Harden: Mr Thompson scored 6 on the STATIC 99R, was at the cut off of 30 for the diagnosis of psychopathic personality disorder on the Hare Psychopathy Checklist, and showed a high risk of future violence on the HCR-20, and the general risk level, as a result of applying the Risk for Sexual Violence Protocol (RSVP), was one of "high risk for similar offending as he has demonstrated in the past and the offending could be recurrent and frequent". In dealing with the application of the factors for estimating risk under the RSVP, Dr Grant observed:

> "The offending is likely to present relatively minor psychological harm to his victims and no significant risk of any physical harm. Re-offending could occur quite soon after his release, particularly if he feels the need for attention and social support. Given his background history, it is likely that future offending could occur frequently and there is long term risk."

[21] The trial judge quoted in full at [28] of the reasons from the opinions expressed by Dr Grant in the summary of the risk assessment in his report. Dr Grant was of the opinion that Mr Thompson represented a high risk of future recurrence of offending behaviour similar to that which he had exhibited for over 50 years and, in particular, "exhibitionistic behaviour or the touching of young males on the pretext of 'searching'". Dr Grant expressed the opinion in the report that a supervision order would assist in reducing the risk to low to moderate. Dr Grant concluded his opinion with the following comments:

> "From the psychiatric point of view there seems little facility in suggesting that Mr Thompson should remain in custody for further treatment, as he is unlikely to be suitable for any group programs. Individual treatment could be provided in the community as part of a Supervision Order.
>
> Whilst the evidence would appear to indicate that the severity of Mr Thompson's offending is at the milder end of the range of sexual offending, the frequency of his offending and the fact that underage males are likely to be victimized, albeit not violently, means that

> Mr Thompson does represent a significant risk to the community, which in my opinion indicates the need for a comprehensive Supervision Order if he is released into the community."

[22] Dr Grant was then provided with further medical records and correctional material relating to Mr Thompson. The trial judge summarised Dr Grant's evidence at the hearing at [30] of the reasons. Despite the opinion expressed in his written report that a supervision order would reduce the high risk of Mr Thompson's reoffending by touching adolescent males to a low to moderate risk, Dr Grant's opinion was "less firmly held" on the basis of the extra material and he expressed the view that the practicalities of a supervision order achieving the reduction in the risk of reoffending were "enormous" and "trying to limit his access to places where he might offend would be very difficult". Dr Grant therefore did not support Mr Thompson's release on supervision.

[23] Dr Phillips assessed Mr Thompson on 28 February 2017. Dr Phillips also obtained similar results to Dr Harden and Dr Grant using the risk assessment tools: Mr Thompson scored 6 on the STATIC 99R, he scored in the high range using the past ratings for items on the RSVP, he scored 18 on the Stable 2007 which indicated he was at a high risk of reoffending, he scored 18 on the SORAG which placed him in category 6, and he scored 28 on the Psychopathy Checklist Revised which was elevated, but below the cut off of 30 required for a diagnosis of psychopathy, and on the HCR-20 his risk of future physically violent offending was in the moderate to high range.

[24] The trial judge set out Dr Phillips' opinion from her report at [33] of the reasons:

> "Taking into account the results of the above risk assessment tools, it is my opinion that Mr Thompson's risk of future sexual re-offending falls in high range, if released from custody without a supervision order. His risk of future physical violence is in the moderate to high range.
>
> It is my opinion that a supervision order would assist in reducing the risk of sexual re-offending by offering assertive monitoring and interventions to target dynamic risk factors for sexual offending. It is my opinion that if Mr Thompson were to be released from custody with a supervision order, in the context of individual sexual offending psychological therapy, abstinence from substances and robust supervision in the community, that his risk of sexually re-offending would be in the moderate range.
>
> The risk of sexual re-offending would increase in the setting of victim access; rejection of supervision; increased sexual pre-occupation; or substance intoxication. In addition, the risk would increase with psychosocial stressors such as lack of stable accommodation or financial difficulties, particularly if Mr Thompson was again to perceive that his quality of life would be better in custody than in the community. The most likely future victims of sexual offending would be pre- or post-pubescent boys. Future offending would likely mirror past offending and include indecent exposure in public or contact sexual offending involving boys who were strangers to him, with inappropriate sexual touching of their

> genitals under the guise of performing a 'search' for money he claimed to lose. He would also be at risk of sexually offending against minors should he ever be allowed in a position of trust or authority with children, for example, if he were allowed to return to teaching or sports coaching, as he has requested. There is a risk of Mr Thompson also performing oral sex on the victims. More serious contact sexual offending is less likely."

[25] Dr Phillips also examined the additional medical and correctional records provided to the other psychiatrists and revised her opinion against Mr Thompson being able to be managed on a supervision order, expressing the view (set out at [34] of the reasons) that he would pose challenges to supervision arising out of his marked personality dysfunction and sexual deviance, so the likelihood was that he would not comply with directions from those who were supervising him.

The trial judge's decision on the threshold issue

[26] The trial judge set out at [50] of the reasons that, on the evidence, Mr Thompson is a person to whom the Act applies on the basis of his diagnosed severe personality disorder, exhibitionism and paedophilia, with an attraction to underage males, his long history of sexual offending against adolescent males culminating in the offending committed on 25 January 2013 upon his release from custody on 14 January 2013 and the index offences then committed on 13 and 14 December 2013, after his next release from custody on 4 December 2013, and that his condition was untreated.

[27] For the additional reasons set out at [51] of the reasons, the trial judge was satisfied that Mr Thompson was a serious danger to the community in the absence of a division 3 order:

> "Each of the psychiatrists who examined the respondent for the purposes of this application expressed the opinion that the respondent's unmodified risk of reoffending if released from custody is high. As Dr Harden said, the respondent's 'short, medium and long-term prognosis from the point of view of interpersonal function and risk of reoffending is poor.' He lacks insight into the seriousness of his past offending and its impact on his many victims. At least until relatively recently, he was inclined to minimise the seriousness of his offending. Although I am prepared to accept that none of his past offences escalated to oral, vaginal or anal intercourse, each such offence had the real potential to cause serious and lasting psychological harm. Furthermore, the respondent has struggled in recent years to live independently and it remains very much in prospect that, if he is released into the community, he may well decide to commit another serious sexual offence in order to be returned to custody. He is impulsive and, to a significant degree, unpredictable."

Late change in legal representation

[28] Apart from Mr Thompson's assertion that his legal representatives had only three days to prepare for the hearing before the trial judge, it is not apparent from the material before the trial judge when the change in legal representation precisely

occurred. That it did occur shortly before the hearing was reflected in this exchange between the trial judge and Mr Ryan:

> "HIS HONOUR: Yes. Can I just say before you start, the court's very grateful to you and Mr Saggers for coming into this so late. Thank you.
>
> MR RYAN: Thank you, your Honour. May I say as well, though – and I've said this to Mr Thompson yesterday – that the fact that we've come into the matter at a late time, we feel that we're well prepared to argue this matter ---
>
> HIS HONOUR: There's no doubt about that.
>
> MR RYAN: --- and we're well and truly across it. So we haven't – neither Mr Saggers or myself have been disadvantaged by us coming in at that stage."

[29] It was apparent from the written submissions tendered by Mr Ryan at the outset of the hearing before the trial judge that Mr Thompson gave specific instructions, as to what course he wanted his lawyers to take in the hearing on his behalf. Consistent with the material before the trial judge that showed Mr Thompson at various times preferred to be in prison, rather than in accommodation in the community that was unsatisfactory to him, Mr Thompson wanted to challenge the making of the decision against him on the threshold issue, but if the trial judge reached the view that he was a serious danger to the community in the absence of a division 3 order, Mr Thompson did not want to contest the making of a continuing detention order.

[30] There was no application made on Mr Thompson's behalf at the commencement of the hearing for an adjournment. Mr Ryan on Mr Thompson's behalf cross-examined each of the psychiatrists in an attempt to highlight the weight they had placed on the actuarial assessment tools in making their assessments, focus on the low level of seriousness of the offending, and explore the extent Mr Thompson's vertigo affected his risk of sexual offending against boys. Dr Grant considered Mr Thompson's vertigo would not interfere with his ability to offend sexually. Dr Grant explained that the risk assessment instruments formed part of an overall assessment of risk in conjunction with clinical assessment, but the risk assessment instruments provide some statistical rigour to the assessment. Dr Grant also explained the STATIC 99 risk was high in Mr Thompson's case, not because of any violence associated with the sexual offending, but based on the prolific nature of it and the fact that his victims were strangers to him. There was nothing of substance to be drawn from the different scores that he and Dr Phillips gave Mr Thompson on the Hare Psychopathy Checklist, as the cut off point of 30 is an artificial point and, on any view, Mr Thompson has "very prominent psychopathic traits".

[31] Mr Ryan cross-examined Dr Grant on the opinion in his written report that Mr Thompson's offending was likely to present "relatively minor psychological harm to his victims". Dr Grant explained that in sexually violent offending, one would expect to see the extreme end of psychological harm in the form of post-traumatic stress and what Dr Grant was endeavouring to explain in his report was that because Mr Thompson had not used violence in his offending against young males, the psychological harm was relatively minor on a scale from none to severe post-traumatic stress disorder. Dr Grant accepted that offending of Mr Thompson's type can be "quite psychologically harmful to children".

[32] In cross-examination, Dr Phillips rejected the notion that Mr Thompson's vertigo made him physically incapable of offending. Dr Phillips accepted that if Mr Thompson were to reoffend in the future in a sexual way against boys, it would most likely follow the same pattern of his past offending. Dr Phillips was cross-examined on the proposition, that if an offence of a sexual nature against a boy were to be committed in the future, the level of psychological harm that might be caused may be relatively minor, but it would depend on the personality and circumstances of the victim. Dr Phillips accepted what Dr Grant had said in his oral evidence that the psychological harm would be minor in comparison to people who were subjected to very severe forms of sexual violence, but "that is not in any way to say that a victim couldn't suffer severe psychological harm as a result of the type of offending that Mr Thompson has committed".

[33] Dr Harden did not consider Mr Thompson's vertigo had any bearing on his risk of sexual offending against boys. Dr Harden accepted that SORAG was the least applicable of the risk prediction instruments in respect of Mr Thompson, but the other risk instruments still provided some useful data in respect of Mr Thompson, with the STATIC 99 being the most useful in broadly placing him in a risk category.

[34] Dr Harden was also cross-examined about the level of psychological harm that might be caused to a child from conduct of the nature of Mr Thompson's offending. Dr Harden responded that:

> "There's … a wide range of harm because harm depends on the victim as much as on the conduct, but it's less likely to be harmful than violent or recurrent sexual abuse. However, Mr Thompson's … abuse of young boys is conducted against strangers out of the blue and could be quite a disturbing experience, I think, and result in psychological harm."

[35] Mr Ryan in submissions emphasised matters which Mr Thompson himself sought to rely on in this appeal: the offending committed by Mr Thompson in the past was at a very low level and did not feature violence, the opinion expressed by Dr Grant in his written report that the level of potential psychological harm to his victims was relatively minor, his participation in the GSPP seemed to have a positive effect on him, and that he acknowledged to Dr Phillips the potential harm that his activities involving indecent treatment had on the victims.

[36] Mr Ryan referred the trial judge to the statement of principle by McMurdo J (as his Honour then was) in *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 and, in particular at [29] to [30]:

> "[29] The Attorney-General must prove more than *a* risk of re-offending should the prisoner be released, albeit under a supervision order. As was also observed in *Francis*, a supervision order need not be risk free, for otherwise such orders would never be made. What must be proved is that the community cannot be adequately protected by a supervision order. Adequate protection is a relative concept. It involves the same notion which is within the expression 'unacceptable risk' within s 13(2). In each way the statute recognises that some risk can be acceptable consistently with the adequate protection of the community.

> [30] The existence of this onus of proof is important for the present case. None of the psychiatrists suggests that there is no risk. They differ in their descriptions of the extent of that risk. But the assessment of what level of risk is unacceptable, or alternatively put, what order is necessary to ensure adequate protection of the community, is not a matter for psychiatric opinion. It is a matter for judicial determination, requiring a value judgement as to what risk should be accepted against the serious alternative of the deprivation of a person's liberty." (*footnote omitted*)

[37] Mr Ryan submitted to the trial judge that Mr Thompson's history of offending should be weighed against the risk that he posed in the future at the low level that characterised his offending and, on that basis, the court should make a value judgment that the risk was not unacceptable in terms of s 13(2) of the Act.

[38] It was apparent on the hearing of the appeal that Mr Thompson could not see how the lawyers who appeared for him before the trial judge could grasp the vast amount of material that was relied on by the respondent before the trial judge and represent Mr Thompson effectively. The experienced lawyers who appeared for Mr Thompson were familiar with these types of applications and the issues that must be addressed under the Act. It is apparent from the transcript of the hearing before the trial judge that, consistent with the instructions that Mr Thompson gave his lawyers, the lawyers managed to provide appropriate representation for Mr Thompson. Not only was there no application for an adjournment made on his behalf, but there was the express acknowledgment by Mr Ryan that he and his instructing solicitor felt they were "well prepared to argue this matter". At that stage Mr Thompson's fulltime discharge date was 19 May 2017. That was a relevant exigency against the adjournment of the hearing.

[39] To the extent that Mr Thompson asserts that the late engagement of his lawyers precluded the engagement of a psychiatrist to prepare a report on his behalf, it is difficult to work out what advantage may have been obtained by Mr Thompson, if another psychiatrist had prepared a report and given evidence on his behalf. There was some variation in the opinions before the trial judge, as Dr Harden's opinion was not the same as the ultimate opinions of Dr Grant and Dr Phillips. In addition, the report of the psychiatrist Dr Mann dated 9 March 2015 who had assessed Mr Thompson for the sentencing for the charges committed on 13 and 14 December 2013 was in the material that was before the court, had been referred to and considered by Dr Harden and Dr Phillips, and was drawn to the trial judge's attention by Mr Ryan.

[40] Another psychiatrist, Dr Sundin, assessed Mr Thompson on 3 March 2016 to prepare a report for the parole board for their consideration. Dr Sundin's report dated 10 March 2016 was also before the trial judge.

[41] Dr Mann diagnosed Mr Thompson as fulfilling the diagnostic criteria for the paraphilias of exhibitionism and paedophilia and was of the opinion that, if Mr Thompson were to engage in the appropriate treatment for his paraphilias, then it was reasonable to conclude he may represent a reduced risk of reoffending in a similar way in the future. Dr Mann noted that Mr Thompson reported that he had been homeless at the time he committed the offences in December 2013 and

thought, if he committed the offences, he may be put into prison where he would be safe. Mr Thompson also reported that he had taken his clothes off in court on 25 January 2013, in order to be sent back to prison, as he did not have a place to go to, if he were released into the community on that day.

[42] Dr Sundin assessed Mr Thompson after he had participated in the GSPP between 15 May and 5 August 2015. Dr Sundin referred to the notes of a case conference regarding rehabilitation options for Mr Thompson that was held on 20 November 2015 involving staff of Corrective Services (including the facilitator of the GSPP undertaken by Mr Thompson). Because of Mr Thompson's responsivity issues in the GSPP, it was not recommended that he undergo a group-based sexual offender treatment program. His participation in GSPP was described as "consistently self-focussed, focused repetitively on certain topics, was judgemental of other prisoners based on their offences, was strongly opinionated and tangential, needing to be redirected on multiple occasions". Dr Sundin described Mr Thompson's paraphilic behaviour as "profound, pervasive and persistent". Dr Sundin agreed with the opinions of the facilitators of the GSPP that Mr Thompson was not a suitable person for participating in High Intensity Sexual Offending Program and stated:

> "Whilst it is very clear that on actuarial scales he is amongst a group of offenders considered to be at very high risk for future sexual offending, the level of minimisation and denial that he exhibits in relation to his offending behaviour is so profound that he is unlikely to be able to appropriately engage within a group programme. His presence and his very negative denigratory attitudes towards other offenders is actually likely to sabotage the participation of other programme members."

Dr Sundin recommended that Mr Thompson required individual therapy with a psychiatrist or clinical psychologist experienced in the treatment of paraphilias and severe personality disorder. Dr Sundin did not consider that Mr Thompson was a person who was currently suitable for parole.

[43] Consideration of Dr Mann's report and Dr Sundin's report in conjunction with those of Dr Harden, Dr Grant and Dr Phillips and the evidence given by the latter three psychiatrists at the hearing leads to the conclusion that it is a vain hope of Mr Thompson that procuring another psychiatrist's report would change the preponderance of psychiatric opinion in respect of his risk of reoffending and the steps that can be taken to address that. Although Dr Mann expressed the opinion in March 2015, that if Mr Thompson were to engage in the appropriate treatment of his paraphilias, he may represent a reduced risk of reoffending in a similar way in the future, there was no treatment of Mr Thompson of the kind contemplated by Dr Mann before the application under the Act was heard by the trial judge.

[44] In view of the belief by Mr Thompson's lawyers expressed to the trial judge that they could represent Mr Thompson appropriately on the material that was adduced in evidence (which was not a mistaken or misguided belief in the circumstances), Mr Thompson cannot now, in effect, assert that the trial judge erred by allowing the hearing on to proceed. Mr Thompson therefore cannot succeed on the appeal based on the late change in his legal representation for the hearing before the trial judge.

Was there any error in the decision on the threshold issue?

[45] The test under s 13(1) of the Act before a division 3 order can be made is whether the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order. Section 13(2) of the Act then expands on what amounts to a serious danger to the community:

> "A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence-
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made."

[46] The definition of "serious sexual offence" found in the schedule to the Act relevantly means an offence of a sexual nature involving violence or against a child. The term "violence" is also defined in the schedule to include intimidation or threats.

[47] The definition of "serious sexual offence" where the victim is a child encompasses any offending of a sexual nature that is committed against the child, whether involving violence or not. The pattern of Mr Thompson's past offending of approaching pre-pubescent or adolescent males and requesting to "search" them which enabled him to touch their genitals thereby committing the offence of indecent treatment of a child under 16 years, anticipates the type of offending that Mr Thompson is at risk of committing, if released from custody. There was no error in the trial judge proceeding on the basis that the type of offending that Mr Thompson was at risk of committing was a "serious sexual offence". In fact, Mr Ryan had properly conceded before the trial judge that the index offences were caught by the definition in the Act of "serious sexual offence".

[48] Section 13(3) of the Act specifies the court may decide that it is satisfied as required under s 13(1) only if it is satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify the decision. Under s 13(4) of the Act, the court must have regard to the matters identified in that provision in deciding whether a prisoner is a serious danger to the community:

> "(aa) any report produced under section 8A;
>
> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
>
> (b) any other medical, psychiatric, psychological or other assessment relating to the prisoner;
>
> (c) information indicating whether or not there is a propensity on the part of the prisoner to commit serious sexual offences in the future;
>
> (d) whether or not there is any pattern of offending behaviour on the part of the prisoner;
>
> (e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

(f) whether or not the prisoner's participation in rehabilitation programs has had a positive effect on the prisoner;

(g) the prisoner's antecedents and criminal history;

(h) the risk that the prisoner will commit another serious sexual offence if released into the community;

(i) the need to protect members of the community from that risk;

(j) any other relevant matter."

[49] Under s 13(7) of the Act the respondent had the onus of proving that Mr Thompson was a serious danger to the community (which the trial judge referred to at [47] of the reasons).

[50] Most of the errors relied on by Mr Thompson in arguing his appeal were directed at whether the evidence supported the finding he would be a serious danger to the community in the absence of a division 3 order.

[51] Although Mr Thompson asserted frequently in the documents he placed before the court that Dr Harden, Dr Grant and Dr Phillips were biased against him, there is nothing of substance that he relied on that, in any way, detracted from their respective opinions being honestly and reasonably held by each of them. To the extent Mr Thompson complained the psychiatrists were provided with "negative" materials about him by the respondent, these were largely correctional records maintained in respect of Mr Thompson. There is a difference between Mr Thompson's perception of his conduct in prison and his criminal history and the reporting of his conduct and history in the correctional records. Mr Thompson was interviewed by each of Dr Harden, Dr Grant and Dr Phillips and gave his perspective about the nature of his offending and his record for them to take into account in making their assessments.

[52] Mr Thompson gave the most emphasis in his submissions to the combination of his low level sexual offending and his health problems, as precluding the finding that he was a serious danger to the community in the absence of a division 3 order. These were the very matters which were traversed in evidence with the psychiatrists before the trial judge and were also the subject of submissions. The psychiatrists acknowledged that Mr Thompson's pattern of sexual offending against young males by touching their genitals was at the lower end of the scale of seriousness of sexual offending, but that had to be considered in conjunction with the inevitability of Mr Thompson's offending in that way on release into the community. Mr Thompson also placed emphasis on his health conditions, but the psychiatrists refuted the proposition that any of his medical conditions diminished the risk of his committing sexual offences against young males of the same nature reflected in his pattern of offending over decades. Mr Thompson sought to emphasise the statement in Dr Grant's report that Mr Thompson's offending was likely to present "relatively minor psychological harm to his victims". That statement was clarified by Dr Grant in oral evidence and it was open to the trial judge to conclude, as his Honour did at [51] of the reasons, that each of his past offences "had the real potential to cause serious and lasting psychological harm".

[53] With respect to Mr Thompson's contention the trial judge failed to give sufficient weight to the benefit Mr Thompson gained from completing the GSPP, the trial

judge referred at [25] of the reasons to the fact that Mr Thompson participated in, and completed, the GSPP. (The trial judge and Dr Grant referred to that occurring at Woodford, when Mr Thompson pointed out that he did the GSPP at Wolston Correctional Centre. That is an immaterial error that has absolutely no consequence for Mr Thompson's appeal.) The trial judge noted (in accordance with the evidence) that was a program to assess Mr Thompson's treatment needs and not a treatment program, as Mr Thompson characterised it. The trial judge also referred to Mr Thompson's claim that as a consequence of undertaking the GSPP, he now knows his offending could have been the cause of psychological harm to his victims. The trial judge was careful in the choice of words in recording Mr Thompson's claim that he now had insight that his offending could cause psychological harm to his victims, as the psychiatric evidence did not support a conclusion that Mr Thompson truly had that insight. For example, Dr Grant noted in his oral evidence that Mr Thompson certainly said that he had some intellectual impression that his behavior might be dangerous or might be harmful, but noted that at the same time "the overall tenor of his continued writings and so on would really minimise that view".

[54] Each of the psychiatrists had taken into account in reaching his or her opinion the participation by Mr Thompson in the GSPP and reached their opinions on the issue of his risk of reoffending and how it could be addressed accordingly. It was the opinions of the psychiatrists in conjunction with Mr Thompson's history that resulted in the trial judge's conclusion on the threshold issue. The trial judge correctly observed at [50] of the reasons that Mr Thompson's "overall condition is, for all intents and purposes, untreated". In view of the nature of the GSPP described in the evidence of Dr Grant and Mr Phelan (who is the Director of the Offender Intervention Unit) as not being a treatment program, but for the purpose of assessing future treatment needs for a sexual offender, and the evaluation of the psychiatrists taking into account Mr Thompson's participation in that program, it cannot be said that the trial judge failed to take it into account.

[55] The evidence before the trial judge traversed the matters mandated for consideration by s 13(4) of the Act and the trial judge addressed those matters in the reasons. Mr Thompson has not succeeded in showing that the evidence accepted by the trial judge lacked the qualities required by s 13(3) of the Act to justify the decision that he is a serious danger to the community in the absence of a division 3 order.

Should a continuing detention order have been made?

[56] Despite the stand taken by Mr Thompson before the trial judge that, if the threshold issue went against him, he conceded a continuing detention order should be made, the trial judge proceeded to consider whether, on the material, a continuing detention order or a supervision order should be made. The trial judge was also cognisant at [47] of the reasons that, upon being satisfied that a prisoner is a serious danger to the community in the absence of a division 3 order, the court had a discretion under s 13(5) of the Act whether to make a continuing detention order, a supervision order or no order at all, but the possibility of making no order at all did not arise on the evidence. The trial judge referred to the considerations required to be taken into account under s 13(6) of the Act and the approach to the need to ensure adequate protection of the community endorsed by the Court of Appeal in *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]:

> "The Act does not contemplate that arrangements to prevent such a risk must be 'watertight'; otherwise orders under s 13(5)(b) would never be made. The question is whether the protection of the community is adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, having regard to the risk to the community posed by the prisoner, then an order for supervised release should, in principle, be preferred to a continuing detention order on the basis that the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorised such constraint."

[57] The trial judge concluded at [57] of the reasons that the adequate protection of the community could only be ensured by a continuing contention order, explaining at [55]:

> "Each of Drs Grant, Phillips and Harden expressed reservations about whether the adequate protection the community could be ensured if the respondent is released on a supervision order pursuant to s 13(5)(b). Of them, Dr Harden was the least pessimistic. He remained of the view that a supervision order would significantly reduce the risk of reoffending because the structure of such an order would make it much more difficult for the respondent to offend. He also thought that, if the respondent was to reoffend in order to go back to custody, it is less likely that he would use a contact sexual offence as a way of doing so. On the other hand, Drs Grant and Phillips did not support the respondent's release on supervision and, amongst other things, pointed to the practical difficulties that would stand in the way of enforcing a supervision order in this man's case. To the extent that Dr Harden expressed a contrary opinion, I prefer the opinions expressed by Drs Grant and Phillips. To the point, I do not think that the respondent can be 'reasonably and practicably managed' by a supervision order or that the requirements for such orders specified in s 16 can be 'reasonably and practicably managed' by Corrective Services officers."

[58] On the evidence, it was open to the trial judge to prefer the firm opinions ultimately expressed by Dr Grant and Dr Phillips and to conclude that Mr Thompson could not be reasonably and practicably managed by a supervision order and therefore a continuing detention order should be made to ensure the adequate protection of the community from the unacceptable risk posed by Mr Thompson that he would commit a serious sexual offence of the same nature that he committed in December 2013 (and on many occasions previously) in the absence of a division 3 order.

[59] This is an unusual case in that it is a sexual offender who commits offences against young males at the less serious end of the scale of sexual offending who is the subject of an application under the Act. What distinguishes Mr Thompson from offenders who have committed more serious sexual offences was the preponderance of the evidence that pointed to the inevitability of his reoffending, if released into the community at his fulltime discharge date for the index offences. That is why the trial judge at [56] of the reasons expressed the hope that Mr Thompson was now prepared to accept the treatment that would be offered to him in custody, so that he

could become a better candidate for release on supervision. The trial judge also noted that individual therapy under the supervision of a treating psychiatrist was the preferred treatment method for Mr Thompson. The trial judge therefore recommended at [59] of the reasons that Mr Thompson receive individual (as opposed to group) therapy and that his treatment be supervised by a psychiatrist.

[60] Although the focus of Mr Thompson's appeal was the finding made against him on the threshold issue, in the light of the evidence before the trial judge, no error can be shown in the trial judge's conclusion that a continuing detention order was the appropriate outcome of the respondent's application.

Orders

[61] It appears that the solicitors who had acted for Mr Thompson on the hearing before the trial judge did not continue to act in relation to the appeal and that contributed to Mr Thompson's failure to file the notice of appeal within the requisite period. It appears the notice of appeal was signed by Mr Thompson by 13 June 2017 and an application to the court for an extension was filed subsequently. Because of the shortness of the delay in filing the notice of appeal after the expiry of the appeal period and the serious consequences for Mr Thompson of the order that is the subject of the appeal, it is appropriate to exercise the discretion to grant the extension of time to appeal, even though Mr Thompson will not succeed on the appeal.

[62] The following orders should be made:

1. Application for extension of time to appeal granted.
2. Appeal dismissed.