SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Musso* [2018] QSC 191
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **FILIPPO JAMES MUSSO** (respondent)
FILE NO:	BS 2583 of 2018
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	24 August 2018
DELIVERED AT:	Brisbane
HEARING DATE:	2 and 6 July and 6 August 2018
JUDGE:	Davis J
ORDER:	**Pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent be detained in custody for an indefinite term for control, care or treatment.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent was subject to examination by psychiatrists for the purposes of the application – where the evidence of those psychiatrists was subject to objection – whether the evidence should be admitted – whether the applicant presents a serious danger to the community in the absence of an order under Division 3 of Part 1 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) – whether such an order should be made *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 3, s 5, s 8, s 9, s 9A, s 11, s 12, s 13 *Attorney-General v Francis* [2007] 1 Qd R 396, cited *Attorney-General v Lawrence* [2010] 1 Qd R 505 *Attorney-General v Phineasa* [2013] 1 Qd R 305, considered

Attorney-General for the State of Queensland v Ellis [2012] QCA 182
Attorney-General for the State of Queensland v Fisher [2018] QSC 074
Attorney-General for the State of Queensland v Newman [2018] QSC 156, cited
Attorney-General for the State of Queensland v Travers [2018] QSC 073, cited
Attorney-General for the State of Queensland v Watego [2003] QCA 512, distinguished
Attorney-General (Qld) v Fardon [2013] QCA 64
Attorney-General (Qld) v Sutherland [2006] QSC 68, cited
Attorney-General (Qld) v Yeo [2008] QCA 115
Fardon v Attorney-General for the State of Queensland (2004) 223 CLR 575, cited
Kynuna v Attorney-General for the State of Queensland [2016] QCA 172, cited
Tilbrook v Attorney-General for the State of Queensland [2012] QCA 279, cited

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

SOLICITORS: Crown Solicitor for the applicant
A W Bale for the respondent

[1] The respondent is presently in custody held under an interim detention order made under s 9A of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (*DPSOA*). The Attorney-General has applied for orders against the respondent under s 13 of the *DPSOA*. That application is resisted by the respondent.

[2] Objection was taken to the admissibility of the expert opinion evidence of the psychiatrists who were called in support of the Attorney-General's application. On 6 August 2018 I ruled that the evidence was admissible and that I would deliver reasons on that issue when I gave judgment on the Attorney-General's application. These reasons deal with both the objection to evidence and the application.

Statutory scheme

[3] Section 3 of the *DPSOA* prescribes the objects of the legislation as follows:

> "**3 Objects of this Act**
>
> The objects of this Act are—
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and

(b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[4] The objects of the *DPSOA* are fulfilled by a scheme providing for the detention of prisoners beyond the expiry of their sentences, or alternatively their release upon supervision.

[5] By s 5, the Attorney-General may apply for both an order under s 8 of the *DPSOA* and also an order under Division 3 of Part 1. Division 3 of Part 1 provides for final orders. Applications can only be brought under s 5 against a "prisoner".

[6] Section 5, which authorises the application for orders and which contains the definition of "prisoner", is as follows:

"**5 Attorney-General may apply for orders**

(1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.

(2) The application must—

(a) state the orders sought; and

(b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and

(c) be made during the last 6 months of the prisoner's period of imprisonment.

(3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (preliminary hearing) to decide whether the court is satisfied that there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.

(4) The return date for the preliminary hearing must be within 28 business days after the filing.

(5) A copy of the application and any affidavit to be relied on by the Attorney-General must be given to the prisoner within 2 business days after the filing.

(6) In this section—

prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serous sexual offence, whether the person was sentenced to the

term or period of imprisonment before or after the commencement of this section."

[7] The definition of "prisoner" in s 5(6) introduces the concept of "a serious sexual offence". That term is defined as follows:

> "***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—
>
> (a) involving violence; or
>
> (b) against a child; or
>
> (c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years."

[8] Section 8 provides for a preliminary hearing. It is in terms:

> "**8 Preliminary hearing**
>
> (1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order, the court must set a date for the hearing of the application for a division 3 order.
>
> (2) If the court is satisfied as required under subsection (1), it may make—
>
> (a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and
>
> (b) if the court is satisfied the application may not be finally decided until after the prisoner's release day –
>
> (i) an order that the prisoner's release from custody be supervised; or
>
> (ii) an order that the prisoner be detained in custody for the period stated in the order."

[9] The term "prisoner", as used in s 8 is defined differently to the definition in s 5(6). In s 8, the term "prisoner" has the same meaning as that defined for the purposes of the *Corrective Services Act* 2006.[1] The distinction is, though, not relevant here.[2]

---

[1] *Dangerous Prisoners (Sexual Offences) Act* 2003 (Qld) s 2 and the dictionary which is the Schedule to the Act.

[2] See *Attorney-General for the State of Queensland v Newman* [2018] QSC 156.

[10] Section 8 introduces the notion of "serious danger to the community". This term is defined in s 13 which is the pivotal section in Division 3 of Part 1. Section 13 is in these terms:

> "**13 Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) 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.
>
> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.
>
> (3) In deciding whether a prisoner is a serious danger to the community as mentioned in subsection (1), the court must have regard to the following—
>
> (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 offence sin 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.

(5) If the court is satisfied as required under subsection (1), the court may order—

(a) that the prisoner be detained in custody for an indefinite term for control, care or treatment (***continuing detention order***); or

(b) that the prisoner be released from custody subject to the requirements it considers appropriate that are stated in the order (***supervision order***).

(6) In deciding whether to make an order under subsection (5)(a) or (b)—

(a) the paramount consideration is to be the need to ensure adequate protection of the community; and

(b) the court must consider whether –

(i) adequate protection of the community can be reasonably and practicably managed by a supervision order; and

(ii) requirements under section 16 can be reasonably and practicably managed by corrective services officers.

(7) The Attorney-General has the onus of proving that a prisoner is a serious danger to the community as mentioned in subsection (1)."

[11] Orders which can be made under s 8 include orders that a prisoner undergo psychiatric examination. The evidence so obtained is then relied upon by the Attorney-General on the application brought under s 13. Relevant to examinations ordered under s 8, are ss 11 and 12 which are in these terms:

"**11 Preparation of psychiatric report**

(1) Each psychiatrist examining the prisoner must prepare a report under this section.

(2) The report must indicate—

(a) the psychiatrist's assessment of the level of risk that the prisoner will commit another serious sexual offence—

(i) if released from custody; or

(ii) if released from custody without a supervision order being made; and

(b) the reasons for the psychiatrist's assessment.

(3) For the purposes of preparing the report, the chief executive must give each psychiatrist any medical, psychiatric, prison or other relevant report or information in relation to the prisoner in the chief executive's possession or to which the chief executive has, or may be given, access.

(4) A person in possession of a report or information mentioned in subsection (3) must give a copy of the report or the information to the chief executive if asked by the chief executive.

(5) Subsection (4) authorises and requires the person to give the report or information despite any other law to the contrary or any duty of confidentiality attaching to the report.

(6) If a person required to give a report or information under subsection (4) refuses to give the report or information, the chief executive may apply to the court for an order requiring the person to give the report or information to the chief executive.

(7) A person giving a report or information under subsection (4) or (6) is not liable, civilly, criminally or under an administrative process, for giving the report or information.

(8) Each psychiatrist must have regard to each report or the information given to the psychiatrists under subsection (3).

(9) Each psychiatrist must prepare a report even if the prisoner does not cooperate; or does not cooperate fully, in the examination.

12 Psychiatric reports to be given to the Attorney-General and the prisoner

(1) Each psychiatrist must give a copy of the psychiatrist's report to the Attorney-General within 7 days after finalising the report.

> (2) The Attorney-General must give a copy of each report to the prisoner on the next business day after the Attorney-General receives the report."

[12] Section 16 deals with the contents of supervision orders but it is unnecessary to set that section out at this point.

History

[13] The respondent was born on 16 October 1992 and is presently 25 years of age. He was placed in foster care in 2002 when he was about 10. His adult criminal history prior to the offences which explain his current incarceration is:

(a) 10 November 2010: The respondent was convicted in the Brisbane Magistrates Court on one count of common assault. No conviction was recorded and a community service order was made together with a compensation order.

(b) 7 January 2011: The respondent was convicted but not further punished in relation to six charges of committing a public nuisance.

(c) 6 February 2011: The respondent was fined $300 with respect to six charges of committing public nuisance and one charge of unauthorised dealing with shop goods.

(d) 14 July 2011: The respondent was fined $100 for breaching the community service order which was imposed on 10 November 2010.

(e) 19 April 2012: The respondent was convicted in the Southport District Court and sentenced to terms of imprisonment, the longest of which was two years. Those sentences concerned a charge of attempted robbery while armed and a charge of stealing. By the time the respondent was sentenced he had served 195 days in pre-sentence custody and was released on parole on the day he was sentenced.

(f) 16 April 2014: The respondent was fined $150 on a charge of unauthorised dealing with shop goods.

[14] The respondent was sentenced in relation to further offences on 22 July 2014. There were five counts to which the respondent pleaded guilty, namely one count of torture, one count of assault occasioning bodily harm, one count of extortion, one count of sexual assault and one count of attempted fraud. Importantly, for reasons which later emerge, the sentencing was conducted upon an agreed statement of facts. I set that out in full as follows:[3]

> "The charges before the Court span a period of approximately three weeks from 21.07.13 to 12.08.13. Those charges involve a total of three complainants, T Ma (Counts 1 & 4), her father D Ma (Counts 2 & 3), and the Commonwealth bank of Australia (Count 5).

---

[3] It has been anonymised.

Ms T Ma was friends with a girl named A Mc. They were living together. A Mc began dating the accused. Some weeks after this, and when the accused had effectively moved in with them full time, the accused became violent towards Ms Ma. Several acts of violence, damage to her property, and ongoing demands for money constitute count one on the indictment, Torture.

The violent behaviour commenced on 21.07.13. The accused deliberately damaged T Ma's belongings including her laptop computer, and her car while she was away from the house and with her father. The accused smashed the car's windscreen and lights with a hammer, he also slashed the tyres. These actions were witnessed by A Mc who was home at the time **(Torture - Particular 1)**.

While the accused was damaging T Ma's car, he injured his hand and had to go to hospital.

At that time while T Ma was out with her father D Ma she received a call from A Mc asking that she go to hospital to meet them. T Ma went to the hospital with her father meeting A Mc and the accused there.

Soon after their arrival the accused became aggressive. He told T Ma's father to leave and that he wasn't welcome. D Ma stayed and the accused then grabbed D Ma by the throat and punched him twice to the face **(Count 2)**. This caused bleeding in D Ma's mouth and swelling to his cheek. The accused in an interview with police admitted to punching D Ma and conceded that D Ma never hit him. A hospital security guard remembers receiving a call and attending to D Ma soon after the incident.

After the commission of Count 2, T Ma returned to her house to discover her property damaged. The accused then demanded that T Ma's father come to the house to fight him. T Ma called her father and her father refused to return. The accused then attacked T Ma grabbing her by the throat and strangled her for what she estimates was 20-30 seconds **(Torture - Particular 2).**

D Ma then received a call from the accused. The accused demanded $350 or stated he would kill his daughter T Ma. D Ma then went to the residence where he saw T Ma upset and the accused has then made threats to kill the both unless he paid $350. D Ma gave him $5 and the accused demanded the rest by 6am **(Count 3 - Extortion).**

D Ma then went to his friend R K to get the $350, which he gave to him. R K remembers D Ma having an injury to his face at the time of the visit.

Several days later on 29.07.13 the accused and T Ma were at home together. T Ma recalls that the accused became angry and smashed her phone with a hammer and demanded money from her **(Torture - Particular 3).** T Ma recalls that this was for no particular reason.

That night A Mc went into hospital. T Ma recalls that when she and the accused were home alone together, the accused said that he liked her and wanted to sleep with her. She said no because he was with A Mc.

Several days after that incident, on 05.08.13, T Ma recalls fighting with A Mc during the day. That evening when T Ma was in her room the accused came in and said 'I'm going to rape you'. T Ma recalls the accused pinning her down and that he tried to take her clothes off. She resisted and screamed for him to stop. The accused was threatening to kill her. A Mc then came in and stopped the accused **(Count 4 - Sexual assault).**

The accused then left the room and soon after returned with a knife. T Ma recalls the accused again pinned her down and that he held the knife to her face which cut her under the nose. The accused in his interview with police admits going into T Ma's bedroom with a knife. T Ma was fighting the accused off and in doing so her hand was cut by the knife. The accused during this attack also punched her to the face hitting both her eyes **(Torture - Particular 4).**

T Ma states that the accused then dragged her by the hair to the lounge room and told her to get out of the house. The accused then stomped on her face above her left eye which caused her to see stars. The accused then threatened that he would urinate on her if he could. T Ma remembers the accused bragging to A Mc that he could see his footprint on her forehead. After this attack the accused demanded $800 off T Ma for 'protection' **(Torture - Particular 5).**

There is medical evidence that T Ma received a fractured right eye socket. It is the Crown case that the injury stemmed from this attack. A maxillofacial surgeon, Dr Dawson, states that if left untreated this would have likely resulted in permanent double vision (Diplopia) to the complainant. On 28.08.13 Dr Dawson operated on T Ma reconstructing the right orbit including the insertion of an artificial floor. The Crown say that this injury if left untreated would have constituted a permanent injury to health.

On 07.08.13 the accused took $300 out of T Ma's account and sold her car for $200. Days later on or about 10.08.13 T Ma recalls that the accused demanded another $50 off her.

T Ma recalls that on the next day which was on or about 11.08.13 the accused wrote on furniture that T Ma 'was a slut' and got her to read it out aloud. He entered her bedroom with a broom stick and started hitting her on the legs causing bruising.

He left the room and returned soon afterwards with broomstick handle broken and was jabbing her with the broken handle to the chest causing bruising. T Ma was telling him to stop **(Torture - Particular 6).** T Ma recalls that evening the accused and A Mc told her they were angry at her because she had nearly broken them up.

> T Ma recalls on the next day (12.08.13) the accused demanded more money. When she couldn't pay he told her to go to her room. The accused went and got some pliers and squeezed her right pinkie finger with the pliers causing her finger to bleed **(Torture - Particular 7).** The accused then left the room and returned and struck her to the face which caused her to scream. The accused then demanded $300 or he would beat her up **(Torture - Particular 8).**
>
> That same day the accused and A Mc went to the bank to try and get money out of T Ma's account with a card that belonged to T Ma. The teller, L L, refused the transaction as neither the signatures signed by the accused or A Mc matched the signature on file. Their requests were refused and bank staff recall that the accused then became aggressive and began making threats before leaving **(Count 5 - attempted Fraud).**
>
> Half an hour later at around 1:30pm L L saw the accused and A Mc outside and a dark haired female with two black eyes being served at the counter. She saw the dark haired female hand over money to the accused outside and recorded this. All three then left.
>
> The matter was reported to police and police arrived at around 3pm. The accused and A Mc then got T Ma to go back into the bank to get them money again, after police had arrived. T Ma was pointed out to police by bank staff who then spoke to her. Officer McGuinness recalls T Ma crying saying to her that 'the accused would kill her if he sees her talking to police, and that she just wants to live'.
>
> Officer McGuinness noted several injuries to T Ma and the ambulance were called and T Ma was taken to hospital.
>
> The accused was later arrested and participated in a record of interview where he made a mixture of admissions and denials."[4]

[15] It is Count 4, sexual assault, upon which the Attorney-General relies as the "serious sexual offence" vesting jurisdiction to make orders under the DPSOA.

[16] The respondent was sentenced as follows:

(a) On count 1, to four and a-half years' imprisonment;

(b) On count 2, to nine months' imprisonment;

(c) On count 3, to 12 months' imprisonment;

(d) On count 4, to 18 months' imprisonment; and

(e) On count 5, to six months' imprisonment.

---

[4] Affidavit of Amanda McLean, filed 8 March 2018, CFI 5, ex AM-5. Emphasis in original. There are obvious typographical errors in various pieces of evidence and in the reports of the psychiatrists. The evidence has been reproduced faithfully, errors included.

[17] All sentences were ordered to be served concurrently. A declaration was made that the respondent had spent 282 days in pre-sentence custody as time served under the sentences. The respondent was ordered to be eligible for parole on 13 April 2015. The sentence imposed in relation to Count 4 (sexual assault) has long since expired. However, the respondent was a "prisoner" for the purposes of ss 5 and 8 of the *DPSOA* as the period of imprisonment which he was serving included "a term of imprisonment" for a "serious sexual offence", assuming that Count 4 was a "serious sexual offence" as that term is defined. On the same assumption, the respondent would also then be a "prisoner" for the purposes of ss 8 and 13.

[18] The respondent applied for parole on 26 November 2015 and again on 10 February 2017. Both applications were refused.

[19] An application seeking orders under the *DPSOA* was filed in 2017, but, for reasons which are not relevant here, that application was discontinued. The present application was filed on 8 March 2018. Dr Scott Harden, psychiatrist, prepared a risk assessment for the purposes of the preliminary application under s 8 of the *DPSOA*.

[20] On 14 March 2018, Burns J heard the preliminary application. His Honour was satisfied that there were reasonable grounds for believing that the respondent was a serious danger to the community in the absence of a Division 3 order and:

(a) Set the application for a Division 3 order for hearing on 2 July 2018; and

(b) Ordered the respondent to undergo examination by Dr Eve Timmins and Dr Ken Arthur, psychiatrists.

[21] The examinations by Drs Timmins and Arthur were conducted and reports were prepared.

[22] The application for Division 3 orders came before me on 2 July 2018. As already observed, Ms Robb objected to the evidence of Drs Harden, Timmins and Arthur. The basis of the objection was, in summary, that the opinions of the doctors were affected by inadmissible material with which they had been provided. Mr Tate, for the Attorney-General, wished to lead evidence of the psychiatrists beyond what was in the reports to show that any inadmissible material did not affect the doctors' opinions. Ms Robb, for the respondent, objected to that course, but if the doctors were to give further evidence she, understandably, wished to cross-examine the doctors in order to explore whether the inadmissible material had influenced the doctors' opinion. I ordered that the doctors should all be called and cross-examined by Ms Robb on all matters going to both the admissibility and substance of their evidence, reserving the question of admissibility. I gave Mr Tate leave to adduce oral evidence from them.

[23] The evidence of the doctors was given on 2 and 6 July 2018. On 6 August 2018, I ruled the evidence admissible. Further submissions on the application were heard and I reserved both my reasons for admitting the evidence of the doctors and my judgment on the application.

[24] In the course of hearing the matter, I made various orders under s 9A(2) of the *DPSOA* detaining the respondent pending judgment being given on the application. The last of such orders was made on 21 August 2018 extending his detention until 4 pm on 24 August 2018.

[25] Before analysing the opinions of the psychiatrists it is necessary to identify the inadmissible evidence which Ms Robb submits has adulterated the expert evidence.

Mr Fuller's affidavit

[26] Todd Fuller QC is the Deputy Director (Operational) of the Office of the Director of Public Prosecutions Queensland (ODPP).

[27] Mr Fuller swore his affidavit on 19 February 2018. The body of the affidavit is very short. There are only four paragraphs of substance. Mr Fuller swore that the ODPP holds two files relevant to the respondent which he then exhibited to the affidavit. One of the files concerns the matters the subject of the respondent's convictions in the Southport District Court on 19 April 2012.[5] The other file concerns the offences for which the respondent was sentenced on 22 July 2014.[6] There are 322 pages of material exhibited to Mr Fuller's affidavit.

[28] While Mr Fuller's affidavit post-dates the reports of Dr Harden, the material ultimately exhibited to the affidavit was provided to Dr Harden prior to Dr Harden preparing his first report of 6 June 2017.[7]

[29] Ms Robb did not, in her submissions, descend to a "document by document" objection to the material. Her submissions, which I analyse later, are focused in a way which does not necessitate such a detailed approach. It is clear that much of the material exhibited to Mr Fuller's affidavit is inadmissible on an application for a Division 3 order.[8]

[30] The ODPP files are what I would expect to be held by the office. There are witness statements, factual summaries and copies of various indictments and draft indictments. Much of the material has no evidentiary value; a summary of facts prepared by a Crown prosecutor for instance. Other material such as witness statements are not admissible through Mr Fuller at least in the form in which those documents were exhibited to his affidavit.

[31] As the prosecution for the offences which occurred in July and August 2013 proceeded, there were various discussions between the ODPP and the defence negotiating the terms of a plea of guilty. Such negotiations are very common, and a necessary and proper part

---

5 Affidavit of Todd Arnold Fuller, filed 8 March 2018, CFI 11–12, ex TAF-2.

6 Ex TAF-1.

7 See Appendix A to Dr Harden's report.

8 *Dangerous Prisoners (Sexual Offenders) Act* 2003, s 7(1).

of the administration of criminal justice. That led to a five-count indictment and an agreed statement of facts, both of which bore little resemblance to the indictment and the allegations as originally framed. Dr Harden was not briefed with the indictment and statement of facts upon which the respondent was ultimately sentenced. Those documents were sent to him later.

[32] It is against that background that the psychiatrists' evidence can be analysed.

Dr Harden

[33] As already observed, Dr Harden was retained to prepare a risk assessment for the preliminary hearing under s 8 of the *DPSOA*. Dr Harden interviewed the respondent on 3 March 2017. He prepared and delivered his report of 6 June 2017. After it was discovered that he had not been briefed with the correct indictment or the statement of facts, those documents were provided to him on 19 December 2017. Dr Harden produced a supplementary report on 20 December 2017.

[34] In his report of 6 June 2017, Dr Harden recited the respondent's history, including a history of the offending behaviour in July to August 2013. In his report, Dr Harden described the offending as follows:

> "The Queensland police service court brief (pages 9 – 15) give some details of the most recent offences and recorded that on 21 July 2013 the offender demanded that the victim's father come to the address and the offender choked the victim from behind threatening to kill her until a witness intervened.
>
> On 28 June 2013 the offender began demanding money from the victim with threats of violence and would ask the victim to have others give her money in her account and withdraw the money for him. The victim complied because she had been assaulted on several occasions and was fearful. The offender would use the money to buy alcohol and drugs.
>
> On 5 August 2013 the victim was in her room and the offender came in, called her names and stated he was going to rape her. The offender put his hand up her dress, pulled her underwear down and a witness entered the room and told him to stop. Additionally on 5 August 2013 the victim was in her bedroom when the offender came in with a knife started threatening her and calling her names. The victim pushed the knife away causing a cut to her hands. The offender then punched her in her right and left eyes, grabbed her by the hair, dragged her from her bed to the lounge room and kicked her in the head. A witness eventually stopped the assault. The offender continued to threaten her and demand money.
>
> On 10 August 2013 the victim was in her bedroom and the offender came in told the victim not to make a sound and that if she had sex with him she did not have to worry about money he had demanded from her. He kneeled on a bed and tried to remove her T-shirt and he put a hand over her mouth. He attempted to remove her pants and she resisted. He took his penis out and

started to masturbate in front of her and asked her to use her hands to masturbate him which she resisted. He then asked if he could squeeze her breast and she agreed he could because she was afraid. The offender then masturbated himself until he was close to ejaculation but his girlfriend called out and he left the room.

On 11 August 2013 the offender went into the victim's bedroom with a broom and started hitting her with it and eventually broke the broom handle on her leg and then returned and jabbed her in the chest with the broken broom handle.

On 12 August 2013 the offender entered the room, screamed at the victim and hit her in the face with the back of his hand demanding that she go the bank to retrieve money to pay for cleaning of the house. At the bank the victim stayed in the car while the offender went into the bank approached the bank teller and used the victim's bankcard trying to withdraw money. The offender signed a name to try and prove it was his account but did not succeed and the transaction was rejected. The offender started spitting at the cashier and this was blocked by security screens in the bank. The victim then came into the branch and withdrew money and the police arrived and arrested the offender.

At the hearing before Justice Rackeman[9] on 22 July 2014 with regard to the above charges it was described that there was a Victorian history of warrants but it was not clear whether there were criminal convictions (pages 25 – 26). At sentencing the Judge noted that the charges spanned a period of approximately three weeks and that the charge of torture related to a number of incidents occurring over a period of time including beginning with on 21 July damaging her belongings and severely damaging her car, demanding money, threatening to kill her and her father, smashing her phone with a hammer and later after the beating with the broomstick taking pliers to her finger causing her finger to bleed. The Judge noted that there were a number of concerning aspects and these were that the offending was protracted over a period of weeks, that the offender was armed, that the victim suffered extreme physical, mental, psychological and emotional pain and suffering including bruising cuts and a fractured eye socket. It was noted that there was an element of cruelty, no empathy with the victim and that the sexual assault 'was one which you desisted in only after the intervention of your girlfriend'."[10]

[35] Dr Harden's recitation of the facts is inconsistent in some respects with the statement of agreed facts. In particular, the respondent has not been convicted of offences which allegedly occurred on 10 August 2013. There was a charge alleging sexual assault on

---

[9] Plainly a reference to Judge Rackemann of the District Court.

[10] Affidavit of Scott Harden, filed 8 March 2018, CFI 7, ex SH-2 at 13–14.

that day but it was withdrawn. Dr Harden's recording of Judge Rackemann's sentencing remarks is accurate.

[36] Dr Harden administered various actuarial tests. He also had regard to records of the respondent's institutional behaviour. Based on his examination of the respondent, a consideration of the history, including the offending history as he then understood it, the respondent's institutional behaviour and the actuarial tests, Dr Harden expressed the following opinion:

> "At the time of assessment Filippo MUSSO was a 24-year old man who had committed only one sexual offence but this was in the context of a prolonged callous, sadistic and extremely violent series of assaults against a young woman over a period of some weeks and included the use of weapons on numerous occasions as well as threats to kill her and others.
>
> He was very likely intoxicated with cannabis and possibly other substances at the time of many of these assaults.
>
> He has a long prior history of criminal behaviour across a range of kinds of offending dating back to early adolescence with reportedly early incarceration in juvenile detention centres and then adult prisons. His immediately previous offence was an attempted armed robbery and he was still under supervision of parole for this offence when he committed the sexual offence and assaults.
>
> There was also an offence of stalking from New South Wales in the history with no further details available.
>
> He comes from an extremely prejudicial early life environment with a mother who suffers from a severe mental health condition and a father who was incarcerated for sexually abusing his older sister. Following the disruption of his family with his father's incarceration he was placed in care where he experienced further emotional and physical abuse. Disruptive, oppositional and difficult behaviour was identified from an early age and resulted in him seeing a number of health professionals with a range of diagnoses over time.
>
> Although he has had symptoms in a range of domains his predominant difficulties seem to involve difficulty appreciating the rights of others, repetitive disruption of social rules, impulsive aggressive behaviour, entitled and selfish attitudes, emotional instability and recurrent decompensation in the face of adverse events with a pattern of either self harm or violence towards others, or both. This rigid maladaptive pattern of interaction with others constitutes a personality disorder and appears to be a pervasive pattern for this young man. His level of dysfunction is such that he struggles to cope with his reaction to his emotions even in the highly structured environment of a custodial setting resulting in recurrent admissions to the detention unit for self harm, disruptive behaviour or aggressive behaviour towards others.

> In the community he consistently complicates this behaviour with pervasive and recurrent polysubstance abuse.
>
> He has generally done poorly educationally but seems to have reasonable general intelligence as a strength. He has completed a preparatory sexual offending program although he found this and the substance abuse program somewhat emotionally difficult. He has not completed a sexual offending treatment program which would address many of his criminal needs. Concern has been raised about his ability to control his behaviour during such a program.
>
> **Diagnoses**
>
> **Personality disorder – mixed with antisocial, narcissistic and borderline features – severe.**
>
> **Polysubstance abuse** – in remission due to custodial setting.
>
> **Risk**
>
> His ongoing unmodified risk of sexual re-offence if released into the community after considering all the available data is in my opinion in the **high (well above average)** range compared to the recidivism rate of sexual offenders generally.
>
> While his risk of committing a violent offence is greater than his risk of committing a sexual offence, the various risk instruments used to assist in understanding his level of risk suggest that his risk of sexual recidivism is still in the high range.
>
> His greatest risk factors are his severe personality disorder and his polysubstance abuse.
>
> If he were to be placed on a supervision order in the community, in my opinion the risk of sexual recidivism would be reduced to moderate.
>
> Without further intervention in custody it is likely that he will struggle to comply with the strictures of a supervision order in the community."[11]

[37] In his supplementary report, Dr Harden reviewed his first report based on the new information (the agreed statement of facts and the indictment), reconsidered his actuarial tests and his first report and expressed the following opinion:

> "I have carefully considered the new material and I have re-examined my report and my scoring of the associated risk assessment instruments. The new material does not substantially alter my previous opinion contained within my full risk assessment report. The opinions contained within my previous report remain unchanged.

---

[11] At 17–18. Emphasis in original.

> In my opinion it is still my view that his **risk of committing a further sexually violent offence** in the community in the absence of other constraints is in the **high (well above average) range compared to other sexual offenders**.
>
> **This may seem difficult to understand in a man who only has one offence which is clearly sexual in nature (and threats to rape a woman in the context of a violent physical attack are clearly a sexual offence for risk assessment purposes).**
>
> However, the risk is substantially explained by the fact that this man has a very severe antisocial personality disorder with psychopathic features and a long history of violation of the rights of other human beings and breaches of laws. While his risk of committing a violent offence is even higher than his risk of committing a sexually violent offence, his risk of sexually violent offence is still high both on the basis of the instruments and also because there are no internal or external barriers to Mr Musso committing a sexual offence. That is, **he has a severe deficit of empathy for others and he appears to be 'punishment insensitive' and is not dissuaded in his behaviour by potential legal consequences.** This means that if he is minded to make sexual threats or commit sexual violence against someone he has no internal or external structures that restrict him from so doing. This lack of internal inhibition to harming others is further exacerbated by periods of intoxication associated with his polysubstance abuse."[12]

[38] Dr Harden gave evidence before me on 2 July 2018. In examination in chief Dr Harden explained that when he received the new information in December 2017 he re-analysed the evidence available in light of the agreed statement of facts and "… discovered … that it did not alter the risk assessment or risk management opinion". Mr Tate led Dr Harden through his administration of the various actuarial tests. Dr Harden was specifically asked whether he took account of the QP9s,[13] which were briefed to him. The doctor answered as follows:

> "Doctor, in forming you[14] clinical views, did you take account of the QP9s which are set out in the DPP material?---Well, I would have read the QP9s. I think that in this matter there were a whole range of different accounts given, so it's quite confusing. And, in fact, it was quite helpful eventually to have an agreed statement of facts because Mr Musso's account at interview is a bit at variance with – quite at variance, I think, with some of the QP9s, as I recall, and – and also at variance with other accounts. So I

---

[12] Affidavit of Scott Harden, filed 8 March 2018, CFI 7, ex SH-4 at 3. Emphasis in original.

[13] Police summaries delivered to police prosecutors.

[14] Plainly an error in the transcript. This word should be "your".

> think it was actually quite useful to have an agreed statement of facts eventually."[15]

[39] Dr Harden was then asked about the respondent's future management and responded as follows:

> "Yes. Can I move to the – the issue of future management, and one of the issues that his Honour must decide is whether – if the respondent is a serious risk to the community, whether he should be detained in custody for treatment or whether he should be released to a supervision order. What is your clinical opinion in relation to the best way of managing this man at this point in time, both personally and from a protection of the community viewpoint?---Yes, so I think you're talking about what are my recommendations, both for his clinical treatment - - -
>
> Yes?--- - - - and also with regard to risk management for the community.
>
> And I'm trying very hard not to lead you?---That's okay. I just wanted to clarify that. So I was – previously, I was of the view that he could – that a supervision order would reduce his risk in the community because it would contain his behaviour to some extent, provide him with a structure, guarantee some individual treatment, but that he – and – and that he should undergo individual and group treatment in the community, but I've been a bit concerned at some of the more recent material I was provided with, including things as recently as the 26th of June, where he's allegedly overheard saying, you know, to cut off his tracking device and run away or similar."[16]

[40] The reference to the respondent speaking to other persons in custody about removing his tracking device is a reference to evidence which came through the witness Mr Bear. Mr Bear was not required for cross-examination.

[41] Dr Harden then went on:

> "WITNESS: And a pattern of – and, I suppose, also, I was provided with, well, actually quite a volume of further material, including the health file and a few other things and more recent material, which I think, elaborated for me more a bit of history of instability at times - - -
>
> MR TATE: Yes?--- - - - which – I suppose there was – the big question with Mr Musso was really his compliance because a supervision order reduces risk largely based on the compliance of the individual on the order with the various either monitoring and/or treatment type provisions. So I'd always – based on Mr Musso's personality, where he struggles with authority and complying with instruction to some extent, I'd always had

---

[15] Transcript at 1-17 ll 6–13.

[16] At 1-17 ll 15–33.

some concerns that he would possibly breach the supervision order – probably by some kind of breach of the provisions of the order rather than by reoffending, necessarily – and that that seemed to me, given his personality structure pretty likely to occur in the first, you know, few months, but I didn't see that as necessarily insurmountable. I'm just a little concerned, given these comments he's reported to have made about cutting off the tracking device and going AWOL that the risk of non-compliance might be higher than I had thought. If he were – if his Honour were to decide to keep him in custody, then he should undertake a group treatment program, such as the medium intensity sexual offending program or the high intensity sexual offending program in custody. If he was placed on a community supervision order, he should undertaken[17] individual treatment still and the medium intensity group program in the community. It's actually important – regardless of the concerns that have been raised about his participation in a group program, it's actually important, in my view, that he participates in a group program. Group programs, I think, provide an opportunity for people to learn better engagement skills with other people and, while it's a bit fraught and some people can actually deteriorate and become more emotionally disregulated during programs – particularly the early phase of them – in the longer term it seems to me that you get better outcomes than just individual therapy, particularly with someone with a severe personality dysfunction where individual therapy is really going to take, I think, quite some years to make a significant difference. Now, he should still have the individual therapy regardless because he requires that support and treatment, in my view.

So it's really a tandem approach – group therapy through a program, as well as the one on one with a counsellor or psychologist, which he's current receiving; is that how - - -?---Yes, that's my view. He should – regardless of the disposition and regardless of the group program participation, which he has not agreed to – hang on, no. It's not that he's not agreed. He's not been offered it at the moment, to date. He should continue with Ms or Dr Andrews, the psychologist whose reports I've – reports I've read two of, because it seems to me that this engagement with her was actually pretty good.

And are you contemplating the HISOP or the MISOP? Where would you see him being properly placed?---Look, I think he – the HISOP is preferable, probably, just because of the sheer dosing effect. You get a much – it's a longer program with more contact. But if he were to be placed on a supervision order, I think the MISOP is an adequate program."[18]

---

[17] This should presumably be "undertake".

[18] Transcript at 1-17 l 42 to 1-18 l 44.

[42] The references to "HISOP" and "MISOP" are references to the High Intensity Sexual Offenders Program and the Medium Intensity Sexual Offenders Program respectively. The HISOP is only available to persons in custody.

[43] Finally, Mr Tate asked Dr Harden this:

> "So if we look at it from the viewpoint of protection of the community, he should do the programs in custody before being released to a supervision order? Is that how – is that - - -?---On balance, that's probably preferable, in my view, at this point in time.'[19]

[44] Ms Robb cross-examined Dr Harden by firstly taking him through the mechanism of the preparation of his first report. Then, this exchange occurred:

> "Thank you. Now, you were asked to provide a second report, and you were given some extra material, You were given a copy of the statement of facts, and you were given a copy on which he was – which is the factual basis on which he was convicted and sentenced. And you were also given a copy of the indictment on which he was convicted, and which had fewer charges on it than the ones contained in the DPP material?---Yes, that's correct.
>
> But it's fair to say that you weren't asked to disregard any of that other information when you were asked to provide that second report?---No, that's – no, I was not, which is interesting.
>
> You were simply asked to take into account the further information, and whether it changes, in any way, your opinion?---Yes, although when there was the agreed statement of facts presented, I took that to mean this is the official version of the conduct, and I should disregard other versions of the conduct.
>
> HIS HONOUR: So you took the statement of agreed facts as an exhaustive explanation of the conduct?---Yes, your Honour. Also, because there had been so many variants, that it was, in fact, as I said earlier, very useful for there to be an agreed statement of facts in this matter.
>
> Yes.
>
> MS ROBB: Which is interesting, because, as I said, we have discussed this before, and my impression was – and please correct me if I'm wrong. But do you then accept that all of the information in that DPP brief is irrelevant?---It's an excellent question. I don't know that I can really answer it. I don't
> - - -
>
> Is it, perhaps - - -?---If you take - - -

---

[19] At 1-20 ll 20–24.

Sorry, I'll let you finish?---It's okay. Let me think about it. If you take the agreed statement of facts as presented, then, yes, there's nothing in that DPP brief that's really germane, because material that's essential occurs elsewhere. So particularly, say, for example, the court – Queensland court outcomes and similar. Yeah.

But, as a psychiatrist – psychiatry being your discipline - - -?---Yes.

- - - as opposed to, say, law. Is it fair to say that you, as a psychiatrist, nonetheless, still approach that material as though it is of some value to you, and informing you about the task that you're setting about doing, which is assessing risk? There's some value in those allegations, and there's some value in the witness statements?---Yeah, there's some value, because it's data. It's all data of some sort. It's a question of weight, isn't it? So I don't generally put enormous weight on DPP files, because they consist of, as you know, QP9s, witness statements – lots of witness statements, and lots of records of interview. Now, records of interview are sometimes more interesting than the other material, but not in this matter. And the witness statements are – I don't – you know, unless there's a particular question that turns on a really specific action, I don't refer to them a great deal.

Perhaps I can ask another question, another way, which is, isn't it the case that you also think – well, is it the case that you think that information relating to charges made but not pursued or not convicted could be relevant to assessing risk?---Yes, they could be, under some circumstances. If they relate to a proceeding alleged offence - - -

Yes?--- - - - in that. But in this matter, that's not the case.

So – and so are you now saying that, once you have access to that material, even though – the schedule of facts, even though you were not asked to disregard the original material on which you based your opinion, that, nonetheless, you did, in writing your second report?---Well, yes, because there wasn't really an agreed version of events prior to that, in that Mr Musso has given one, and then there were a couple of – there were some different ones in the QP9s. I thought the agreed statement of facts was then the agreed statement of facts, so I proceeded on that basis.

Just excuse me one minute, please, your Honour.

HIS HONOUR: So the idea is that, originally, you used the various bits of the material that had been given to you, including the DPP files, in order to construct a factual basis upon which to make your assessment of this man, and then, once an agreed statement of facts was given to you, that supplanted the inferences you'd drawn, factually? Is that where we're going?---Yes, your Honour, in general. Yes, because, also, there's not – there wasn't that much – the different accounts effectively said there was all this violent and threatening behaviour, and then a – and a sexual element to it, in different – but with different details. Now, from a risk assessment/risk

> management point of view, none of the differences in details really amounted to anything.
>
> I see?---They didn't change anything, from my point of view. Once there was an agreed statement, then that's easier, because this is what's agreed. And, once again, it amount to violent conduct with a sexual element. And so it wasn't that different, but it's an accepted version.
>
> And probably, some of the details of that didn't make much difference, either?---Yes, your Honour. That's correct. The – I think there might be an erroneous belief that the really fine grain detail of the actions are always critical to the risk assessment and management. In Mr Musso's case, I don't really think they are. In someone with a – say, a paraphilia, might be much more relevant."[20]

[45] And a little later:

> "MS ROBB: What I'm trying to work out is, had this second report been prefaced by a request to you to absolutely disregard the information that you had relied on, and perhaps drawn attention to where, in the first report, it appeared you had relied on it, do you think you might have approached that second report in a slightly different way, or perhaps a more fulsome way?---Good question. Let me think. I think in this matter it would have come out much the same, but I would have probably made a specific reference in the addendum report to disregard those – those elements in the collateral history that came from the DPP file.
>
> Okay. Thank you. Now, I'm somewhat shifting away from what you've taken into account and what you haven't to risk, but these questions also have some relevance for that branch. Is it fair to say – and I get this impression from your reports, and please correct me if I'm wrong – that your impression – I think your evidence with my learned friend this morning – your impression of this man is that we have a – I think your words were very high risk of violence that might – might end up involving sexual violence, depending on the circumstances and depending on who the person is standing in front of Mr Musso at the time?---That's probably not an unfair way to characterise it. Effectively, what I said, though, is there's a very high risk of violence, but still a well above average risk of sexual violence - - -
>
> Yes?--- - - - although less so than the risk of violence, in my view."[21]

[46] Theresa Wood is a psychologist who had worked with the respondent and prepared a report. She said this in her report:

---

[20] At 1-25 l 5 to 1-26 l 46.

[21] At 1-28 ll 8–29.

> "…it should be noted that Mr Musso limited his sexual abuse of the victim to a sexual assault. Given his dominance over the victim at the time of his offending, the duration of the offending, his residence with the victim, and his apparent willingness to use weapons in the context of threatening and abusing her it would appear reasonable to conclude that a forcible rape of the victim could have been perpetrated by Mr Musso during the period of his offending."[22]

[47] Ms Robb took Ms Wood's point up with Dr Harden. Ms Robb's line of cross-examination was designed to establish that the fact that the respondent did not take the opportunity to commit rape demonstrated a certain degree of control. There were certain weaknesses with that line of cross-examination given that by the agreed statement of facts it appeared that the respondent was interrupted during his offending. Ultimately, though, Dr Harden thought that Ms Wood's observation was relevant at least in a limited way. He said:

> "HIS HONOUR: Perhaps put another way, at that point in time when he committed the sexual assault, he clearly had an opportunity to commit a more violent sexual offence, and the fact is he didn't. So the question, then, is, in your expert opinion, what is the significant,[23] if any, of that?---In my opinion, it's of some – there's some suggestion that there's some strengths to work with there, maybe, but it doesn't sort of jump out as – as a major strength, I think. That's why I thought Ms Wood had – I thought, personally, Ms Wood had overstated that, to be – I thought that was an unusual paragraph.
>
> All right. The fact that he's made a decision not to take that opportunity to sexually offend violently, what, in your opinion, is the relevance of that to risk, if anything?---Your Honour, it might suggest that any future recidivism might not be at the more violent end of the spectrum in terms of sexual violence, but it doesn't speak to the risk – risk of recidivism in terms of frequency or chance.
>
> Or the nature of it being violent and sexual?---No, your Honour. It just suggests it might not be at the more severe end."[24]

[48] As will be seen, one of Ms Robb's submissions in resisting a continuing detention order is that there has only been one offence of a violent sexual nature. She cross-examined on this as follows:

> "It was a sexual assault where the person's clothes weren't removed and their genitals weren't touched?---The short answer is that past offending is the best predictor of future offending [indistinct]

---

[22] Affidavit of Daniel Bear, filed by leave 2 July 2018, ex DB-18 at 146 [11.6].

[23] An error in the transcript; this word should be "significance".

[24] At 1-30 ll 24–40.

> Okay?---So a future assault would be – if it were to occur, would be more likely to be of the same form.
>
> Thank you. So can the community, then, take some comfort from the fact that the sexual offence – the single index sexual offence was not in fact an incredibly serious sexual offence in terms of if you're looking at, say, for instance, a rape on one hand?---Oh, I don't – the – the violent circumstances surrounding the sexual assault don't give the community any particular comfort, I don't think, no."[25]

[49] And later:

> "MS ROBB: So just again, I'm trying to calibrate the nature of the risk, what that risk actually looks like. If we can bear in mind that this didn't escalate past threats and that he was desisted by his partner entering the room – and we know nothing about whether or not he knew his partner was present or otherwise on the agreed facts – we know – and I think it – well, it's reflected in the reports – and I'm interested in your opinion on this – that he's had six or seven partners, on his account, in his life. He's also very close to his mother and grandmother, who are present in court today. What do you take and how does it affect your risk assessment from the fact that he's got nothing in his criminal history about offending against any of these women that he's ever been in a relationship with or that he's - - -?---Yeah, look - - -
>
> - - - related to?--- - - - as I – as I said to his Honour, I don't think the dynamics of this is necessarily that of domestic violence, so I don't know that necessarily his partners are the ones at risk even though they are in most proximity. It seemed to me that in some ways, this victim represented a threat to his relationship to his partner in his mind or to an unborn child, potentially, in some statements and that that may have been part of a very complex set of motivations that are not fully understood by us for his behaviour. I think you're right. We only have one offence. The prediction of the pattern of any future offence is much more difficult. Mr Musso's overall behaviour: about the only thing you can say is it's going to be associated with interpersonal violence if it occurs.
>
> But nonetheless, your point remains that past offending is the best predictor of future offending [indistinct]?---In general terms. Correct.
>
> So to be clear, then does that mean – and I'm jumping forward here to your expressed opinion, which I appreciate you contextualised this morning or this afternoon, whichever it was, that he is at moderate risk of sexual violence if released on a supervision order?---That's what I said previously. I added a caveat to that - - -

---

[25] At 1-31 l 41 to 1-32 l 5.

> Yes?--- - - - this morning based on his other statement which was just about a concern about his compliance.
>
> Yes?---I'm not sure whether that really shifts my views about his risk reduction on a supervision order. It – it – you know, and I'm unsure how much it shifts my view [indistinct] okay. So it - - -
>
> Yes?--- - - - may be that the reduction in risk is not as low as moderate. I don't – I'm not sure."[26]

[50] Dr Harden was re-examined, relevantly:

> "MR TATE: Doctor, just so that I'm clear on some of the responses you gave to my learned friend, the first relates to the agreed statement of facts, and a number of questions were put to you about, possibly, control and ability to stop the offending. The issue, of course, as we understand the factual transaction is that his girlfriend entered the room and that seems to have been the trigger to stop. Is that at all significant in helping us understand this man's risk?---Yes, and I did actually say that in response to one question, that, as I understood, it was terminated by someone else coming along.
>
> When we look at risk to the community, earlier, you indicated that you saw the appropriate approach would be for him to undertake a course whilst in custody – or a program, at least, whilst in custody, as well as, in parallel, individual counselling. Do you still maintain that that is the lower risk option, in terms of protection of the community, from this man's risk?---Well, obviously, it's a lower-risk option. He's in custody. It makes the – you know, removes most risk to the community if he's in custody.
>
> To be fair to Mr Musso, I'd like to ask you this question: you've indicated that the best predictor of future behaviour is past behaviour. In this case, we have one offence, and we're looking at prediction into the future. How should we understand this man's cluster B personality disorder as being implicated in understanding his risk of future sexual – serious sexual offending?---Yes. That's a good question. I think his personality disorder is integral to risk and to risk management. If he didn't have such a severe personality disorder, his risk would be, really, considerably less, I think, and he wouldn't have accrued a number of the variables that rate on the various instruments. So I think his personality disorder's key to intervention, and I'm pleased that he's engaged with a therapist reasonably well, from what I can see."[27]

Dr Timmins

---

[26] At 1-32 l 25 to 1-33 l 17.

[27] At 1-35 l 46 to 1-36 l 25.

[51] After Dr Timmins was nominated as one of the examining psychiatrists by order of Burns J, material was sent to Dr Timmins under cover of a letter from the Crown Solicitor's office dated 4 May 2018. Relevantly, that provided:

> "The brief provided to you contains the affidavit of Dr S Harden sworn on 22 February 2018 and the affidavit of T A Fuller sworn on 19 February 2018. Dr Harden prepared a psychiatric risk assessment report dated 6 June 2017 (exhibit 'SH-2' to the affidavit) for use in considering whether an application under the Act should be brought. Dr Harden was briefed with prosecution material now attached to the affidavit of T A Fuller as exhibits 'TAF-1' and 'TAF-2'. The material contains a number of QP9s/court briefs which detail offences with which Mr Musso was charged arising from the index offences. (The index offences referred to are the offences for which Mr Musso was sentenced on 22 July 2014 and are detailed on the indictment, exhibit 'AM-4' to the affidavit of A McLean. One count of sexual assault was indicted.)
>
> After consideration by the Office of the Director of Public Prosecutions and discussion with Mr Musso's legal representatives at the time of sentence, those charges were reduced on indictment to five counts (indictment dated 22 July 2014) and an agreed statement of facts settled on. The indictment and statement of facts are attached to the affidavit of A McLean sworn on 6 March 2018 as 'AM-4' and 'AM-5' and form the official record of the facts of the index offending. The QP9s/court briefs are not on relied on as the facts of the index offending. The affidavit of T A Fuller exhibits a number of versions of the indictment and schedules of fact. Similarly, these documents do not form part of the official records and should not be relied upon as such.
>
> The indictment and agreed statement of facts upon which Musso was sentenced were not available at the time Dr Harden prepared his report dated 6 June 2017. This material was subsequently obtained and provided to Dr Harden, and a supplementary report requested. The supplementary report dated 20 December 2017 is attached to Dr Harden's affidavit as exhibit 'SH-4'."[28]

[52] Dr Timmins interviewed the respondent on 25 May 2018. She applied various actuarial tests.

[53] In her report of 21 June 2018 Dr Timmins recorded her diagnosis of the respondent as:

> "He has evidence of a **Mixed Personality Disorder with Borderline, Narcissistic and Antisocial traits.**
>
> He has a PCL-R scoring which indicates the presence of psychopathic traits.

---

[28] Second supplementary affidavit of Amanda McLean, filed by leave 2 July 2018, ex AM-2 at 4.

> He also has a **Polysubstance Dependence, mainly Alcohol and Cannabis (in sustained remission in a controlled environment).**
>
> He has also likely abused other substances in the past including cocaine, amphetamines and methylamphetamines, petrol and possibly other substances.
>
> He does not currently have a Axis 1 psychotic illness or a major mood disorder, however, I do note other documentation indicate previous diagnosis of Attention Deficit Hyperactivity Disorder, Post-Traumatic Stress Disorder and he has been in a special school. He is currently under the care of the Prison Mental Health Service and is prescribed psychotropic medication."[29]

[54] As to the risk of reoffending, Dr Timmins commented as follows:

> "In summary, I am of the opinion that Mr Musso risk of sexual reoffending is **HIGH** if released into the community without a supervision order in place.
>
> Mr Musso's victims are likely to be anyone with whom he has a relationship with, either intimate or non-intimate and whom he perceives has wronged him somehow. If this happens to be a female he will commit sexual violence in order to dominate, have control and power over and achieve some form of retribution towards the victim. He possibly harbours some sexual deviance towards women in the form of rape fantasies and he is confused about sexual relationships and intimacy in general given his upbringing.
>
> There would be physical and psychological coercion involved in the offending and a high degree of harm to the victim.
>
> He is also likely to return to substance use in the community to manage his emotional distress. Any use of substances by Mr Musso will increase the propensity to use violence, including sexual violence, and thus would raise his risk of offending sexually and violently.
>
> He may present an absconding risk given his history of escaping custody, breaching community orders and the lack of supports in Queensland. He is likely to breach an order currently if released even with the support of the psychologist. I am also unclear exactly where his family reside with information in the documentation indicates his family have lived in Queensland. In other information it appears his family may be in NSW."[30]

[55] Dr Timmins saw difficulties with releasing the respondent on a supervision order. The respondent would need ongoing support, treatment, stable accommodation, GPS

---

[29] Report of Dr Eve Timmins, filed 25 June 2018, CFI 22 at 36–37. Emphasis in original.

[30] At 40–41. Emphasis in original.

monitoring and would struggle to comply with the conditions of the order. She thought that on supervision the respondent "… would most likely fall into a Moderate to High risk category". Mr Tate led further evidence from Dr Timmins in chief. Particularly relevant to risk she gave this evidence:

> "There are potentially two risks and tell me if I have this wrong. One is a risk of future serious violence and the other is a risk of serious future sexual offending with violence. Are those risks intertwined and is it artificial to try and separate them or should we be looking at them as quite separate risks?---I think it depends on the victim. I – I don't think he's going to sexually offend against a man. I think that's more likely to be some sort of violent offence or violent behaviour. I think that the risk of sexual offending comes if the – the person or the victim is a female. That's where I think it becomes intertwined. So I think it really depends on who the victim could potentially be.
>
> You – on page 42 you indicate that you consider quite obviously that an order under division 3 is necessary and you discuss at least in passing what sort of order may be considered by his Honour. You indicate that at page 42 his risk may be modified by a community supervision order – paraphrasing – he would most likely fall into a moderate to high risk category which really isn't a great modification of his unmodified risk of high, is it?--- Not if he's released at the moment, no.
>
> Would it be fair to say that you consider that the community would be better protected if he was not released at this point?---I think Mr Musso will be able to understand himself and manage himself better if he undergoes a period of treatment and I think in order for that to have the most beneficial outcome for him, it would be better done in custody rather than the community. I think in the community he's going to – there's going to be a lot going on for him. I think he's quite a vulnerable person particularly to stress and I don't know how well he's going to cope with the community at this point in time so I think he would do better if he understood his risk factors more and underwent treatment and further engagement with the psychologist at the same time in order to decrease the risk further."[31]

[56] Ms Robb cross-examined Dr Timmins as to any impact upon her opinion of the material which was exhibited to Mr Fuller's affidavit. Although she was cross-examined at length on this topic, her evidence is fairly neatly summarised in the following exchange:

> "HIS HONOUR: I know what you're getting at, but isn't the answer this: whatever those facts were, whatever those allegations were, the statement of facts represented the distilled version of what you were to accept as the facts of his offending?---Yes.
>
> That's the point?---Yes.

---

[31] Transcript at 1-43 l 28 to 1-44 l 8.

> Right. And albeit that you read the other material, it was that statement of facts that you relied upon as the factual basis of the offending?---Yes.
>
> All right. Yes. I'm just not sure that there's a good deal of utility in asking a psychiatrist how the 12 morphed into five.[32] You've got to look at it from the point of view of what is she acting upon - - -
>
> MS ROBB: I agree, your Honour.
>
> HIS HONOUR: - - - as the facts of what your client did."[33]

[57] Ms Robb took Dr Timmins to two letters[34] authored by Dr Anthony Tie, a consultant psychiatrist at the prison mental health service. Dr Tie described the respondent as "affable", having commenced work as the unit cleaner and showing no pervasive mood or psychotic symptoms. The respondent denied to Dr Tie any "current aggressive ideation towards either himself or others".

[58] Dr Timmins was asked to assume the correctness of what Dr Tie said in the letters and then gave this evidence:

> "Yes, so does it – is it relevant to your opinion on risk posed on supervision might be the first question?---I think it shows that he is settling using the process of settling. I wouldn't call him settled. And that his behaviour is not being able to be maintained at this level. That seems to be indicated in the letter. So does it substantially change my opinion? No, probably not.
>
> Thank you. Now, you've given some evidence, I think, that the custodial environment is probably obviously beneficial in the sense that it will contain violent behaviours. Is there a relationship, however, do you think, in your opinion, having read the medical records and the IOMS, the custodial records – is the custodial environment an environment that is, in fact, exacerbating his, perhaps, violent tendencies or self-harm tendencies, or is that not something – is that an unfair question?---I think that's a difficult question to answer because I think it depends on where he is in the custodial setting, how long he's been there, and who he's interacting with and what's happening, so there's no contextual sort of - - -
>
> I understand?--- - - - factors to that."[35]

[59] Mr Tate re-examined Dr Timmins, in particular in relation to the two letters written by Dr Tie. Dr Timmins was asked to have regard to Dr Tie's letters and the evidence of the respondent's behaviour in prison and opine as to whether there was evidence that the respondent had settled. Dr Timmins gave this evidence:

---

[32] This refers to the reduction of the number of charges from what was originally contemplated.

[33] Transcript at 1-56 ll 1–16.

[34] Which ultimately became Exhibits 8 and 9.

[35] Transcript at 1-61 ll 10–27.

"Can I – the last issue I'd like to raise with you is at page 62 which is DP5. And you'll see there that that is – there are six pages of history and it's headed up violation history, and when I look at that I see there's a major incident on the 7th of May. Offensive behaviour 7th of May, 3rd of May self-harm, 4th of April self-harm, 31st of March self-harm, threats against staff and so it continues over a six-page period. In terms of the efficacy of the medication, does that suggest that there are breakthrough symptoms of his cluster B personality or should we be understanding his behaviour as really not settled?---Well, his behaviour's not been settled and I do think all the – the incidents are in the context of his personality disorder and not a major mental illness. I think that there's certainly been some trigger in the recent six months anyway possibly with this process or the interviews, possible other factors might be impacting that we don't know about, association issues maybe, other stressors, I'm not sure because there does seem to be an escalation, but like in general, he's been quite – there has been periods where he's much more dysregulated than other periods and it seems regardless of the medication."[36]

Dr Arthur

[60] Dr Arthur was also nominated as one of the examining psychologists by the order of Burns J. Dr Arthur received a similar letter of appointment to that received by Dr Timmins, and received the same material. Dr Arthur interviewed the respondent on 18 May 2018. He applied various actuarial tests.

[61] Dr Arthur's diagnosis was as follows:

"250. Prisoner Musso is a 25-year-old single man with two children (one he now claims is not his) who is currently incarcerated at Wolston Correctional Centre after serving a 4½ year prison sentence for a suite of charges dated mid-2013 which included a sexual assault.

251. The sexual offending occurred in the context of protracted physical and emotional violence directed towards the victim, a young woman who was sharing a residence with prisoner Musso's girlfriend. The violence included punching the victim, at one stage stomping on her head, an episode of choking and repeated threats to harm her and her family. He further intimidated the victim by destroying her belongings, killing her pet cat and threatening/assaulting her father. Prisoner Musso denigrated the victim sexually, repeatedly calling her a: 'slut' and writing words to the effect on the furniture and forcing her to read them aloud. According to the victim's statements prisoner Musso propositioned her whilst his girlfriend was in the hospital and forced himself on her sexually on two separate occasions.

---

[36] At 1-66 ll 15–29.

252. The official version of events is that prisoner Musso pinned the victim down in her room and attempted to take her clothes off, threatening to kill her when she resisted. He desisted when his girlfriend intervened. Prisoner Musso then threatened the victim with a knife and severely physically assaulted her.

253. Prisoner Musso has given various different accounts of the offences. He has consistently stated that the victim falsely accused him of forcing her to have sex with his brother, causing his girlfriend at the time to become stressed and physically unwell. In another version he has reported that he (in the company of others) assaulted the victim with items including a baseball bat, squeezed her breast and masturbated over her. In other versions he admitted to threatening rape and, after sexually assaulting her, told her that now she had justification to tell other people he had raped her.

254. He is now denying aspects of the sexual assault apart from making threats to pay someone to rape his victim.

255. Prisoner Musso reports a history of developmental trauma. His father was a convicted paedophile and sexually assaulted prisoner Musso's older sister; he reports that he was exposed to these assaults as a prepubescent and was coerced by his father to kick and spit on her. He reports his mother abused substances and suffered from a psychotic illness. There are reports that other members of his family suffer from various mental illnesses. He spent many years being moved between his parents to foster homes and the care of various extended family including his grandmother and uncles/aunts. He claims to have been sexually assaulted twice as a child.

256. There is collateral history from his mother which reports he was born prematurely, suffered developmental delays and was assessed as having a learning disorder.

257. He describes a history of ambivalent, abusive and destructive relationships. Whilst he focuses heavily on his family as a source of support and motivation for him to not reoffend, it appears that these relationships are inherently unstable. Prisoner Musso's attitude towards relationships and women in general is extremely disturbed. He has a history of sexualising relationships dating back to the age of 12 and has freely engaged in emotional/physical violence against past partners. The description of his offences displays a high degree of sexual entitlement, uninhibited violence against women and contemptuous mistrust.

258. There is an extensive forensic history dating back to his teenage years. In the documentation provided there are reports on charges including stalk/intimidate prior to 2010, attempted robbery whilst

armed in 2011 amongst others. He has a history of repeated failures to comply with community supervision. He reports gang affiliations.

259. There is a documented history of longstanding polysubstance abuse. The index offences of extortion relate to prisoner Musso seeking out money to buy drugs and he was likely under the influence of substances (alcohol and cannabis amongst others) around the time of these offences.

260. Prisoner Musso's psychiatric history is complex; there are indirect reports of childhood assessments/treatment with diagnoses including Conduct Disorder, Attention Deficit Hyperactivity Disorder, Post Traumatic Stress Disorder and Psychosis. He has a history of deliberate self-harm dating back to his early teens. There are reports of psychiatric admissions in the context of homelessness, substance use and deliberate self-harm/suicidal acting out.

261. His behaviour in custody has been characterised by repeated episodes of physical aggression directed towards other inmates, verbal abuse/threats made to staff, contingent threats of violence/self-harm and a demanding, entitled attitude. His self-harming is often provocative in nature (such as swallowing razor blades in full view of staff, covering the camera/window and smearing blood on walls), demanding physical intervention which places staff at risk.

262. There is insufficient evidence to support a diagnosis of Paraphilia, although his offences show a degree of sadism. His psychiatric history and presentation is consistent with severe personality pathology, with Antisocial, Narcissistic and Borderline features. The history is also consistent with Substance Misuse Disorder, predominantly alcohol and cannabis, currently in remission in a controlled environment. It is likely that he suffers from chronic Post-Traumatic Stress Disorder."[37]

[62] Dr Arthur identified the likely risk scenario as follows:

"275. Were prisoner Musso to reoffend, it would most likely be in the context of an intimate relationship, although potential victims would also include other women within his sphere of influence. When triggered by conflict or perceived/actual rejection, prisoner Musso is likely to become emotionally aroused and verbally/physically aggressive. If the conflict has sexual undertones (such as infidelity, accusations of sexual impropriety, etc), prisoner Musso may become sexually violent as a way of re-establishing his control over the woman or as a form of punishment. Another trigger may be

---

[37] Report of Dr Ken Arthur, filed 25 June 2018, CFI 23 at 40–41.

experiencing conflicting emotions about a woman (such as he did with his victim TT[38]), particularly if there is ambiguity in the relationship. If his sexual advances are not reciprocated, he may react violently out of shame or anger.

276. Any sexual reoffending is likely to involve physical and psychological coercion and be associated with non-sexual physical violence. Given prisoner Musso's history of violence against women, lack of empathy and ability to emotionally disconnect from his victims, there is a chance that any sexual violence may escalate to serious or life-threatening violence.

277. It is difficult to predict the imminence of such violence on release; a return to substance use would increase this risk significantly."[39]

[63] Dr Arthur summarised his findings as follows:

"278. As a product of his early developmental trauma and further social conditioning, prisoner Musso displays extremely disturbed attachments and is highly sensitised to perceived threat, rejection or disrespect. He has a history of behaving in a violent, controlling and domineering manner towards his sexual partners. He subscribes to hypermasculine ideals and tends to sexualise relationships with women. He vacillates between idealising his partners and other women in his life ('the love of my life' etc) to extreme devaluation and contempt. When he feels wronged, he justifies violent retribution as a way of re-establishing his dominance, avoiding emotional vulnerability and saving face.

279. Whilst there is no evidence that prisoner Musso has any paraphilic drives per se, he has admitted to enjoying the feeling of control over others (such as ex-partners and his victim). He has a history of using denigration (such as forcing his victim to read out sexually demeaning statements) and threats of sexual violence.

280. Despite treatment and containment, he continues to display extremely poor self-regulation in regard to managing his emotional responses. He becomes rapidly aroused and has difficulty de-escalating. He displays limited empathy. His self-control in relation to managing his substance abuse is untested and he has a history of anti-authoritarian noncompliance in the community.

281. Prisoner Musso reports plans on release to move to NSW and live close to family supports, but there is no evidence that such supports exist or will be sufficient to stop him returning to substance abuse

---

[38] Identified as T Ma in the statement of facts.

[39] At 43–44.

and criminality. The history of severely pathological family dynamics suggests that this plan is ill-advised.

282. It should be acknowledged that Prisoner Musso has only been convicted of a single sexual offence which occurred in the context of severe prolonged physical and emotional abuse of his victim. He has no previous convictions for sexual offences or history of paraphilic interests. Because of this, it might be argued that focussing treatment on the sexual offence may have limited utility. However, his static and dynamic risk factors remain valid in regard to further sexual offending.

283. Although prisoner Musso has engaged in psychological therapy and there are reports of a positive response, there is little objective evidence of a significant shift in his core attitudes or capacity for self-regulation. It has been suggested that his continuing detention is acting as a destabiliser and triggering ongoing self-harm and aggressive outbursts, but the inability to contain his emotional responses and his propensity for both reactive and contingent violence remain highly salient when considering his risk to the community on release.

284. Prisoner Musso remains an aggressive and emotionally unstable young man who has a severely disturbed personality. He continues to utilise violence as a way of controlling his environment and regulating his affect. His distorted view of relationships and attitude towards women remains essentially unchanged, as does his hypermasculine and anti-authoritarian views.

285. Based on the clinical interview, documentation and risk assessment is my opinion that prisoner Musso's risk of sexual recidivism remains high and as such he poses an unacceptable risk to the community."[40]

[64] Dr Arthur's recommendations were:

"286. A supervision order would reduce his risk to moderate.

287. Prisoner Musso has ongoing treatment needs in relation to his sexual offending.

288. It is my understanding that he has been deemed inappropriate to Sexual Offender Programs such as the MISOP based on concerns that this involvement may trigger further violent acting out against himself and others (including female convenors of the program). It has also been opined by previous assessors that due to his history of childhoold sexual abuse and sexual assault in custody he may be

---

[40] At 44–45.

retraumatised by such programs, or that due to the nature of his offending, programs such as the MISOP may not appropriately address his treatment needs. I would counter this by noting that prisoner Musso successfully completed the GS:PP program. Excluding him from a program designed to address important aspects of his sexual offending is counterintuitive. No doubt he will find aspects of the program difficult and as such it should be attempted whilst incarcerated to ensure the safety of himself and others.

289. Prisoner Musso should continue with his individual psychological therapy whilst in custody; given the therapeutic relationship that has already developed with Dr Andrews, every effort should be made to maintain this in the community.

290. The psychotropic medication currently prescribed appears to have some value and should be continued under the supervision of a Psychiatrist. Given the high likelihood of ongoing deliberate self-harm on release, it would be useful to have close liaison between Community Corrections, his treatment team and the local Mental Health Service who will be required to provide emergency management and acute care interventions.

291. Supervision would ensure that prisoner Musso does not re-engage with pro-criminal peers or return to substance use. Monitoring of his movements in the community would also be of assistance, as would a curfew.

292. He should abstain from all drugs of abuse including alcohol and undergo regular urine drug screens/breathalyser monitoring. Given prisoner Musso's lack of self-regulation, it would be wise to restrict access to licensed premises.

293. His relationship with family, friends and intimate partners should be closely scrutinised. Because of the unstable nature of his interpersonal relationships, I would have concerns about prisoner Musso returning to live with family members.

294. Prisoner Musso has identified a strong desire to seek employment on release from jail, both as a pro-social focus and to distract him from returning to substance use and criminal activity. This should be encouraged.

295. Given the severity of his personality pathology, he is likely to require long-term psychological therapy and support. Any gains are likely to take many years to consolidate; as such the duration of

> supervision needs to be longer than the minimum. I would not oppose a 10-year order."[41]

[65] Some evidence was led from Dr Arthur by Mr Tate. He was asked what part of the material that was sent to him he relied upon and he said "All of it".[42] This would include the material exhibited to Mr Fuller's affidavit.

[66] I then asked him how he took the QP9s into account. This was said:

> "HIS HONOUR: Well, if you look at the material – all of the material?---Yes, your Honour.
>
> Firstly, you've got an agreed statement of facts, which is a solid factual non-contentious basis upon which you can proceed?---Yes.
>
> Then you've got statements in the QP9s, which, you would accept, are just allegations - - -?---Yes.
>
> - - - by people depending upon viewpoints and they're simply unproven allegations?---That's correct, your Honour.
>
> And then you got statements by the – by Mr Musso himself?---Yes.
>
> So you've obviously acted on behalf of the statement – acted on the statements that he's made to you and you've acted upon the non-contentious or agreed facts?---Essentially, yes, your Honour.
>
> Right. What about the QP9s? How have you actually – because they're just allegations, how have you acted on those?---Well, I didn't reference them in my report. I read them, but I didn't – I didn't spend too much time over them and really - - -
>
> But how did you treat them?---Well, I treated them as information, like I treat everything, to make sure that I wasn't missing anything because, I suppose, that's – part of – of my concern is that I don't want to miss any relevant information which may affect my risk assessment. In this case, as I've quoted, I mostly took note of the sentencing remarks as the most relevant to that case."[43]

[67] Dr Arthur was taken by Mr Tate through how he scored the various actuarial tests and was asked how the information attached to Mr Fuller's affidavit referred to by Dr Arthur as "the material supplied by the DPP" impacted. His evidence was:

> "Did that include simply the fuller material or a broader canvas of material? I'm just trying to get to an understanding of what you took into account and what you didn't take into account?---Look, at the end of the day, I took into

---

41 At 45–46.

42 Transcript at 2-5 ll 33–34.

43 At 2-7 l 40 to 2-8 l 19.

> account everything. But if you're asking me if the material supplied by the DPP was highly relevant in that, not necessarily. In fact, I would say negligible because most of the information I was interested in was my clinical assessment, but it was also the data that came from other assessments – that came from the assessments of Ms Wood. It came from the assessment of his treating psychologist. It came from my colleagues' assessments and also from the incredibly rich amount of information from, you know, Corrective Services documentation about Mr Musso's behaviour and interactions and how he negotiated, you know, his time in jail. So I think that's much more relevant and if you would like me to go through, I can go through each of the factors and I can point out where that data came from."[44]

[68] Mr Tate then asked Dr Arthur about the prospect of reducing risk through the respondent completing courses. This was said:

> "It's three questions?---If I address them one at time – so my assessment, as per my report, was that I consider Mr Musso's risk of sexual recidivism to be high, and I think that's based on only on his history. It's based on the presence of his severe personality disorder. It's based on the presence of psychopathy. It's based on Mr Musso's history of – history of violence. It's also based on Mr Musso's past offending. So, if we just look at the actuarial instruments, which, you know, are pretty straightforward, they rate him as high. And I think that, looking at the totality of the information – the information I received – my synthesis is that he remains at high risk. I recommended that – well, I opined that a supervision order was necessary and that its application may reduce his risk to moderate. And that would mostly be by reducing victim access, by – and also reducing his – the risk of him returning to substance abuse in the community and returning to, you know, an antisocial criminal lifestyle and associating with those – with his peers in regard to that. I – I've reflected on the information that I've received since that time, particularly in relation to Mr Musso talking about cutting off his – his monitoring device and absconding to New South Wales and I know that that was put to the court and it was questioned whether or not that may have just been bravado by the fact that he was talking in front of a – a Corrective Services officer at the time. I think we need to take what he says seriously and I think that that's something obviously he has considered if he's talking about it. And I think that the – the concerns about his violence escalating in the context of contingent accommodation – contingency accommodation is real and I think that's reasonably – a reasonable concern. I also think that a risk of his violence escalating in the context of starting a program, particularly something like the MISOP or the HISOP, that's also real and I think that that's worth considering. So whilst I think a – a supervision order is necessary and will reduce his risk, the

---

[44] At 2-9 l 37 to 2-10 l 2.

> question of whether, at this point in time, he's safe to be released on a supervision order – at the time of my report, I didn't really consider that. The new information at hand, I would have to say that I don't think he would be safe to do – to do a program in the community such as the MISOP. I'm led to believe that due to the fact that he's actually scored highly on the Static-99 and he relates highly on Stable, that would stream him into the HISOP – into the High Intensity Sexual Offender Program. Now I - - -
>
> HIS HONOUR: That can only be done in prison, can't it?---And that's correct, your Honour. That's my understanding anyway. So if that's the case then it's a moot point, really. But given – you know, when we look at how Mr Musso's been functioning over the last six to 12 months and also look at the concerns around that, I think that if he's to do a program, which I think he should, it would be much safer for the community and safer for Mr Musso for that to be done in custody."[45]

[69] And then later:

> "- - - simply, is there an indicative plan that you would offer in relation to continuing custody for Mr Musso over the next 12 to 18 months? What might a plan look like?---I think Mr Musso should continue with his individual psychotherapy and Dr Andrews is a very skilled psychotherapist. It appears that there – she's developed some rapport with Mr Musso which is really important and consistency is very important so I would highly urge that therapy to continue. I think that Mr Musso should do a group treatment program for his – for the sexual offence and I'll leave that – I think he's been wait-listed – or he was, at one stage – for the MISOP. Whether it's the MISOP or the HISOP, that should be completed in custody. I think there's been other reference to the cognitive skills program based around violence, given that I think it's generally accepted that Mr Musso has – has treatment [indistinct] regards to his violence then that wouldn't be inappropriate. I'm unaware of whether that can be completed in the community or not but from his – from a sexual recidivism perspective, he should definitely do a group program. So my plan would be ongoing psychotherapy one to one, en – enrolment in a – in a group program such as the MISOP and then assessment after that to determine suitability for release on a supervision order."[46]

[70] Ms Robb cross-examined Dr Arthur concerning the material attached to Mr Fuller's affidavit, and he said:

> "MS ROBB: Thank you, Dr Arthur. So is – and this would be repetitive in some ways. But it seems to me that the material attached to Todd Fuller's affidavit did have some relevance to you in assisting you to understand Mr

---

[45] At 2-14 l 42 to 2-15 l 35.

[46] At 2-15 l 42 to 2-16 l 11.

> Musso?---I – I think I tried to use the information to understand Mr Musso. And, again, I don't want to labour the point but realistically, if you pick apart my formulation and diagnosis, if we go through it line by line, feature by feature, the information in that affidavit is not particularly relevant to that. I mean, it adds to it – I won't deny that it adds to it – but certainly without that information, my formulation, diagnosis and risk assessment would really be no different.
>
> And I understand, for instance, that it seemed it would make almost no difference to the actuarial assessments?---That's correct."[47]

[71] As to risk, Dr Arthur said:

> "Thank you, Dr Arthur. I'm going to have an attempt at paraphrasing your opinion here. Please, correct me if I'm wrong. It seems to me your opinion is that sexual offending is likely to be subsidiary to violent offending?---I think the best way to answer that is to say that Mr Musso has a history of violence and he has an extensive history of violence. And I think that his – his – the sexual offence, the index offence, occurred on a substrate of a protracted period of interpersonal violence against the victim. So if we're looking at past, you know, predicting the future, you would expect there to be some degree of interpersonal violence. To say it's subsumed, I think – I think that's – that's difficult. I think they are – they are separate. And I also think and as I've noted in my report, whilst I don't have enough evidence to – to support a diagnosis of paraphilia, there's some concerning comments made by Mr Musso over the time of his assessments in custody that certainly, I think, raise that question for further discussion. One of those was that Mr Musso admitted that he – he enjoyed the control of he had over the victim and there was incident where he was speaking to a junior female psychologist where he actually told the psychologist that he masturbated over the – over the memory of the offence and that that – that – he found that sexually arousing. Now, I'm sure you could – you could argue that that was – that was Mr Musso attempting to intimidate or somehow influence the psychologist, but the fact is – the fact remains he said it. It's not something that come out of the air. He said it and it wasn't suggested to him. So I have a problem with saying, you know, there's no paraphilia, there's no sadism involved. I think there's little hints that, perhaps, there may be an element of that and that will really require very careful evaluation and – and, I suppose, elaboration in a – in a safe therapeutic environment. But certainly if you look at my formulation, I think that – I think that violence will be part of the sexual offending."[48]

[72] And later, when Ms Robb was cross-examining Dr Arthur as to the sexual offence which was committed in 2013:

---

[47] At 2-16 ll 23–34.

[48] At 2-18 l 43 to 2-19 l 20.

"HIS HONOUR: Well, hang on. I think we should break that up.

Firstly, it's put – two propositions are being put to you. Firstly, it's not a serious sexual offence. Secondly, if it's not a serious sexual offence, what do you take from that? That's what's been put to you. So the first proposition
- - -?---Yes.

- - - is do you consider it a serious sexual offence in the context of general offending seems to be the question?---Yes, I do consider it a serious sexual offence. I mean, Mr Musso has admitted that it was his intention to – to rape the victim and that it was actually his girlfriend at the time coming in that stopped him. So I think that – I think that there's – it's reasonable to assume that if his girlfriend hadn't come into room, he would have pursued that. I think the second – the second issue, I suppose, is – is that he also made sort of significant threats and – and I think that's part of the accepted version of events as well, threats of a sexual nature towards that victim afterwards. And putting that together in the context of a sense – ongoing violence and physical domination of this – of the female victim, yes, I think it was a very serious sexual offence."[49]

[73] Ms Robb cross-examined Dr Arthur concerning Theresa Wood's report and the fact that the respondent did not actually commit rape when he may have had the opportunity to do so. Dr Arthur responded: "We know he has a propensity for sexual violence. The fact that he didn't follow through doesn't give me any comfort that he won't follow through in the future. He has capacity and that – that puts him at high risk …". Ms Robb cross-examined Dr Arthur about Dr Tie's letters. Dr Arthur responded:

"I understand that you weren't provided with any reports from his current treating psychiatrist, Dr Tie?---No. No. I haven't – I haven't seen that letter that was referred to on Monday.

And the letter aside though, if there had been a specific report written by Dr Tie or some information relevant to perhaps this man's status quo at the moment, would you have found that relevant to forming your opinion or
- - -?---Look, I think the – and I've – I've – I have been employed in that position. I am – for many years, I was a VMO psychiatrist doing that job. And the core business of that job is to ensure that people who have a major mental illness – we're talking about a psychotic illness, bipolar affective disorder or a major depression or severe anxiety disorder have treatment. And the safety issue is really in some ways being incarcerated is a much safer environment than even being in hospital. So I think that, from the information given to me that I heard in court about Dr Tie's opinion was really saying that Mr Musso hasn't shown any evidence of such a major mental illness that he's concerned about and that it was his opinion that there was no need for any further intervention than had already been

---

[49] At 2-19 ll 29–45.

> provided. Now, I think what we can say from that really is that prison mental health really don't consider Mr Musso has a major mental illness that requires treatment.
>
> Do you perceive it as a positive or take any comfort with respect to risk that Mr Musso appears to be consenting to the treatment he has been receiving, including the medical treatment?---Yeah, Mr Musso has a – has a history in the past of – of being non-compliant with treatment. There has been times where he hasn't taken medication. But generally, he has been I understand in the last six to 12 months and I think that whilst that medication is not going to affect his underlying personality disorder, it may have some – it may have some benefit in lowering his level of arousal and, you know, to – to use a colloquialism, giving him a longer fuse so that he has more time to apply cognitive strategies before his emotions take over. So I – I – I'm happy that he's taking that medication. Yes."[50]

Other evidence

[74] In addition to the evidence of the psychiatrists I have already mentioned, there was evidence of earlier psychological and psychiatric opinion from Mr Peter Stoker,[51] a psychologist, Dr Sreeja Venugopal, a psychiatrist,[52] Theresa Wood, a forensic psychologist (already mentioned) and Dr Tie, a prison psychiatrist (already mentioned). Some of this evidence was considered by the three psychiatrists and it is not necessary for me to analyse it.

[75] There was also evidence of the respondent's behaviour in prison and evidence of treatment programs he had undertaken. Again, much of this is dealt with in the psychiatrists' reports and it is not necessary to refer to it further.

[76] Of some significance is the evidence of Mr Daniel Bear and Mr Bruce Tannock. Mr Bear is the acting manager of the High Risk Offender Management Unit within State-wide operations, Queensland Corrective Services. Mr Tannock appears to be Mr Bear's predecessor in that role. Mr Bear opines that given various features of the respondent's case, Corrective Services could not manage him in the community. Mr Bear and Mr Tannock deposed to various management concerns arising out of incidents of self-harm by the respondent, assaults by the respondent upon other prisoners, possession of contraband in custody and risk of absconding which then all leads to difficulties in locating appropriate accommodation for the respondent. Neither Mr Bear nor Mr Tannock were required for cross-examination.

Objection to psychiatric evidence

[77] The objections taken by Ms Robb were these:

---

[50] At 2-21 l 44 to 2-22 l 26.

[51] 11 April 2012.

[52] 4 January 2013.

(a) Mr Fuller's affidavit was inadmissible.

(b) The evidence of the psychiatrists is tarnished by the fact that they had access to the inadmissible material. What follows from that is:

(i) Oral evidence by the psychiatrists ought not have been called;

(ii) The opinions of the psychiatrists are not properly factually based;

(iii) Because of the inadmissible evidence, "the expert psychiatric evidence is … incurably unfair";

(iv) "Even if untarnished opinion evidence could now be elicited from the reporting psychiatrists, an attempt to do so at the hearing would significantly curb the respondent's rights to a fair hearing in light of the *UCPR* and principles of natural justice and procedural fairness".

[78] The applicant did not rely upon Mr Fuller's affidavit. It was accepted, it seems, that much of the material exhibited to the affidavit was inadmissible.[53] I had regard to Mr Fuller's affidavit for one, very limited purpose and that was to assess Ms Robb's submissions as to the impact of the fact that Mr Fuller's affidavit had been provided to the psychiatrists. Having determined (as I have) that Mr Fuller's affidavit was inadmissible, and having determined (as I have) that Ms Robb's submission that the psychiatrists' evidence should be excluded should be rejected, I then disregarded the affidavit and its annexures.

[79] I allowed oral evidence to be led in chief from the three psychiatrists. In so doing, I took a different approach to that taken by the judge at first instance in *Attorney-General for the State of Queensland v Watego*.[54]

[80] It is certainly contemplated by the *DPSOA* that evidence of the psychiatrists should be in the form of reports and should be furnished to a respondent.[55] There is nothing in the *DPSOA* though which prohibits the leading of evidence from the psychiatrists beyond what is contained in the reports. Obviously, circumstances will arise when that is appropriate. A respondent may, for instance, produce expert evidence to answer the evidence of the psychiatrists appointed under s 8. It must be that the Attorney-General could then lead further evidence from the psychiatrists appointed under s 8 in order to meet the challenge of a respondent's witnesses.

[81] Similarly, if there is a challenge to the factual basis upon which the psychiatrists base their opinions, further evidence could be led as to the impact, if any, of those factual issues upon the opinions expressed. That was not doubted in *Watego*. The issue in *Watego* was whether fairness could be afforded to the respondent.

---

[53] *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 7; *Attorney-General for the State of Queensland v Watego* [2003] QCA 512.

[54] [2003] QCA 512.

[55] Sections 11 and 12.

[82] When the matter came before me on 2 July 2018, Ms Robb took the objection to the psychiatrists' evidence and then the following exchange occurred:

> "MS ROBB: Thank you, your Honour. In short, if – if you ruled that the evidence was admissible and that the matter would be determined on the basis of the evidence as it stands – augmented by examination – I would – I would like a moment, if possible, if we get to that point, to have a conference with my client. It's a matter that I think I would need to take instructions on. It is something that was raised and – in the preliminary hearing with respect to the respondent not having had the opportunity to get expert evidence at that stage, and the matter was resolved by my client taking a certain course, but I have not raised it or had the opportunity to raise it with him with respect to the hearing today. But I appreciated there might be one or two routes.
>
> One of the reasons that that route wasn't taken at first instance is because the court appointed two independent psychiatrists, and I think, as I've made clear in my outline, perhaps there was a miscommunication or it wasn't fully appreciated that the same material would again be briefed to the court-appointed psychiatrists. So I can't necessarily take any comfort from the instructions under those circumstances as to what my client would want to do today, but it would, of course - - -
>
> HIS HONOUR: And, in fairness, I mean, you can reasonably take the position that you really shouldn't be called upon to get any instructions until this issue is finalised because you don't know the terms upon which it'll be finalised.
>
> MS ROBB: That's exactly right.
>
> HIS HONOUR: And therefore you don't really know what you're going to be facing, and - - -
>
> MS ROBB: I wouldn't be in a position to give him any advice at this point.
>
> HIS HONOUR: That's right. No, I think that's – I think that's an ethically appropriate position to take, frankly.
>
> MS ROBB: Thank you, your Honour.
>
> HIS HONOUR: So the thing that's got me a tad bothered is I assume, therefore, that all these preliminary issues really need to be determined first.
>
> MS ROBB: I think that that would be appropriate.
>
> HIS HONOUR: The psychiatrists – their evidence in full can be received, though. They won't have to come back?
>
> MS ROBB: No, that's correct, your Honour, unless, of course, we find ourselves in a position where there's further expertise that can be put to them.

HIS HONOUR: Well, they might – they might want to come back because if you – if you then take instructions, get further material, it might very well be that there's some reply material.

MS ROBB: Might be a different matter.

HIS HONOUR: All right. So your submission, then, is that the psychiatrists should be called today.

MS ROBB: My submission is if your Honour is minded to allow them to be called so that my friend – I assume it's a matter for evidence-in-chief at first instance.

HIS HONOUR: Well, you see – see, what I'm – I'm just trying to – I'm trying to get to a position whereby this can be dealt with efficiently, because, quite apart from anything else, your client's in custody. Now, I would have thought that you would want to cross-examine the psychiatrists about precisely what they did and didn't take into account; is that right? Or are you simply happy to just say, well, it's obvious they took these things into account, and therefore I should draw an inference that it all mattered? That could be a bit dangerous for you, I would have thought.

MS ROBB: I am in a slightly unusual position, in that I have already cross-examined Dr Harden with respect to these matters.

HIS HONOUR: Was that done at the section - - -

MS ROBB: Eight hearing. At the third hearing of the section – the third day of hearings, Dr Harden was cross-examined. I – my learned friend provided me with a copy of that transcript this morning. It was probably remiss of me not to ask for a copy of it earlier. I just had not assumed one was in circulation.

HIS HONOUR: All right.

MS ROBB: I have made some decisions about how I would approach Dr Harden, obviously, based on my memory of that experience, and perhaps I'm pre-empting the evidence that should come. So – but – the short point is, I anticipate, in terms of the actuarial scales, that it may not make such difference what material – whether someone has committed one, two or seven offences and the nature of those offences. My point that I would rely on, nonetheless, is that it would be very difficult for one to – and by 'one' I mean a psychiatrist, any person – to instruct themselves – aside from, perhaps, a judicial officer, and that particular set of skills – to be able to ignore something when what you've done is a process of synthesising information to come up with a consolidated clinical judgment, that it's quite an artificial task to then attempt to pull threads of that out of it.

HIS HONOUR: But aren't I going to have to hear evidence about that?

MS ROBB: Yes. I'm sorry, and I'm probably really contextualising my argument.

HIS HONOUR: And that's probably not the best – it's irrelevant material. Your submission is that there's some irrelevant material that's been taken into account in the formation of the opinion.

MS ROBB: Yes.

HIS HONOUR: And your submission is that the doctor can't distil out that irrelevant material and now express an opinion, because he's already formed a view. That's the general idea?

MS ROBB: That's the gist of it, thank you.

HIS HONOUR: Well, I might hear the psychiatrist and accept that there's good reason why he could to that.

MS ROBB: Yes.

HIS HONOUR: Or I might hear the psychiatrist and agree with you.

MS ROBB: Yes. And I - - -

HIS HONOUR: But I've got to hear him, haven't I?

MS ROBB: Perhaps I should say, I'm not objecting to the course your Honour has proposed.

HIS HONOUR: All right.

MS ROBB: That's probably the quicker way.

HIS HONOUR: All right.

MS ROBB: Instead of pre-empting what submissions I might make after that, I will [indistinct]

HIS HONOUR: Okay. So what we ought to do is, we ought to hear the psychiatrists now. Mr Tate will lead further evidence from them, over your objection.

MS ROBB: Thank you, your Honour.

HIS HONOUR: And on the basis that I've not ruled either way, as to whether or not that's admissible.

MS ROBB: Thank you, your Honour.

HIS HONOUR: And we will deal – the psychiatrists will give all their evidence in the case, generally, and any evidence relevant to this issue about distilling out the irrelevant material. And you will cross-examine on all those issues, and then we'll see where we've got to after that.

MS ROBB: That sounds like a good plan. Thank you, your Honour.

HIS HONOUR: All right. Do you accept that as the way to proceed?

MS ROBB: I think it's a very sensible approach, your Honour.

> HIS HONOUR: All right. The record will show the point that we have gotten to and what we are now going to endeavour to achieve, so I don't think there's any reason for reasons at this point.
>
> MS ROBB: No, thank you, your Honour.
>
> HIS HONOUR: I note that the adducing of further evidence is over objection.
>
> MS ROBB: Thank you, your Honour."[56]

[83] As I have explained, Ms Robb then cross-examined each of the three psychiatrists. On 6 August 2018 I ruled that the psychiatrists' evidence was admissible and the following exchange occurred with Ms Robb:

> "HIS HONOUR: The matter came before me on the 30th of July.[57] Objection was taken to evidence of the opinions stated by the examining psychiatrists in the case. Argument was heard. The matter was adjourned to today so that I could consider the matter of the admissibility of the opinion evidence. I hold that the opinion evidence of the examining psychiatrists is admissible and ought to be admitted, and I will deliver reasons in relation to that decision when I deliver reasons on the application. Where do we go from here?
>
> MS ROBB: Thank you, your Honour. I am therefore in a position where I would need to take some instructions from my client. I am confident that we could probably do that quite quickly.
>
> HIS HONOUR: Yes.
>
> MS ROBB: If your Honour was prepared, and I apologise for the inconvenience in advance - - -
>
> HIS HONOUR: No, that's all right.
>
> MS ROBB: - - - but we could certainly do that in the room if – or we could do it in the cells outside if - - -
>
> HIS HONOUR: It's not desirable that you take instructions on an important matter like this in the courtroom.
>
> MS ROBB: Thank you, your Honour.
>
> HIS HONOUR: Unless Mr Tate has some submissions to the contrary, I'd be of a mind to adjourn for 15 minutes to enable you to take those instructions in the privacy at least of the cells.
>
> MS ROBB: Cells outside. Thank you, your Honour. Much appreciated.

---

[56] Transcript at 1-4 l 8 to 1-7 l 29.

[57] This should have been a reference to the 2nd and 7th of July.

> HIS HONOUR: Mr Tate, you've got no objection to that?
>
> MR TATE: No. No problem with that.
>
> HIS HONOUR: All right. Adjourn until 12.45.
>
> …
>
> HIS HONOUR: Yes, Ms Robb.
>
> MS ROBB: Thank you, your Honour. My instructions are to not obtain any further expert opinion evidence in the matter.
>
> HIS HONOUR: Right.
>
> MS ROBB: So I think that leaves decision on the section 13 application.
>
> HIS HONOUR: Right. You don't want to make any further submissions?
>
> MS ROBB: I'm really not in a position to take it any further. The only submission that I would make is that obviously I concede that what Mr Tate has submitted is correct. The evidence is one way about risk. We would stress that that evidence is based on actuarial models which rely in this case on a paucity of evidence about a tendency to commit sexual offences. I've tried to emphasise that - - -"[58]

[84] The respondent had the opportunity to hear the further oral evidence and Ms Robb had the opportunity to cross-examine the psychiatrists at large. Once the evidence was ruled to be admissible, the respondent was then afforded the opportunity to consider his position. No adjournment was sought to muster evidence against the evidence that had been given by the three psychiatrists called by the Attorney-General. No unfairness has been perpetrated upon the respondent.

[85] Ms Robb's submission that the opinion evidence of the psychiatrists was not properly factually based ought to be rejected. As already explained, each doctor gave a diagnosis of the respondent, each assessed his risk and each expressed a view about his appropriate future management. All were asked to reconsider their opinions on the express basis that the material exhibited to Mr Fuller's affidavit was not considered. All, one way or another, affirmed their views. Consequently, the expert opinion upon which the Court is asked by the Attorney-General to rely upon is properly factually based.

[86] The submission that the psychiatric evidence is "incurably unfair" also should be rejected. The psychiatrists were carefully examined in chief by Mr Tate on the issue of the impact (if any) of the inadmissible material on the opinions expressed. Ms Robb was given the opportunity in cross-examination to explore that evidence. There is no unfairness.

---

[58] At 3-2 l 13 to 3-3 l 25.

[87] The submission that, assuming the psychiatrists could give "untarnished opinion evidence", allowing the doctors to do so at the hearing has adversely affected the respondent's right to a fair hearing should also be rejected. The respondent was afforded the opportunity to consider the evidence and then seek an adjournment if that was required to meet the evidence. No adjournment was sought.

Is the respondent a "prisoner"?

[88] Ms Robb referred to the fact that, at the preliminary hearing before Burns J,[59] the respondent argued that he was not a "prisoner" as defined by s 5(6) of the *DPSOA* because he had not been convicted of a serious sexual offence; a sexual offence involving violence. If the respondent has not been convicted of a "serious sexual offence" then he is also not a "prisoner" for the purposes of s 13.

[89] The issue has, relevantly though, been determined by Burns J on the preliminary hearing. His Honour found that the sexual assault committed on 5 August 2013 was an offence of a sexual nature involving violence. I too find that offence was a "serious sexual offence".

[90] The Court of Appeal in *Attorney-General v Phineasa*[60] considered the level and type of violence necessary to meet the definition of "serious sexual offence". Muir JA, with whom White JA and Philippides J (as her Honour then was) agreed, said this:

> "As I trust emerges from earlier discussion, the 'violence' referred to in the definition of serious sexual offence is force significantly greater in degree than mere physical contact or even, at least as a general proposition, acts such as pawing, grasping, groping or stroking. The language of sections 8 and 13, in particular, is inconsistent with the application of the Act to sexual offences other than of a very serious kind where offending against adults is concerned. Those sections are addressing conduct of such a nature, that the risk that a prisoner, assumed to be a member of a particular class, might engage in it and harm a member or members of the public if released from custody or if released without a supervision order, is regarded as unacceptable. Consequently, the 'violence' contemplated by the Act (excluding for present purposes threats and intimidation) would normally involve the use of force against a person to facilitate the 'rape' of that person within the meaning of s 349 of the *Criminal Code* or which caused (or in the case of predicted conduct would be likely to cause) that person significant physical injury or significant psychological harm."[61]

---

[59] Under s 8.

[60] [2013] 1 Qd R 305.

[61] At [38].

[91] *Phineasa* was approved and followed in *Tilbrook v Attorney-General for the State of Queensland*[62] and *Kynuna v Attorney-General for the State of Queensland*.[63] As to the sexual assault committed by the respondent on 5 August 2013:

(a) Violence was used to overcome the victim's resistance;

(b) The respondent tried to remove the victim's clothing;

(c) The respondent told the victim that he would rape and kill her;

(d) The attack only stopped when someone intervened.

[92] I find that the respondent is a prisoner for the purposes of s 13.

Does the respondent present a serious danger to the community in the absence of a Division 3 order?

[93] It is of course a matter of judgment as to whether the level of risk in any particular case is "unacceptable".[64] In *Attorney-General (Qld) v Sutherland,*[65] McMurdo J (as his Honour then was) said:

> "… 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 judgment as to what risk should be accepted against the serious alternative of the deprivation of a person's liberty."[66]

[94] His Honour's comment is understood in light of the provisions of s 13(4), which compel the Court to have regard to the reports prepared by psychiatrists under s 11.[67] Psychiatrists on these applications are often asked to give an opinion in terms of the statutory test. As observed though by his Honour, the ultimate question as to whether the test has been fulfilled is one for the Court. I accept the evidence of the psychiatrists and intend to act upon that evidence.

[95] Ms Robb relies heavily on the consideration in s 13(4)(d). By that subsection the Court must consider any pattern of offending behaviour. Ms Robb submits that there is only one serious sexual offence which has been committed by the respondent and that was the offence committed on 5 August 2013.

---

62 [2012] QCA 279 at [16]–[17].

63 [2016] QCA 172 at [44]–[45].

64 Section 13(2).

65 [2006] QSC 68.

66 At [30].

67 Section 13(4)(a).

[96] Section 13(4)(d) identifies just one of many prescribed considerations including the one prescribed by s 13(4)(j) being "any other relevant matter". No doubt, s 13(4)(d) compels the Court to consider offences (including any pattern or lack thereof) which may have been committed before the period of incarceration that a respondent is presently serving. However, that must be considered in the overall scheme of the *DPSOA*.

[97] The *DPSOA* is a scheme of preventative detention. It is not the first scheme of preventative detention to be deployed in Queensland. The first was contained in the *Criminal Law Amendment Act* 1945 (Qld). That required a judge, at the time of sentence for an offence to determine whether "the offender is incapable of exercising proper control over the offender's sexual instincts". The second scheme was that of indefinite sentences introduced by Part 10 of the *Penalties and Sentences Act* 1992 (Qld). That empowers a judge at the time of sentence to impose an indefinite sentence. Both those schemes involve the Court undertaking an assessment of risk at the time of sentence rather than undertaking the exercise near the time of release.

[98] The *DPSOA* works differently. The application under s 5 is filed near the end of the sentence being served and the assessment of risk is performed at that point. Therefore, while a respondent's past offending is clearly relevant,[68] and is critical, in the sense that no jurisdiction exists unless a respondent has committed a "serious sexual offence".[69] Often, the more cogent evidence of risk will relate to events, treatments and examinations since sentence. The issue under s 13 is not the respondent's risk of reoffending generally, but rather the risk of reoffending in a particular way, namely by the commission of a "serious sexual offence".[70]

[99] Here, the respondent has been diagnosed by all three psychiatrists as having a personality disorder with anti-social and narcissistic traits. All psychiatrists assessed his risk of violently, sexually offending without supervision as high. All three saw the risk of violent offending as a primary concern, but saw that offending as likely to have a sexual element where the victim of the violence is female. There is evidence of violent behaviour in prison and non-compliance with authority.

[100] I accept the evidence of the psychiatrists, which I regard as cogent and powerful. I am satisfied to a high degree of probability that the respondent is an unacceptable risk of committing serious sexual offences if released without a Division 3 order.

What order should be made?

[101] Once a finding under s 13(1) is made, the discretion arises:

(a) to make a continuing detention order; or

---

[68] Section 13(4)(d).

[69] Section 5.

[70] *Attorney-General for the State of Queensland v Travers* [2018] QSC 073 at [30]; *Attorney-General for the State of Queensland v Fisher* [2018] QSC 074.

(b) to make a supervision order; or

(c) to make no order.[71]

[102] Here, having found that the respondent is an unacceptable risk of committing a serious sexual offence in the absence of a Division 3 order, I can see no basis upon which I would exercise the discretion in favour of making no order.

[103] In determining whether to make a continuing detention order or a supervision order, I must follow s 13(6), which requires me to regard the adequate protection of the community as "the paramount consideration" and to consider whether that protection can be "reasonably and practicably managed by a supervision order". Further, I am to consider whether the mandatory requirements under s 16 "can be reasonably and practicably managed by corrective services officers". Section 16 is as follows:

> "**16 Requirements for orders**
>
> (1) If the court or a relevant appeal court orders that a prisoner's release from custody be supervised under a supervision order or interim supervision order, the order must contain requirements that the prisoner—
>
> (a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and
>
> (b) report to, and receive visits from, a corrective services officer as directed by the court or a relevant appeal court; and
>
> (c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and
>
> (d) be under the supervision of a corrective services officer; and
>
> (da) comply with a curfew direction or monitoring direction; and
>
> (daa) comply with any reasonable direction under section 16B given to the prisoner; and
>
> (db) comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order; and

---

[71] *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575 at [113]; *Attorney-General v Francis* [2007] 1 Qd R 396.

(e) not leave or stay out of Queensland without the permission of a corrective services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

(2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—

(a) to ensure adequate protection of the community; or

(b) for the prisoner's rehabilitation or care or treatment." [72]

[104] If I am satisfied that adequate protection of the community can be ensured by a supervision order, then I should order the respondent's release on supervision rather than order his continued detention.[73] All three psychiatrists opined that the risk of committing a serious violent offence would be reduced if the respondent was released under supervision. Dr Harden though that the risk might be reduced to moderate but was unsure whether the risk would be reduced that far. Dr Timmins thought that the risk on supervision would be moderate to high. Dr Arthur opined that a supervision order would reduce the risk to moderate. All three psychiatrists expressed concern as to whether the respondent's current state of mind was such that he could comply with a supervision order. Concerns were also expressed that he might flee. If at large without supervision, the risk of the respondent committing a further serious sexual offence is high.

[105] All psychiatrists thought that either the MISOP or HISOP should be completed by the respondent, with preference to the HISOP which is not available in the community. The psychiatrists were of the view that any courses should be completed in custody. Views were expressed that the treatment might destabilise the respondent initially and thereby increase risk of reoffending. I accept that evidence.

[106] Turning my mind then to s 13(6)(b)(ii), there is the evidence of Mr Bear and Mr Tannock that Corrective Services could not manage the respondent in the community, which I accept. I have considered whether conditions could be imposed to enable the respondent to be managed within the community. I cannot imagine conditions which could be imposed which could ensure adequate protection of the public against the risk which the respondent poses of committing a serious sexual offence.

[107] I am not satisfied that adequate protection of the community can be ensured by the release of the respondent on supervision. The respondent is an unacceptable risk of committing a serious sexual offence unless he is detained. I have reached these

---

[72] Statutory notes removed.

[73] *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

conclusions to a high degree of probability, on the evidence which I have identified which I regard as cogent.

[108] In the circumstances, I make the following order:

Pursuant to s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), the respondent be detained in custody for an indefinite term for control, care or treatment.