SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v McKellar* [2019] QSC 92
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **ADAM CLIFFE MCKELLAR** (respondent)
FILE NO:	No 9745 of 2013
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	9 April 2019 Orders made 18 December 2018
DELIVERED AT:	Brisbane
HEARING DATE:	18 December 2018
JUDGE:	Davis J
ORDER:	**Orders made 18 December 2018:** **THE COURT being satisfied to the requisite standard that the respondent, Adam Cliffe McKellar, has contravened requirements of the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017, ORDERS THAT:** **1. The respondent, Adam Cliffe McKellar, be released from custody and continue to be subject to the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017 with the following amendments:** **(a) amend order (1) by omitting the words "24 November 2019" currently in the order and inserting the following underlined words to read:** **(1) The respondent be subject to the following conditions until <u>24 November 2020.</u>**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where a supervision order was

made with respect to the respondent under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ('the Act') – where it was alleged that the respondent had contravened requirements of the supervision order – where a warrant was issued for the arrest of the respondent pursuant to the Act and the respondent was detained in custody – where the applicant sought orders with respect to the respondent under s 22 of the Act – where the contraventions were admitted by the respondent – where the applicant had not committed any further serious sexual offences – where the court considered whether the supervision order should be extended and how the extension is calculated – whether the adequate protection of the community could, despite the contravention of the order, be ensured by the existing supervision order

Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld) s 3, s 5, s 13, s 13A, s 14, s 15, s 16, s 20, s 22, s 23, s 24

Attorney-General v Francis [2007] 1 Qd R 396, cited

Attorney-General v Lawrence [2010] 1 Qd R 505, cited

Attorney-General v Phineasea [2013] 1 Qd R 305, cited

Attorney-General v Van Dessel [2007] 2 Qd R 1, cited

Attorney-General v Yeatman [2019] 1 Qd R 89, cited

Attorney-General for the State of Queensland v Ellis [2012] QCA 182, cited

Attorney-General (Qld) v Fardon [2013] QCA 64, cited

Attorney-General (Qld) v Foy [2014] QSC, cited

Attorney-General (Qld) v Sands [2016] QSC 225, cited

Attorney-General (Qld) v Yeo [2008] QCA 115, cited

Fardon v Attorney-General (Qld) (2004) 223 CLR 575, cited

Kynuna v Attorney-General (Qld) [2016] QCA 172, cited

LAB v Attorney-General [2011] QCA 230, cited

Tilbrook v Attorney-General [2012] QCA 279, cited

Turnbull v Attorney-General (Qld) [2015] QCA 54, cited

COUNSEL: A Meisenhelter for the applicant
J Lodziak for the respondent

SOLICITORS: G R Cooper, Crown Solicitor for the applicant
Legal Aid Queensland for the respondent

[1] The Attorney-General sought orders under s 22 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the Act) consequent upon a breach by the respondent of a supervision order made by Mullins J on 24 November 2014 and amended by Brown J on 12 June 2017 (the supervision order).

Statutory context

[2] The Act provides for the continued detention or supervised release of "a particular class of prisoner".[1] The objects of the Act are twofold, namely the protection of the community and the control, care and treatment of certain prisoners to facilitate their rehabilitation.[2] The prisoners the subject of the Act are those serving a term of imprisonment for a "serious sexual offence"[3] which is "an offence of a sexual nature … involving violence" or "an offence of a sexual nature … against a child".[4]

[3] Part 2 of the Act provides that the Attorney-General may apply to the Court for either a continuing detention order[5] or a supervision order.[6] A continuing detention order requires the detention in custody of the prisoner beyond the date of expiry of the sentence which is then being served. A supervision order provides for the release of the prisoner under supervision notwithstanding the expiry of the sentence.

[4] A critical provision is s 13. Section 13 has significance to the present application as the provisions which deal with breaches of supervision orders[7] adopt terms and concepts included in s 13. The section 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

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) s 3.

2 Section 3 and see generally *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

3 Section 5(6).

4 Sections 2 and the Schedule (Dictionary).

5 Sections 13, 14 and 15.

6 Sections 13, 15 and 16.

7 Primarily see section 22.

(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.

(4) 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 offences in the future;

(d) whether or not there is any pattern of offending behaviour on the part of the prisoner;

(e) efforts by the prisoner to address the cause or causes of the prisoner's offending behaviour, including whether the prisoner participated in rehabilitation programs;

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

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

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

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

(j) any other relevant matter.

(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)."

[5] Therefore:

(i) the test under s 13 is whether the prisoner is "a serious danger to the community";[8]

(ii) that initial question is answered by determining whether there is an "unacceptable risk that the prisoner will commit a serious sexual offence"[9] if no order is made;

(iii) if that conclusion is reached, then a supervision order (as opposed to a continuing detention order) can only be made where the adequate protection of the community can be ensured by the making of a supervision order;[10]

(iv) where "adequate protection of the community" can be ensured by a supervision order, then the making of a supervision order ought to be preferred to the making of a continuing detention order.[11]

[6] If a supervision order is made, then s 16 mandates that certain requirements be contained in the order.[12] By s 16(1):

"16 Requirements for orders

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[8] Section 13(1).

[9] Section 13(1) and (2).

[10] Section 13(6).

[11] *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

[12] Section 16(1)

(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

Examples of direct inconsistency—

If the only requirement under subsection (2) contained in a particular order is that the released prisoner must live at least 1km from any school—

1 A proposed direction to the prisoner would be directly inconsistent if it requires the released prisoner to live at least 2km from any school.

2 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner to live at least a stated distance from something else, including, for example, children's playgrounds, public parks, education and care service premises or QEC service premises.

3 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner not to live anywhere unless that place has been approved by a corrective services officer.

[7] Of some relevance here is s 13A of the Act which concerns the duration of supervision orders. It provides:

"**13A Fixing of period of supervision order**

(1) If the court makes a supervision order, the order must state the period for which it is to have effect.

(2) In fixing the period, the court must not have regard to whether or not the prisoner may become the subject of—

(a) an application for a further supervision order; or

(b) a further supervision order.

(3) The period can not end before 5 years after the making of the order or the end of the prisoner's period of imprisonment, whichever is the later."

[8] The supervision order should be in place while supervision is necessary to ensure the adequate protection of the community. Since making orders in this case, I considered s 13A in some depth in both *Attorney-General for the State of Queensland v KAH*[13] and *Attorney-General for the State of Queensland v PCO*.[14]

[9] Breach of a supervision order has consequences under Division 5 of Part 2 of the Act. Section 20 provides, relevantly:

"20 Warrant for released prisoner suspected of contravening a supervision order or interim supervision order

(1) This section applies if a police officer or corrective services officer reasonably suspects a released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the released prisoner's supervision order or interim supervision order.

(2) The officer may, by a complaint to a magistrate, apply for a warrant for the arrest of the released prisoner directed to all police officers and corrective services officers to arrest the released prisoner and bring the released prisoner before the Supreme Court to be dealt with according to law.

(3) The magistrate must issue the warrant, in the approved form, if the magistrate is satisfied the grounds for issuing the warrant exist.

(4) However, the warrant may be issued only if the complaint is under oath.[15]

(6) The warrant may state the suspected contravention in general terms…."

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[13] [2019] QSC 36 at [53]-[72]

[14] [2019] QSC 44 at [68]-[76]

[15] There is no s 20(5).

[10] Section 22 provides:

> "**22 Court may make further order**
>
> (1) The following subsections apply if the court is satisfied, on the balance of probabilities, that the released prisoner is likely to contravene, is contravening, or has contravened, a requirement of the supervision order or interim supervision order (each the existing order).
>
> (2) Unless the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by the existing order as amended under subsection (7), the court must—
>
> (a) if the existing order is a supervision order, rescind it and make a continuing detention order; or
>
> (b) if the existing order is an interim supervision order, rescind it and make an order that the released prisoner be detained in custody for the period stated in the order.
>
> (3) For the purpose of deciding whether to make a continuing detention order as mentioned in subsection (2)(a), the court may do any or all of the following—
>
> (a) act on any evidence before it or that was before the court when the existing order was made;
>
> (b) make any order necessary to enable evidence of a kind mentioned in section 13(4) to be brought before it, including, for example, an order—
>
> (i) in the nature of a risk assessment order, subject to the restriction under section 8(2); or
>
> (ii) for the revision of a report about the released prisoner produced under section 8A;
>
> (c) consider any further report or revised report in the nature of a report of a type mentioned in section 8A.
>
> (4) To remove any doubt, it is declared that the court need not make an order in the nature of a risk assessment order if the court is satisfied that the evidence otherwise available under subsection (3) is sufficient to make a decision under subsection (2)(a).
>
> (5) If the court makes an order in the nature of a risk assessment order, the psychiatrist or each psychiatrist examining the released prisoner must prepare a report about the released prisoner and, for that purpose, section 11 applies.

(6) For applying section 11 to the preparation of the report—

(a) section 11(2) applies with the necessary changes; and

(b) section 11(3) only applies to the extent that a report or information mentioned in the subsection has not previously been given to the psychiatrist.

(7) If the released prisoner satisfies the court, on the balance of probabilities, that the adequate protection of the community can, despite the contravention or likely contravention of the existing order, be ensured by a supervision order or interim supervision order, the court—

(a) must amend the existing order to include all of the requirements under section 16(1) if the order does not already include all of those requirements; and

(b) may otherwise amend the existing order in a way the court considers appropriate—

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

(ii) for the prisoner's rehabilitation or care or treatment.

(8) The existing order may not be amended under subsection (7)(b) so as to remove any requirements mentioned in section 16(1)."

[11] Proceedings upon a contravention or likely contravention of a supervision order are commenced by the issue of a warrant under s 20. In practice, the Attorney-General files an application seeking orders under s 22.[16]

[12] By s 22, once a contravention is proved, the Court shall rescind the supervision order and make a continuing detention order[17] unless the prisoner satisfies the Court that continuation on supervision in the community (either on the supervision order as it stands, or with amendment) will ensure the adequate protection of the community.[18] It is well established that the concept of "the adequate protection of the community" in s 22(7) has the same meaning as it bears in s 13.[19] Therefore, prisoners facing an application under s 22 must prove that the supervision order will ensure adequate protection of the community by removing unacceptable risk that they will commit a serious sexual offence.

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16 *Attorney-General (Qld) v Sands* [2016] QSC 225.

17 Section 22(2).

18 Section 22(7).

19 *Kynuna v Attorney-General (Qld)* [2016] QCA 172 at [60]; see also *Turnbull v Attorney-General (Qld)* [2015] QCA 54 at [36].

[13] Section 22 authorises the variation of a supervision order by extending its duration where that is necessary for the adequate protection of the community.[20]

[14] The issue under s 22 of the Act is not whether there is an unacceptable risk that the respondent will breach the supervision order. The issue is whether there is an unacceptable risk that he will commit a serious sexual offence.[21]

Background to the present application

[15] The respondent is an indigenous man who was born on 18 July 1990. He is currently 28 years of age and was 27 years old at the time of the contraventions the subject of the present application.

[16] On 19 January 2006, the respondent was convicted as a juvenile of property offences, dishonesty offences and possession of dangerous drugs in the Cunnamulla Childrens Court. He was detained but the detention was ordered to be served by way of a conditional release order.[22]

[17] In March 2008, the respondent was convicted of one count of rape in the District Court at Beenleigh, which was committed in 2006 when he was 16 years old.[23] He was sentenced to detention for 966 days, but taking account of pre-sentence custody he was released. In July 2008, the respondent was convicted and sentenced to probation for 12 months in the Magistrates Court at Charleville for property and weapons offences and obstructing a police officer.[24] In November 2008, the respondent was convicted and sentenced to both a suspended sentence of imprisonment and a sentence of imprisonment in the Magistrates Court at Cunnamulla, with immediate release on parole for further property offences.[25]

[18] On 12 March 2010, the respondent was convicted of five counts of indecent treatment of children and two counts of supplying dangerous drugs to minors. He was sentenced to a term of imprisonment on some counts and probation on others.[26] Pre-sentence custody was declared and he was released on probation on the day of sentence.[27] On 22 March 2011, the respondent was sentenced to four years' imprisonment for break and enter and rape.[28]

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[20] *Attorney-General v Van Dessel* [2007] 2 Qd R 1 at [31]; *Attorney-General (Qld) v Foy* [2014] QSC 304 at [14].

[21] *Attorney-General (Qld) v Francis* [2012] QSC 275 at [64]-[67].

[22] Criminal history: Affidavit of Kimberley Alison Thies, filed 6 September 2018, CFI 92, exhibit KAT-2 at 3.

[23] At 3.

[24] At 3–4.

[25] At 4.

[26] Such a sentence is open as explained in *R v Hood* [2005] 2 Qd R 54.

[27] At 4.

[28] At 4–5.

[19] It was the conviction for rape on 22 March 2011 (the index offence) which brought the respondent within the provisions of the Act. On that occasion he digitally penetrated the vagina of a sleeping woman. At the time of the commission of the offence the respondent was under the influence of some substance and the offending was opportunistic.

The supervision order

[20] The Attorney-General applied for orders under the Act on 16 October 2013.[29] Margaret Wilson J made preliminary orders pursuant to s 8 of the Act for the respondent to be interviewed by psychiatrists (the s 8 application).[30]

[21] On the s 8 application a preliminary issue arose as to whether the respondent came within the meaning of "prisoner" in the Act.[31] It was submitted for the respondent that the offence for which he was serving a sentence (the index offence) was not a serious sexual offence because it did not involve violence.[32] Reliance was sought to be made on *Attorney-General v Phineasea*[33] and *Tilbrook v Attorney-General*[34] but that argument was unsuccessful.

[22] The final hearing of the Attorney-General's originating application was listed for 7 April 2014. The sentence of imprisonment being served by the respondent was due to expire on 16 April 2014. At the hearing, the Attorney-General's primary submission was that the application should be adjourned for the respondent to be allowed to complete the High Intensity Sexual Offender Program to ensure his suitability for a supervision order.[35] On 7 April 2014, Douglas J declared that the respondent was a "prisoner" for the purposes of the Act,[36] adjourned the application to a date to be fixed, and ordered that the respondent be detained in custody pending the outcome of the application, pursuant to s 9A(2)(b) of the Act.[37]

[23] The application was then listed for final hearing on 24 November 2014.[38] Mullins J ordered that the respondent be released from custody subject to the requirements of a supervision order until 24 November 2019.[39]

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29 Originating application, filed 16 October 2013, CFI 1.

30 Order of Margaret Wilson J, 7 November 2013, CFI 16.

31 Defined by s 5, and referred to at [2] of the reasons.

32 Outline of submissions on behalf of the respondent, filed 31 March 2014, CFI 21.

33 [2013] 1 Qd R 305.

34 [2012] QCA 279.

35 Outline of submissions on behalf of the applicant, filed by leave 7 April 2014, CFI 22.

36 The definition of prisoner is different to that which is relevant upon the s 8 application; *Attorney General for the State of Queensland v Newman* [2018] QSC 156.

37 Order of Douglas J, 7 April 2014, CFI 27.

38 Order of Flanagan J, 26 August 2014, CFI 29.

39 Order of Mullins J, 24 November 2014, CFI 38.

The first contravention

[24] Relevantly to the first contravention, the supervision order as made by Mullins J included the following requirements:

> "…
>
> 16. comply with any reasonable direction of a Corrective Services officer that is not directly inconsistent with a requirement of the order;
>
> …
>
> 23. abstain from illicit drugs."

[25] On 25 November 2014, a Corrective Services office issued the following direction to the respondent:

> "…Not to ingest any synthetic substance that has a similar pharmacological effect; or is intended, or apparently intended, to have a similar pharmacological effect to an illegal drug.
>
> AND
>
> **NOT** to enter any business or establishment that sells or distributes any synthetic substance or similar substance."[40]

[26] The first contravention arose from a urinalysis result on 9 January 2015, when the respondent was found to have used synthetic cannabis. That was said to breach requirements 16 and 23 of the supervision order. The Attorney-General filed an application for orders pursuant to s 22 as a result of that breach on 19 January 2015.[41] The respondent was convicted of contravening the supervision order in the Magistrates Court at Richlands on 28 April 2015.[42]

[27] The application for s 22 orders was adjourned to a date to be fixed for the Attorney-General to obtain material, and the respondent was detained until the final hearing, pursuant to s 21(2)(a) of the Act.[43] The hearing was later set down for 9 June 2015.[44]

[28] The first contravention was admitted by the respondent,[45] and it was conceded by the Attorney-General that the protection of the community could continue to be ensured by

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[40] Affidavit of Andrew Wilson, filed by leave 19 January 2015, CFI 40, exhibit AW-2.

[41] Application, filed by leave 19 January 2015, CFI 39.

[42] Criminal history: Affidavit of Kimberley Alison Thies, filed 6 September 2018, CFI 92, exhibit KAT-2 at 5.

[43] Order of Applegarth J, 19 January 2015, CFI 43.

[44] Order of Boddice J, 9 April 2015, CFI 51.

[45] Outline of submissions on behalf of the respondent, filed by leave 9 June 2015, CFI 58 at [1(b)].

releasing the respondent back on the supervision order.[46] On 9 June 2015, Bond J ordered that the respondent be released and continue to be subject to the supervision order.

The second contravention

[29] The respondent was convicted in the Magistrates Court at Brisbane on 8 March 2017 of breaching the requirements of the supervision order on 17 October 2015.[47] That was a contravention of requirement 18 of the first supervision order, which provided that the respondent was "not to have any direct or indirect contact with a victim of his sexual offences". At a football game in Toowoomba the respondent approached the victim of the index offence.[48]

[30] It appears that the Attorney-General did not file an application for s 22 orders consequent on that breach.

The third contravention

[31] Also on 8 March 2017 in the Magistrates Court at Brisbane, the respondent was convicted of a further charge of contravening a requirement of the supervision order.[49] That breach occurred on 30 January 2016. The respondent stole an Apple iPhone he found on top of a toilet in a shopping centre.[50] That breached a requirement of the supervision order that the respondent not commit any indictable offence. Stealing is an indictable offence even though it is one that may be dealt with summarily.[51]

[32] It also appears that no application for s 22 orders was filed in relation to that contravention.

The fourth to sixth contraventions

[33] The Attorney-General filed an application on 20 September 2016 for s 22 orders relating to three contraventions of the supervision order, which were the fourth to sixth contraventions.[52] The respondent was alleged to have contravened the following requirements of the supervision order:

> "…

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[46] Outline of submissions on behalf of the applicant, filed by leave 9 June 2015, CFI 59 at [24]–[25].

[47] Criminal history: Affidavit of Kimberley Alison Thies, filed 6 September 2018, CFI 92, exhibit KAT-2 at 6.

[48] Decision of Magistrate Coates, 8 March 2017: Affidavit of Stephanie Nicole Hunter, filed 22 March 2017, CFI 68, exhibit SNH-4 at 37.

[49] Criminal history: Affidavit of Kimberley Alison Thies, filed 6 September 2018, CFI 92, exhibit KAT-2 at 6.

[50] Decision of Magistrate Coates, 8 March 2017: Affidavit of Stephanie Nicole Hunter, filed 22 March 2017, CFI 68, exhibit SNH-4 at 37.

[51] *Criminal Code* ss 391, 398, Chapter 58A

[52] Application, filed by leave 20 September 2016, CFI 63.

7. not commit an indictable offence;[53]

…

16. [set out at paragraph [24] of these reasons]

…

17. respond truthfully to enquiries by a Corrective Services officer about his activities, whereabouts and movements generally;

…

19. disclose to a Corrective Services officer upon request the name of each person with whom he associates and respond truthfully to requests for information from a Corrective Services officer about the nature of association, address of the associate if known, the activities undertaken and whether the associate has knowledge of his prior offending behaviour;"

[34] At some point prior to March 2016, the respondent had apparently been in a relationship with a woman who is referred to in the material as "AB". The relationship between them ceased on bad terms. On 3 March 2016, the respondent was directed not to have contact with AB.[54] A domestic violence order was made in the Magistrates Court at Ipswich on 7 March 2016.[55] On 13 June 2016, the respondent assaulted AB. He pleaded guilty to that offence, and the contravention of the supervision order in the Magistrates Court at Brisbane on 8 March 2017.[56] The assault constituted the fourth contravention.

[35] The fifth and sixth contraventions occurred on consecutive days, 7 and 8 September 2016. On 7 September 2016, the respondent met with AB and assaulted her.[57] That is the fifth contravention. On 8 September 2016, AB made complaint to police about the assault and also provided Corrective Services with copies of text messages the respondent had sent her and details of social media profiles he used.[58] It is somewhat unclear what part of that forms the sixth contravention. He pleaded guilty to the contravention also on 8 March 2017.[59] On that date the respondent was sentenced to various concurrent penalties of imprisonment with immediate release on parole, with a total head sentence of 18 months' imprisonment.[60]

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[53] The requirement relevant to the contravention constituted by the stealing of the mobile telephone.

[54] Affidavit of Jolene Monson, filed by leave 20 September 2016, exhibit JM-3.

[55] At [11].

[56] Decision of Magistrate Coates, 8 March 2017: Affidavit of Stephanie Nicole Hunter, filed 22 March 2017, CFI 68, exhibit SNH-4 at 37.

[57] At 38.

[58] Affidavit of Jolene Monson, filed by leave 20 September 2016 at [30]–[31].

[59] Decision of Magistrate Coates, 8 March 2017: Affidavit of Stephanie Nicole Hunter, filed 22 March 2017, CFI 68, exhibit SNH-4 at 39.

[60] At 40.

[36] An application for s 22 orders was made and the matter was set down for hearing on 12 June 2017.[61] The respondent admitted the fourth to sixth contraventions,[62] and sought release back onto the supervision order.[63] The Attorney-General contended for the imposition of a continuing detention order.[64]

[37] On 12 June 2017, Brown J released the respondent and amended the supervision order to add further requirements to facilitate Corrective Services monitoring of the respondent's contact with other people, as well as his use of the internet.[65]

The seventh and eighth contraventions

[38] Convictions in the Magistrates Court for what are respectively the seventh and eighth contraventions of the supervision order occured on 1 February 2018 and 23 March 2018.[66] These contraventions were not the subject of any s 22 application and the material about them is sparse.

The present contravention

[39] The present contraventions are the ninth and tenth contraventions of the supervision order. As a result of the second to sixth contraventions, the respondent was on parole at the time of the present contraventions. As a result of the eighth contravention, he was also the subject of a suspended sentence.

[40] The present contravention alleged is a breach of requirements 23 and 24 of the supervision order, which provide:

> "The Respondent must:
>
> …
>
> 23. [set out at paragraph [24] of these reasons]
>
> 24. submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by a Corrective Services officer;"

[41] On 20 June 2018, the respondent was directed to provide a sample for urinalysis. The sample was apparently of an unusually high temperature and the respondent was directed to provide a further sample. He refused to comply with that direction. On 21 June 2018, the respondent was directed to report for further urinalysis testing. He refused to comply with that direction

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61 Order of Mullins, 12 April 2017, CFI 72.

62 Outline of submissions on behalf of the respondent, filed by leave 12 June 2017, CFI 84 at [10].

63 At [48].

64 Outline of submissions on behalf of the applicant, filed by leave 2 June 2017, CFI 75 at [90].

65 Order of Brown J, 12 June 2017, CFI 86.

66 Criminal history: Affidavit of Kimberley Alison Thies, filed 6 September 2018, CFI 92, exhibit KAT-2 at 6.

and later admitted to his case manager that he had used "ice".[67] The contraventions are admitted.

[42] A warrant was issued under s 20 of the Act and the respondent was taken into custody on 21 June 2018. At the watchhouse, police found the respondent had secreted two syringes between his buttocks, one of which contained a substance the respondent admitted was methylamphetamine. Possession of the drugs seems to be a particular of the breach of requirement 23 rather than a separate contravention.

[43] The respondent pleaded guilty in the Magistrates Court at Richlands on 23 July 2018 to the contravention and to possessing methylamphetamine.[68] The Magistrates Court activated the suspended sentence imposed for the eighth contravention and sentenced the respondent to three months imprisonment for the possession of the dangerous drug methylamphetamine and five months imprisonment for the contraventions, with eligibility for parole set at 24 September 2018.[69]

The psychiatric evidence

[44] In the course of the breach proceedings, evidence was obtained from two psychiatrists, Dr Andrew Aboud and Dr Scott Harden, and a psychologist Dr Michele Andrews. Dr Andrews has been treating the respondent and reported progress. She opined that the respondent could be managed in the community on a supervision order.[70] Prior to the contravention, the respondent had been coping well even though he failed to attend his appointment on 7 June 2018, about two weeks before the contravention.[71]

[45] Dr Aboud diagnosed the respondent with Antisocial Personality Disorder with prominent psychopathic traits. He opined that the respondent also harboured emotionally unstable personality traits (fear of rejection and abandonment) and dependant personality traits with evidence to support diagnoses of alcohol dependence and cannabis abuse and more recently stimulant abuse.

[46] Dr Aboud viewed the respondent's unmodified risk of sexual offending as between moderate and high but on a supervision order considered the risk to reduce to be between moderate and low.

[47] Dr Harden considered that the respondent met the criteria for Antisocial Personality Disorder. He thought the respondent suffered from poly substance abuse in remission because of incarceration. Dr Harden opined that the respondent may have met the criteria for Attention Deficit Hyperactivity Disorder earlier in his life but did not meet the criteria for the diagnosis at this point.

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[67] Amended application, filed by leave 18 December 2018, CFI 117.

[68] Transcript: Affidavit of Stephanie Nicole Hunter, filed 6 September 2018, CFI 100, exhibit SNH-1 at 6.

[69] At 12.

[70] Affidavit of Michele Andrews, filed 14 November 2018, CFI 108, pages 25-26.

[71] At 11–12.

[48] As to risk, Dr Harden thought that the respondent's future risk of sexual re-offence is high but a supervision order would decrease risk to moderate or low.

[49] Both doctors recommended release of the respondent back into the community on the supervision order.

The real issue

[50] As already observed, the central question under s 22(7) of the Act is not whether there is an unacceptable risk that the respondent will breach the supervision order. Rather, the question is whether the respondent has satisfied the court that the adequate protection of the community can be ensured by releasing him back on a supervision order. In context, "adequate protection of the community" means that the supervision order renders the risk of the respondent committing a serious sexual offence at an acceptable level. As already observed, if supervision can ensure the adequate protection of the community then a supervision order ought to be preferred over an order for continuing detention.[72]

[51] As already observed, both psychiatrists opine that the respondent's risk of committing an offence of a sexual nature whilst in the community is quite low and both recommend his release. There was no challenge to any of the evidence of the psychiatrists and no reason not to accept it. Acceptance of the psychiatrists' evidence inevitably leads to the conclusion that the respondent has discharged the onus upon him under s 22(7). The real issue is whether the duration of the supervision order ought to be extended.

[52] Dr Aboud in his report said this:

> "It is my understanding that the current order is to expire on 24 November 2019. Given his history of breaches while subject to this order, in conjunction to the ongoing nature of the risk of sexual reoffending, it would seem appropriate that consideration be given to extending the order for a further five years."

[53] By s 24 of the Act, a supervision order is suspended while the person the subject of the order is in custody. The term of the supervision order is then extended by a term equivalent to the time in which the person under supervision was in custody. The upshot of all this is that the present supervision order (unless amended) will expire towards the end of 2020.

[54] This was pointed out to the two psychiatrists. Dr Harden responded with an email dated 13 December 2018 wherein he suggested that the supervision order be extended by one to two years to either December 2021 or December 2022. He explained that such a period would be required "to demonstrate compliance and stability".

[55] Dr Aboud in a supplementary report reviewed his initial report and said:

> "As it stands, I am now aware that he will likely be subject to the current order until December 2020. It is my view that this timeframe will probably allow a

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[72] *Attorney-General v Francis* [2007] 1 Qd R 396 at [39]; *Attorney-General (Qld) v Yeo* [2008] QCA 115; *Attorney-General v Lawrence* [2010] 1 Qd R 505; *LAB v Attorney-General* [2011] QCA 230; *Attorney-General for the State of Queensland v Ellis* [2012] QCA 182; *Attorney-General (Qld) v Fardon* [2013] QCA 64.

> sufficient amount of time (approximately two years) for the above concerned to be addressed. I therefore would like to revise my recommendation accordingly, and suggest that the current may not need to be extended at this time, or if so, for only a further year at most."

Determination

[56] Both psychiatrists agree that a period of time without breach of the supervision order is necessary to ensure a lowering of risk of sexual re-offending. In terms of ss 13 and 16 of the Act, at some point during that period of supervision (without breach) the respondent will become an acceptable risk without a supervision order.

[57] Dr Aboud thought that period would be "only a further year at most". By that, Dr Aboud meant an extension so that the order would expire towards the end of 2021. Dr Harden thought there should be an extension of "one to two years". By that he meant the supervision order should expire either at the end of 2021 or the end of 2022. There is, therefore, a body of evidence justifying a one year extension of the order: that is, to expire late 2021. I will extend the order accordingly.

Form of order

[58] What is intended is to make an order resulting in the expiry of the supervision order in late 2021. That has been complicated here because the respondent served about 300 days in custody during the period of the supervision order. Sections 23 and 24 of the Act provide as follows:

> "**23 Application of division**
>
> This division applies if, after being released from custody under a supervision order or interim supervision order, a released prisoner is sentenced to a term or period of imprisonment for any offence, other than an offence of a sexual nature.
>
> **24 Period in custody not counted**
>
> (1) The released prisoner's supervision order or interim supervision order is suspended for any period the released prisoner is detained in custody on remand or serving the term of imprisonment.
>
> (2) The period for which the released prisoner's supervision order or interim supervision order has effect as stated in the order is extended by any period the released prisoner is detained in custody."

[59] By force of s 24, the period of the supervision order is extended by 300 days (approximately) so it would expire in late 2020 without further order. What is intended is that the respondent be subject to supervision in the community for six years not five: so the order would then expire (given the time in custody) at the end of 2021.

[60] The question arises then as to whether the appropriate order is to extend the period of the order to 24 November 2020 (one year from the original expiry date) or to extend it to some

time towards the end of 2021 which is when (assuming the respondent is not returned to custody in the meantime) the order is intended to expire.

[61] Section 22(7) contemplates the release of the respondent back into the community. However, the subsection does not contemplate the making of a new supervision order.[73] Quite the contrary. The subsection contemplates the release of the respondent back on "the supervision order" with any amendments. Reference to "the supervision order" is a reference to the order made under s 13 against the respondent: here that is the order of Mullins J made on 24 November 2014 as amended by Justice Brown on 12 June 2017.

[62] If an order was made extending the period of the order to a date towards the end of 2021, ss 23 and 24 would operate to extend the period of supervision by 300 days (approximately) from the end of 2021 to a date towards the end of 2022. An order which extends the period of supervision to 24 November 2020 might seem odd because the existing order will, by ss 23 and 24 not expire until the end of 2020 in any event. However, the extension of the order to 24 November 2020 will, by force of ss 23 and 24 (and the 300 days in custody) result in:

(i) the order expiring towards the end of 2021; and

(ii) the respondent being on supervision in the community for a total of six years.

[63] That is what is intended.

[64] I make the following orders:

THE COURT being satisfied to the requisite standard that the respondent, Adam Cliffe McKellar, has contravened requirements of the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017, ORDERS THAT:

1. The respondent, Adam Cliffe McKellar, be released from custody and continue to be subject to the supervision order made by Justice Mullins on 24 November 2014 and amended by Justice Brown on 12 June 2017 with the following amendments:

    (a) amend order (1) by omitting the words "24 November 2019" currently in the order and inserting the following underlined words to read:

        (1) The respondent be subject to the following conditions until 24 November 2020.

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[73] *Attorney-General v Yeatman* [2019] 1Qd R 89.