SUPREME COURT OF QUEENSLAND

CITATION:	*Pollentine v Attorney General* [2019] QSC 200
PARTIES:	**EDWARD POLLENTINE** (Applicant) **v** **THE HONOURABLE YVETTE D'ATH ATTORNEY GENERAL FOR THE STATE OF QUEENSLAND** (Respondent)
FILE NO/S:	BS No 496 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application for Review
DELIVERED ON:	15 August 2019
DELIVERED AT:	Brisbane
HEARING DATE:	25 July 2019
JUDGE:	Bowskill J
ORDER:	**The application for review is dismissed. I will hear from the parties as to costs.**
CATCHWORDS:	ADMINISTRATIVE LAW – JUDICIAL REVIEW – GROUNDS OF REVIEW – ERROR OF LAW – where the applicant was convicted in 1984 of serious sexual offences against children – where the sentencing judge declared, on the basis of the reports of two specialist psychiatrists, that the applicant "is incapable of exercising proper control over his sexual instincts" and directed that the applicant be indeterminately detained pursuant to s 18(3) of the *Criminal Law Amendment Act* 1945 (Qld) – where the applicant requested that the Governor in Council exercise the implied power under s 18(5) of the Act to release him – where the Governor in Council was not satisfied, having regard to the reports of psychiatrists before them, that "it is expedient to release" the applicant and accordingly made a decision that he not be released – where the applicant seeks judicial review of the decision, on the basis the Governor in Council failed to make the decision according to law, by not addressing or answering the question whether he was presently incapable of exercising proper control over his sexual instincts – where the applicant claims the Governor in Council made this error, because neither of the two psychiatrists principally relied upon directly or sufficiently addressed that question in their reports – whether the Governor in Council's decision is

affected by error of law and ought to be set aside

Criminal Law Amendment Act 1945 (Qld) s 18, s 18E
Judicial Review Act 1991 (Qld)

Attorney-General (NSW) v Quin (1990) 170 CLR 1
Buck v Bavone (1976) 135 CLR 110
Butler v Attorney-General [2018] QCA 243
Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611
Minister for Immigration and Multicultural Affairs v Yusuf (2001) 206 CLR 323
Plaintiff M64/2015 v Minister for Immigration and Border Protection (2015) 258 CLR 173
Plaintiff M70/2011 v Minister for Immigration and Citizenship (2011) 244 CLR 144
Pollentine v Attorney General [1995] 2 Qd R 412
Pollentine v Bleijie (2014) 253 CLR 629
The Queen v Kiltie (1986) 41 SASR 52

COUNSEL: D O'Gorman SC and S Lane and for the applicant
S McLeod QC and G del Villar for the respondent

SOLICITORS: Prisoners' Legal Service for the applicant
Crown Law for the respondent

Introduction

[1] In July 1984 the applicant pleaded guilty to and was convicted of fourteen counts of serious sexual offences committed against four different children, on three separate occasions between January and April of that year. The detail of the offences appears in the material before the court. It is unnecessary to refer to that detail here; the description of the offending by Dr Beech is apt: "[t]he offending is notable for the amount of psychological coercion, threats with weapons, the physical coercion, and the violence. It involved both opportunistic and predatory behaviour".[1]

[2] On the basis of the unchallenged evidence of two specialist psychiatrists, the sentencing judge declared that the applicant "is incapable of exercising proper control over his sexual instincts" and directed that he be detained in an institution[2] during Her Majesty's pleasure (that is, detained for an indeterminate period) pursuant to s 18(3) of the *Criminal Law Amendment Act* 1945 (Qld) (**CLA Act**).[3] No other sentence was imposed. The applicant remains in custody.

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1 Exhibit 1 at p 106.

2 At that time, defined to include a prison or police gaol, as well as any institution proclaimed for the purposes of s 18 (*Pollentine v Bleijie* (2014) 253 CLR 629 at [7]); now defined to include a corrective services facility or watch-house, as well as another institution prescribed under a regulation (s 18(14)).

3 See also *Pollentine v Bleijie* (2014) 253 CLR 629 at [12]-[13].

[3] Section 18(5)(b) of the CLA Act governs the *unconditional* release of an offender who is ordered to be detained indefinitely, providing that such an offender:

> "shall not be released[4] until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender …".

[4] *Conditional* release (or parole) is also potentially available, on application to the Parole Board Queensland, after the offender has served a minimum of 13 years: see part 3A (ss 18A to 18H) of the CLA Act. Under s 18E, the Parole Board must not grant a detainee a parole order unless it is satisfied the detainee does not represent an unacceptable risk to the safety of others. The applicant has made applications for parole, but has not been successful.

[5] Supervised release, under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), is not an option for an offender indefinitely detained under s 18 of the CLA Act. Legislative amendment would be required in order to change this.

[6] Whilst the CLA Act does not expressly provide for an offender indefinitely detained to apply for release, an offender may make a request for the implied[5] power under s 18(5)(b) to be exercised in their favour.[6] That occurred in this case. The request was ultimately refused.[7] On 1 February 2018, the Governor in Council determined that the applicant not be released from indefinite detention. A statement of reasons for the decision was provided, dated 25 February 2018.[8]

[7] The applicant seeks judicial review of that decision and relief in the form of an order in the nature of certiorari quashing the decision; and an order in the nature of mandamus, requiring the respondent to refer the matter of the applicant's release back to the Governor in Council for reconsideration.[9] The sole ground of review is that the decision involved an error of law, because the Governor in Council failed to make the decision according to law, "by not addressing or answering the relevant statutory test (being whether the applicant was presently incapable of exercising proper control over his sexual instincts)".[10]

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4 In this section, "release" means unconditional release and does not include (conditional) release under part 3A of the CLA Act: see s 18(14).

5 As Thomas J observed in *Pollentine v Attorney General* [1995] 2 Qd R 412 at 415, s 18 does not expressly confer a power of release upon the Governor in Council; although it is plainly given by implication by s 18(5)(b).

6 See *Pollentine v Attorney General* [1995] 2 Qd R 412 at 415-417; *Pollentine v Bleijie* at [63] per Gageler J.

7 A chronology filed in this court on 25 July 2018 indicates that the applicant commenced the process of requesting the Governor in Council to exercise the power to release him, in late 2014, following the High Court's decision in *Pollentine v Bleijie* (2014) 253 CLR 629, rejecting his challenge to the constitutional validity of s 18 of the CLA Act. It is unnecessary to say more about the lengthy procedural history of this matter which appears from that chronology. The present application is concerned only with the decision made on 1 February 2018, and whether it is affected by an error of law.

8 Exhibit 1 at pp 1-5.

9 See part 5 of the *Judicial Review Act* 1991 (Qld).

10 Amended Application for Review filed 28 March 2018; applicant's submissions at [23] and [47].

The material before the decision-maker

[8] The material which was before the Governor in Council for consideration is referred to on page 2 of the statement of reasons. It included medical reports from four psychiatrists: Dr Brand (report dated 20 June 2016); Dr Tie (report dated 11 August 2017); Dr Beech (report dated 28 June 2017) and Dr Grant (report dated 5 July 2017).

[9] Dr Brand's and Dr Tie's reports are both presented in the same format, commencing with the statement that the "purpose of this report is to meet the statutory obligations of the Director of Mental Health (DMH) under the *Criminal Law Amendment Act 1945*". As further explained at the beginning of each report, this is a reference to the requirement, under s 18(8) and (8A) of the CLA Act, for an offender indefinitely detained to be examined every three months by the chief psychiatrist, or a medical practitioner appointed by the chief psychiatrist, and for a report to be provided. The reports are in the same format, of responses to a kind of questionnaire.

[10] Dr Brand completed his report after examining the applicant on 13 June 2016. He expresses the view that the applicant's presentation would not fulfil the criteria for any major mental illness (that is, he did not have symptoms suggestive of a pervasive mood disorder, anxiety disorder or psychotic disorder). However, he also states that the applicant's presentation would fulfil the criteria for paraphilic disorder, namely paedophilia (nonexclusive type, sexually attracted to both males and females) and sexual sadism.[11] In answer to the question "is the person capable of exercising proper control over sexual instincts?" Dr Brand states that the applicant "does not have a major mental illness, personality disorder or an intellectual impairment that might affect his ability to exercise control over his sexual instincts".[12]

[11] Dr Tie prepared his report after reviewing the applicant on 10 August 2017. He had examined or reviewed the applicant on many previous occasions, from 2010 to 2017. Dr Tie also says there "is no current evidence of pervasive mood or psychotic symptoms", but that the applicant filled the DSM-IV-TR criteria for paedophilia (nonexclusive type, sexually attracted to both males and females) and sexual sadism.[13] Like Dr Brand, in answer to the question "is the person capable of exercising proper control over sexual instincts?" Dr Tie states that the applicant "has no current mental illness, nor evidence of intellectual disability, that would affect his ability to exercise control over his sexual instincts".[14]

[12] In the statement of reasons, the following was said about these reports:

> "The Governor in Council made the decision for the following reasons:

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[11] Exhibit 1 at p 121.
[12] Exhibit 1 at p 122.
[13] Exhibit 1 at p 24.
[14] Exhibit 1 at p 26.

1. PLS [Prisoners' Legal Service] submits that the reports of Dr Grant (5 July 2017), Dr Tie (11 August 2017) and Dr Brand (20 June 2016) should be considered, but that Dr Beech's report of 28 June 2017 should not be considered.

2. Dr Beech's report contains highly relevant information about Mr Pollentine and his capacity to control his sexual instincts if released unconditionally into the community. It was considered along with the other three reports.

3. Dr Brand's 20 June 2016 report was previously considered by the Governor in Council in making the decision of 26 October 2016. It was considered inadequate and insufficient to satisfy the Governor in Council that it was expedient, at that time, to release Mr Pollentine.

4. In relation to Dr Tie's report dated 11 August 2017, among other questions Dr Tie was asked 'Is the person capable of exercising proper control over sexual instincts?' In response Dr Tie says that 'Mr Pollentine has no current mental illness, nor evidence of intellectual disability, that would affect his ability to exercise control over his sexual instincts'.

5. Both Dr Tie and Dr Brand however accept that Mr Pollentine fulfils the criteria for paedophilia and sexual sadism, both being paraphilic disorders. The DSM-IV-TR describes paraphilias as 'recurrent, intense sexually arousing fantasies, sexual urges or behaviours generally involving nonhuman objects, the suffering or humiliation of oneself or one's partner, or children or other nonconsenting persons …' …"

[13] It is apparent from the statement of reasons that the Governor in Council placed more weight on the reports of Dr Grant and Dr Beech, which I will refer to shortly. It is relevant to note that the answer given by each of Dr Brand and Dr Tie to the question about capacity to exercise proper control over sexual instincts does not address the relevant question, which is whether the offender's "mental condition is such that the offender is incapable of exercising proper control over [their] sexual instincts".[15] In *The Queen v Kiltie* (1986) 41 SASR 52 at 61-62 (King CJ), 66 (Legoe J) and 71 (Johnston J) it was held that in the equivalent South Australian provision "mental condition" does not connote or require the existence of a psychiatric illness capable of diagnosis, but rather means the state or condition of the mind of the offender. That decision remains authoritative. Accordingly, both Dr Brand's and Dr Tie's answers to the capacity question are too narrowly confined (referring as they do to mental illness or intellectual disability).

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[15] See s 18(1)(a).

[14] The decision in *Kiltie* also addressed the meaning of "incapable of exercising proper control" in this context. As summarised by Gageler J in *Pollentine* at [59], by reference to *Kiltie* at 65 (per Legoe J):

> "It has been held, and is not in dispute, that an offender is incapable of exercising 'proper' control over his sexual instincts if he is incapable of exercising that degree of self-control which would prevent him from committing a further offence of a sexual nature."[16]

[15] Dr Grant interviewed the applicant on 5 May 2017, before providing a report dated 5 July 2017. Consistently with Dr Brand and Dr Tie, Dr Grant also found that the applicant suffers from no current mental illness; but that he does have a sexual paraphilia, namely paedophilia, and shows evidence of a paraphilia of sadism. Dr Grant records that the applicant has been on antiandrogen medication since 1992, which the applicant reports "has significantly reduced his propensity to deviant sexual fantasies and made it easier for him to avoid them".[17] Dr Grant's "overall risk assessment" is that:

> "… Mr Pollentine represents a moderate risk of future sexual re-offending, the risk being to prepubescent children. The risk could be restricted to moderate or lower if Mr Pollentine was to continue under close supervision and treatment if released into the community. **If he were not to be receiving treatment or supervision, the risk would in my opinion rise to high for sexual re-offending.** Any supervision and monitoring program would need to ensure that Mr Pollentine had no unsupervised contact with children."[18]

[16] Dr Grant describes the risk for any reoffending as "long-term (chronic)". He says it is "unclear how imminent any re-offending might be"; that it would "probably not be immediately after release but could occur in a situation where he became isolated, frustrated, angry and preoccupied with deviant fantasies once again, particularly in the context of non-compliance with treatment".[19] Dr Grant says that if the applicant were to offend again, "it would involve sexual assaults with probable physical force or threats directed against pre-pubertal children, most likely strangers to him. Those offences would be motivated by paedophilic and sadistic drives as part of his paraphilia and that deviance would be coupled with the expression of frustration and anger". Dr Grant also says that, if offending occurred, "the psychological harm to victims would be potentially severe. Physical harm would probably be minor and there would appear to be a low probability that sexual violence might escalate to serious or life threatening violence. However, it cannot be stated with certainty that more serious violence might

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16 Or as Johnston J put it, in *Kiltie* at 70, "the word 'proper' must mean in conformity with law. The section is not concerned with moral judgments".

17 Exhibit 1 at p 54.

18 Exhibit 1 at pp 58-59. The emphasis in this quote, and those set out below, is mine.

19 Exhibit 1 at p 58.

not occur, given that Mr Pollentine's offending was brought to a halt within months and any further escalation of violence was therefore prevented".[20]

[17] Dr Grant answered the specific questions put to him,[21] as follows:

> "1. [*Does Mr Pollentine suffer from any diagnosable mental illness or disease?*]
>
> Mr Pollentine does not suffer any mental illness or disease. He does, however, have a sexual paraphilia, namely Paedophilia and Sadism.
>
> 2. … [*not relevant, in light of Dr Grant's answer to question 1*]
>
> 3. [*If the answer is 'no', is Mr Pollentine's state of mind such as to increase the risk that he would commit a sexual offence if released into the community without conditions or supervision?*]
>
> Whilst Mr Pollentine does not suffer from a diagnosable mental illness or disease he has a significant sexual paraphilia, this being **a chronic aspect of his mental life which increases the risk of a sexual offence if released into the community without conditions or supervision**. That paraphilia is currently quiescent with treatment but **in the absence of such treatment and supervision it would represent a significant risk**.
>
> 4. [*If the answer to either (2) or (3) is 'yes', what is the risk that Mr Pollentine would commit a sexual offence if he were released into the community without conditions or supervision?*]
>
> In my opinion, the risk that Mr Pollentine would commit a sexual offence if released into the community without conditions or supervision would be **high**. Containment of the risk would require long-term treatment and supervision.
>
> 5. [*In light of the answer to (4), is Mr Pollentine incapable of exercising that degree of self-control that would prevent him from committing a sexual offence if he were released into the community without conditions or supervision?*]
>
> In the light of Mr Pollentine's need for supervision and long term treatment in order to contain his risk, in my opinion **if he were released into the community without conditions or supervision the risk of re-offending would be high**, and in that sense it is likely **over time that he would find himself incapable of exercising an appropriate degree of self control to prevent re-offending**. Whilst it may be considered that Mr Pollentine,

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[20] Exhibit 1 at pp 57A to 58.

[21] The instructions to Dr Grant appear at exhibit 1, pp 73-77.

> having undergone extensive treatment, would have sufficient insight to continue with treatment and supervision on a voluntary basis, I consider that the risk of opting out of treatment unless it was mandatory would be **too high a risk** in terms of Mr Pollentine potentially re-offending."[22]

[18] Dr Beech interviewed the applicant on 13 April 2017, and prepared a report dated 28 June 2017. Dr Beech's opinion accords with the other psychiatrists, in terms of the applicant having the paraphilias of sexual sadism and paedophilia. Dr Beech records that the applicant "has had ongoing deviant fantasies but, from his account, they are substantially supressed by anti-libidinal medication while in custody". It is noted that the applicant has been on this medication since the 1990s. Dr Beech says there is "evidence of limited empathy for the victims, and from what I could see limited remorse overall, but he does articulate these intellectually and he has some understanding of the effects on his victims of his behaviours". He notes that the applicant's institutional behaviour reports are "quite good", save for a "jarring note", being "a breach in Palen Creek CC after he was found to have stored the anti-libidinal medication". The "second jarring note" referred to by Dr Beech is an anomaly in the applicant's testosterone levels, having regard to the dose of medication (suggestive of problems with compliance in taking the medication).[23]

[19] Dr Beech says:

> "Mr Pollentine gives a mixed account of the fantasies now. He is at pains to stress that they are absent or infrequent or that he avoids them. Realistically it is likely I believe that they can be triggered by certain cues and I think these are importantly visual cues such as seeing children at visits or seeing children on television. In my opinion it is a significant factor given that any release would likely place him in the community where there would be more visual cues likely to lead to the greater return of more intense sexual urges and fantasies around children."[24]

[20] Dr Beech also says:

> "Overall, I think that there is **a significant risk of reoffending if Mr Pollentine were to be released into the community without treatment or supervision**. He has two significant sexual paraphilias, Sadism and Paedophilia and he has acted on them. Admittedly, there is only one sentencing date but the offences are noted for the spree that was involved, his continued offending until arrest, and the intensity of the urges that drove him at the time. It is my opinion that the fantasies in fact continue they are suppressed to a certain extent by anti-libidinal medication and his own conscious attempts to avoid them. I think that they are also reduced by the

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22 Exhibit 1 at pp 59-60.
23 Exhibit 1 at p 107; this latter issue is also referred to by Dr Grant: see exhibit 1 at p 53.
24 Exhibit 1 at p 107.

> relative absence of visual cues that might trigger them while he is in custody. He is not psychopathic, and he is now in his middle years or older, which reduces the risk. However, he has two paraphilias, and he has used them to meet his emotional needs when stressed.
>
> The risk in the community is, I believe, that once released he might decide to stop the medication. This might be because he does not like the side effects or because he becomes complacent. I have a concern in fact that he still misuses medication because of the earlier breach and because of the discrepancies in dose and testosterone levels. The concern as well is that the dose does not appear to have drastically reduced the testosterone levels and in fact may not be enough to reduce sexual arousal once he is in the community and in the presence of children."[25]

[21] Dr Beech says that "[a]ny signs of this deterioration might be evident in a general sense but it would be difficult to elicit from him the presence of fantasies or the development of any plans". If he were to act on the fantasies, Dr Beech thinks "it is likely to be a young male stranger child that he has taken from the street. The victim would suffer severe psychological and emotional trauma and probably moderate physical trauma. It is possible that there might be more than one victim".[26]

[22] Dr Beech is of the opinion that the risk of the applicant reoffending is moderately high, despite his age; but that the risk could be reduced to moderate with ongoing treatment, compliance and monitoring.[27]

[23] The instructions (and questions) put to Dr Beech do not form part of exhibit 1. As will be discussed in more detail below, on this application the applicant is critical of Dr Beech's report for failing to expressly address the question whether the applicant's mental condition is such that he is incapable of properly controlling his sexual instincts. This was the reason why the legal representatives for the applicant submitted the Governor in Council should not have regard to Dr Beech's report (see paragraph 1 of the statement of reasons, set out above).

The reasons for the Governor in Council's decision

[24] Further to the paragraphs set out at [12] above, the statement of reasons continues (after referring to parts of Dr Beech's and Dr Grant's reports, at paragraphs 6, 7 and 8):

> "9. Dr Tie is not prepared to answer questions directed towards the likelihood of Mr Pollentine reoffending if released unsupervised into the community.[28]

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[25] Exhibit 1 at pp 108-109.
[26] Exhibit 1 at p 109.
[27] Exhibit 1 at p 109.
[28] See Dr Tie's report, in exhibit 1 at p 26, where he says this is a question to be "legally determined, rather than placed solely in the purview of mental health".

10. The reports of Drs Beech and Grant however both address in detail this question and **both recommend against unsupervised and unconditional release of Mr Pollentine into the community**.

11. The PLS suggests in its submissions that Dr Beech's report does not address the correct test. The PLS refers to the High Court decision in *Pollentine v Bleijie* (2014) 253 CLR 629, and attempts to draw from the reasons of the plurality (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) a concise definition of a 'test' which should be applied to the question of release.

12. With respect, there is not one simply expressed concise and clearly articulated test. There is however a lengthy consideration of how the question should be approached. **The Court held that the central question to be determined was whether the detainee remains incapable of exercising proper control**: (2014) 253 CLR 629, 646-647 [33]-[34]. Anticipated adverse community reaction or other forms of political consequence are not relevant to the question of whether or not it is expedient to release the detainee: (2014) 253 CLR 629, 647 [35]-[36].

13. The plurality held ((2014) 253 CLR 629, 647 [36], 648 [38]) that:

> … whether it is expedient to release must depend upon the assessment that is made of the risk of reoffending and the nature of the offences that the detainee might commit if released from detention without conditions or supervision.
>
> …
>
> If detention is terminated under s 18(5), the detainee is released without condition. The risks that are to be considered are to be identified by reference to those circumstances.

14. Both Drs Beech and Grant have addressed in detail the risk of reoffending and the nature of the offences that the detainee might commit if released from detention without conditions or supervision. Both reports are highly relevant and neither recommends Mr Pollentine's unconditional and unsupervised release into the community. **The conclusions drawn by the two doctors are conclusions about the capacity of Mr Pollentine, in the context of unconditional release, to exercise control over his sexual instincts**.

15. PLS submits that the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* is sufficient to provide an

effective supervisory regime in the community if Mr Pollentine is released under s 18(5) of the CLAA.

16. Dr Beech's conclusions suggest that, if released into the community, Mr Pollentine would require supervised accommodation, restrictions on contact with children, and ongoing treatment compliance and monitoring.

17. Dr Grant gives an overall estimate of risk of reoffending as moderate but with the possibility of escalation to high in any situation where Mr Pollentine was not receiving treatment and supervision or if he became isolated, withdrawn or dysphoric. Dr Grant says at page 31:

> It is important that Mr Pollentine should continue psychiatric treatment and antiandrogen treatment in the long term and that he should have assistance with social rehabilitation if released from prison. He will need a great deal of support in adjusting to life in the community.
>
> Supervision of Mr Pollentine in the community would need to involve monitoring of his movements, a curfew at night time, monitoring his contacts and relationships and a complete ban on him having any unsupervised contact with children. Supervision would need to be coupled with continued therapy and general support and rehabilitation.
>
> Risk would potentially increase significantly if Mr Pollentine were to abscond from supervision or become non-cooperative with treatment and monitoring.

18. The kind of reporting conditions which can be imposed under the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* are insufficient to meet the requirements which are suggested by Drs Beech and Grant.

19. After considering the request for release, the medical reports and the submissions made by PLS on behalf of Mr Pollentine, **the Governor in Council was not satisfied that it was expedient to release Mr Pollentine from indefinite detention**."

The contended error of law

[25] The applicant contends the Governor in Council failed to make the decision under review according to law, "by not addressing or answering the relevant statutory test (being whether the applicant was presently incapable of exercising proper control over his sexual instincts)".

[26] The crux of the applicant's complaint is that neither of the psychiatrists upon whose reports the Governor in Council principally relied in making the decision (Dr Grant and Dr Beech) directly, or sufficiently, addressed the question whether the applicant is incapable of exercising proper control over his sexual instincts. The applicant says Dr Beech did not address the question at all; and to the extent Dr Grant did, it was insufficient, as he did not express an opinion of present incapacity, but only incapacity over time. The applicant submits that, in consequence, the Governor in Council has misdirected himself, as a matter of law, by making a decision in circumstances where the medical reports do not address the "statutory question".

The relevant principles

[27] The power under s 18(5)(b) to (unconditionally) release an offender who has been indeterminately detained is exercisable only where the Governor in Council is satisfied on the report of two medical practitioners that it is expedient to release them:

> "Every offender or prisoner in respect of whom a direction is given under subsection (3) or (4) [relevantly, a direction that the offender be detained in an institution during Her Majesty's pleasure] –
>
> …
>
> (b) shall not be released until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender or prisoner."

[28] The High Court in *Pollentine v Bleijie* (2014) 253 CLR 629 considered the proper construction of s 18(5)(b), in the course of determining the applicant's challenge to the validity of s 18. The decision of the High Court was unanimous, comprising reasons of the plurality (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) and, separately, of Gageler J.

[29] The plurality first considered s 18(1) and (3), which govern the (initial) making of a declaration for indeterminate detention. Relevantly, those sections provide:

> "(1) In any case where a person has been found guilty of an offence of a sexual nature committed upon or in relation to a child under the age of 16 years –
>
> (a) if such person was found so guilty on indictment – the judge presiding at the trial of such person for that offence may at the judge's discretion direct that 2 or more medical practitioners named by the judge (of whom 1 shall be a person registered under the Health Practitioner Regulation National Law as a specialist registrant in the specialty of psychiatry where the judge is of opinion that the services of such a person are reasonably available), inquire as to the mental condition of the offender, and in particular **whether the offender's mental**

condition is such that the offender is incapable of exercising proper control over the offender's sexual instincts; or

(b) …

…

(3) **If** the medical practitioners report to the judge that the offender is incapable of exercising proper control over the offender's sexual instincts **the judge may**, either in addition to or in lieu of imposing any other sentence where the offender was convicted on indictment, or in addition to the punishment (if any) imposed or to be imposed by the Magistrates Court where the offender was summarily convicted, declare that the offender is so incapable and direct that the offender be detained in an institution during Her Majesty's pleasure."

[30] At [23]-[24] of *Pollentine*, their Honours said:

"23 The expression 'incapable of exercising proper control over … sexual instincts' is used in s 18 to identify the question to be answered by medical practitioners appointed to report to a court and to identify the content of the declaration a court must make if indeterminate detention is to be directed. It is the statutory criterion critical to the operation of s 18. The expression is cast in terms suggesting an inquiry about the present existence of some objective fact: about whether the offender can or cannot now exercise 'proper control'. But the inquiry required by s 18(3) of the CLA Act is more complex than that binary description suggests.

24 First, **the inquiry is about future human behaviour**: about the offender's (future) control of sexual instincts. Secondly, it is an inquiry about the exercise of 'proper control', and some content must be given to the adjective 'proper'. Thirdly, the Act's requirements that medical practitioners report their opinion about the question, and that the court may direct indefinite detention only if two medical practitioners report that the offender is incapable of exercising proper control, suggest that the provisions assume that 'capacity to control' is connected with matters discernible principally, perhaps even only, by a medical practitioner. And if that is so, **what those underlying matters are, as well as what consequences follow from them, appear to be matters of opinion rather than objectively demonstrable fact**."

[31] The plurality then went on to say, at [25]-[26]:

"25 Whether, as was suggested in argument, these considerations point to the conclusion that the statutory criterion for directing indeterminate detention requires a court to make some assessment of whether the

risk that the offender will reoffend is 'acceptable' or 'unacceptable' need not be decided. There are evident dangers in attempting to capture the whole of the operation of any statutory criterion by choosing some different collocation of words. And in this case, using notions of 'risk' and what is 'acceptable' or 'unacceptable' to describe the content given to the statutory criterion may be thought to do no more than shift debate about the meaning of the statutory language to a debate about the meaning of the substituted expressions. **But because the decision whether a person is 'incapable of exercising proper control over his sexual instincts' requires consideration of what that person would do if not detained, predictions must be made. It is unsurprising, then, that the *result* of the inquiry can be described in terms of 'risk' and 'likelihood'**.

26 It remains important, however, to emphasise two points about the statutory criterion. First, the consequences for an offender of a court making a direction for detention under s 18 are very large. Secondly, the use of the word 'incapable' suggests that, absent some intervening fact or circumstance, reoffending is well-nigh inevitable."

[32] The plurality said the following, about the CLA Act's provisions for release:

"32 The plaintiffs submitted that the CLA Act provides different criteria for directing detention from those which govern release from detention. In this branch of their argument, the plaintiffs directed chief attention to s 18(5)(b) of the CLA Act and, in particular, what is meant by the phrase 'it is expedient to release him'. It is important to notice, however, that the provisions governing release from detention must be understood in the context of the Act as a whole. In particular, **what is meant by 'it is expedient to release him' must be understood in light of not only the Act's provisions authorising a direction for detention but <u>also</u> the provisions made for conditional release of a detainee**. **<u>All of these considerations</u> inform the meaning that is to be given to the word 'expedient'**.

33 The Governor in Council must (s 18(5)(b)) be satisfied *on the report of two medical practitioners* that 'it is expedient to release' the offender. The required state of satisfaction **must thus draw upon the reports** and, in the context of this Act, **those reports must be directed to whether, at the time of the report, the detainee remains a person whose 'mental condition is such that he is incapable of exercising proper control over his sexual instincts'** (s 18(1)(a)). Section 18(5) makes no mention of any other source of material which may inform the formation of the required state of satisfaction.

> 34 Because s 18(5) provides for the termination of detention, it should not be construed as conferring an unfettered discretion to grant or refuse a detainee's release. On the contrary, **by identifying the report of the medical practitioners as the foundation for the decision about what is 'expedient', the provision should be read as confining the matters which the decision maker may lawfully take into account to the matter with which those reports should deal: whether the detainee remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts**. Whether the decision maker may be informed on that subject by reference to more than the reports provided is a question which need not be decided. But what is 'expedient' turns only on whether the detainee remains incapable of exercising proper control."

[33] At [35] the plurality addressed an argument about whether anticipated adverse community reaction had any role to play in determining expediency, and continued, at [36]:

> 36 … It is enough to say that, for the reasons which have already been stated, neither 'anticipated adverse community reaction' nor other forms of political consequence, whether assumed to be well founded or not, are relevant to whether it is expedient to release a person detained under s 18. **As has been explained, whether it is expedient to release must depend upon the assessment that is made of the risk of reoffending and the nature of the offences that the detainee might commit if released from detention without conditions or supervision**. To take into account 'anticipated adverse community reaction' or 'public opinion', even if those expressions could be and were given some legally sufficient meaning, would be to fall into error.
>
> 37 The conclusions which have been stated follow from construing the expression 'it is expedient' in the context in which it appears in s 18(5) and by reference to the subject matter, scope and purpose of the detention provisions made by s 18 and the CLA Act as a whole. They are conclusions which are consistent with, and reinforced by, the conditional release provisions now set out in Pt 3A of the CLA Act. The substance of those provisions has been described earlier in these reasons. For present purposes the observation of central importance is that, as noted earlier, s 18E requires that there be no release on parole unless the Parole Board 'is satisfied the detainee does not represent an unacceptable risk to the safety of others'.

38 What is an 'unacceptable' risk may, probably will, differ according to the conditions on which a detainee is released into the community. **If detention is terminated under s 18(5), the detainee is released without condition. The risks that are to be considered are to be identified by reference to those circumstances**. By contrast, if released on parole, a detainee may be released on conditions including, for example, continued compliance with medication or other forms of treatment. The risks to be considered in that case would be considered against a background where the detainee would risk return to detention for breach of those conditions, regardless of whether the detainee had committed any offence.

39 It is not necessary to explore these aspects of the matter further. For the purposes of this case, the important observation to make is that there is no relevant difference between the basis on which a court will act in ordering indefinite detention under s 18(3) and the basis on which the Executive must act in deciding whether it is expedient to terminate the detention."

[34] Later in the plurality's reasons, in dealing with an argument that s 18 impermissibly delegates the sentencing task to the Executive, their Honours said:

"44 … A direction for indefinite detention will serve **purposes of punishment and community protection**. According to what happens to the offender during the detention, the direction may serve some reformative purpose. None of these features of the matter points in any way to repugnancy to or incompatability with the institutional integrity of the court that makes the direction or of State courts more generally.

45 Secondly, once it is recognised that release is not at the unconfined discretion of the Executive, but **dependent upon demonstration by medical opinion of the abatement of the risk of reoffending**, the notion that a court has delegated the fixing of the extent of *punishment* loses most, if not all, of its force. The **continuation of detention depends upon danger to the community**, not upon retribution for what the offender has done. …"

[35] In separate reasons, Gageler J described the purpose of s 18(3) is "wholly protective" (at [64] and [73]). At [64] his Honour said:

"… The declaration is to be made and the direction is to be given [under s 18(3)] on the basis of a judicial assessment that detention of the person in such institution as the Governor in Council directs – where he is to be examined medically at least every three months and from where he is not to

be released until the Governor in Council is satisfied on the report of two legally qualified medical practitioners that it is expedient to release him – is warranted to protect society from an unacceptable risk of physical harm arising from that person being incapable of exercising that degree of self-control which would prevent him from committing a further offence of a sexual nature."

[36] In relation to the release provision, Gageler J went on to say, at [65]-[67]:

> "65 The same combination of features also makes plain that the power conferred on the Governor in Council by s 18(5)(b) to release a person who has been made the subject of a declaration and direction under s 18(3)(a) is integral to the protective character of the detention. It is satisfaction on the part of the Governor in Council that it is expedient to release the person which alone triggers the person's release from detention. Release follows automatically if, but only if, the requisite satisfaction is formed. There is no superadded executive discretion either to shorten or to prolong detention.
>
> 66 Satisfaction on the part of the Governor in Council that it is expedient to release a person is satisfaction that continued detention of the person is no longer warranted to protect society from unacceptable risk of physical harm. That satisfaction must be formed on the basis of executive assessment of a report of two medical practitioners. The content of such a report is (by implication) to be directed to the ability of the person to exercise proper control over his sexual instincts.
>
> 67 Risk being inherently a question of degree and the acceptability of a given level of risk being inherently a question of judgment, it is left by s 18(5)(b) to the Governor in Council to determine from time to time the level of risk of physical harm that is acceptable…"

[37] On an application for judicial review such as this, the analysis is confined to the legality of the decision in question, not its merits; it is concerned with whether the decision was one which the Governor in Council was authorised to make.[29]

[38] The exercise of the power to release conferred by s 18(5)(b) is conditioned upon the Governor in Council being satisfied, on the report of two medical practitioners, that it is expedient to release the offender. That involves the making of an evaluative judgment.[30] On judicial review of such a decision, it is not for the court to substitute its opinion for the opinion of the Governor in Council; rather, the inquiry is as to whether

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[29] *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2015) 258 CLR 173 at [23] per French CJ, Bell, Keane and Gordon JJ; see also *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36 per Brennan J.

[30] *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144 at [57]-[58] per French CJ.

the opinion was reasonably formed, by a decision maker who correctly understands the meaning of the law under which they act. As McHugh, Gummow and Hayne JJ said in *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82]:

> "… identifying a wrong issue, asking a wrong question, ignoring relevant material or relying on irrelevant material in a way that affects the exercise of power is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other words, if an error of those types is made, the decision-maker did not have authority to make the decision that was made; he or she did not have jurisdiction to make it. …"[31]

[39] It is not contended that the Governor in Council ignored relevant material, or relied on irrelevant material; nor that the decision was legally unreasonable. The question is, did the Governor in Council identify a wrong issue, or ask the wrong question – that is, misdirect himself in law?

No error demonstrated

[40] I am not persuaded that the decision involved any error of law.

[41] The question for the Governor in Council, under s 18(5)(b), was whether he was satisfied, on the report of two medical practitioners, that "it is expedient to release" the applicant.

[42] Significantly, "release" under s 18(5)(b) means unconditional release (see s 18(14)). As explained by the High Court, what is meant by "it is expedient to release", under s 18(5)(b), must be understood from that perspective; and in light of the provisions of s 18(1) and (3), authorising a direction for indeterminate detention to be made in the first place; and also the provisions for conditional release of such a detainee.[32]

[43] It is apparent from the statement of reasons that the Governor in Council made his decision by reference to, and was informed by the contents of, the reports of the medical practitioners, in particular Dr Beech and Dr Grant.

[44] Those reports are directed to[33] and deal with[34] whether, at the time of the reports, the applicant remains a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts, if released unconditionally.[35]

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31 See also *Buck v Bavone* (1976) 135 CLR 110 at 118-119 per Gibbs J and *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [130]-[137] per Gummow J.
32 *Pollentine v Bleijie* (2014) 253 CLR 629 at [32], [36], [37] and [38].
33 Ibid at [33] per the plurality and [66] and [73] per Gageler J.
34 Ibid at [34].
35 Ibid at [36] and [38].

[45] The plurality found it unnecessary to decide whether the criterion for indeterminate detention (the incapacity referred to in s 18(1) and (3)) requires a court to make some assessment of whether the risk that the offender will reoffend is acceptable or unacceptable; although cautioned against construing legislation by reference to a different collocation of words from those used in the relevant provision.[36] Nevertheless, it is clear, in my view, from both the plurality's and Gageler J's reasons, that the concept of risk is central to the statutory criterion, at the time when a declaration is first made (s 18(1) and (3)), and that it remains of central relevance when the Governor in Council is requested to exercise the power of release under s 18(5)(b).

[46] In so far as the plurality's reasons are concerned, this is clear from the reference to the inquiry being "about future human behaviour: about the offender's (future) control of sexual instincts" (at [24]); from the statement that "because the decision whether a person is 'incapable of exercising proper control over his sexual instincts' requires consideration of what that person would do if not detained, predictions must be made" (at [25]); from the statement that "whether it is expedient to release must depend upon the assessment that is made of the risk of reoffending and the nature of the offences that the detainee might commit if released from detention without conditions or supervision" (at [36]); from the statement that "[t]he risks that are to be considered are to be identified by reference to" the circumstance that release under s 18(5)(b) is unconditional (at [38]); and from the statement that "release is not at the unconfined discretion of the Executive, but dependent upon demonstration by medical opinion of the abatement of the risk of reoffending" (at [45]). It is also clear from the passages from Gageler J's reasons (at [64], [65]-[67]), which are extracted above.

[47] It is not an express requirement of the legislation that the medical practitioners whose report(s) are to found the Governor in Council's decision under s 18(5)(b) must specifically or expressly articulate an opinion[37] whether (or not) the offender "is incapable of exercising proper control over [their] sexual instincts". This is in contrast to s 18(1) and (3), pursuant to which the lawful exercise of the discretion to make a direction for indeterminate detention in the first instance *is* expressly conditioned upon the medical practitioners' report to that effect.[38]

[48] That observation, which is apparent from a comparative textual analysis between s 18(1) and (3), on the one hand, and s 18(5)(b) on the other, is not inconsistent with the statement by the High Court that the reports which are the foundation for the decision under s 18(5)(b) must be directed to, or deal with, the issue of capacity (or incapacity) to control the person's sexual instincts, in the context of unconditional release. The reports can readily be said to be directed to, or deal with, that matter, even if the medical practitioner does not articulate a specific opinion about it.

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[36] Ibid at [25].
[37] Ibid at [24].
[38] See also, as to the requirement under the South Australian equivalent of s 18(3), *The Queen v Kiltie* (1986) 41 SASR 52 at 62.

[49] In this case, Dr Grant did articulate an opinion on the question of incapacity. The applicant's complaint is that it was insufficient, because it identified an incapacity "over time", as opposed to at the time of the report. However, as the plurality explained in *Pollentine v Bleijie* at [24], the inquiry is about future human behaviour; about the offender's (future) control of sexual instincts. In that regard, a statement of opinion that the risk of the applicant reoffending would be high, if he were released unconditionally, and that it is likely that over time he would find himself incapable of exercising an appropriate degree of self-control to prevent re-offending, is in my view clearly directed to the relevant statutory criterion.

[50] Dr Beech did not articulate an express opinion about incapacity *per se.* However, he did articulate a clear opinion about the risk of the applicant reoffending if released unconditionally; describing the risk as "significant" and "moderately high". Again, in my view, Dr Beech's report is directed to, and deals with, the question of this applicant's capacity to exercise proper control over his sexual instincts, if released unconditionally. The articulation of a significant risk of reoffending, if released without supervision or treatment, in circumstances where the likely victim is a child taken from the street, it is possible there would be more than one victim, and any victim would suffer severe psychological and emotional trauma and probably moderate physical trauma, is plainly directed to the central issue for determination, when the Governor in Council is asked to exercise the power of release under s 18(5)(b): does the detainee remain a person whose mental condition is such that he is incapable of exercising proper control over his sexual instincts, if released unconditionally?

[51] On the face of the statement of reasons, it is apparent the Governor in Council was cognisant of that being the "central question" (see the reasons at [12] and [13]). It is recorded in the statement of reasons that both Dr Beech and Dr Grant recommend against unsupervised and unconditional release of the applicant into the community (reasons at [10]) and, further, that the conclusions drawn by the two doctors are conclusions about the capacity of the applicant, in the context of unconditional release, to exercise control over his sexual instincts (reasons at [14]). The latter is a rational and reasonable inference to draw from the content of the reports. Indeed, on this application for review, it was not contended, nor in my view could it have been, that the Governor in Council made such an error of fact (making a finding or drawing an inference in circumstances where there was no evidence to support it, or it is perverse in the relevant sense) as would amount to a reviewable error. [39]

[52] Having articulated the central question, consistently with the High Court's decision, and having regard to the contents of the two reports of Dr Beech and Dr Grant, the Governor in Council was not satisfied that it was expedient to release the applicant from indefinite detention (reasons at [19]).

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[39] *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 359-360; *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at [40]-[41]; and *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 at [40], [78] and [129]-[131].

[53] I am unable to discern any error of law in the manner in which that state of satisfaction was reached. The Governor in Council did not misdirect himself as to the law. He asked himself the right question: whether he was satisfied, on the reports of two medical practitioners, that it was expedient to release the applicant (s 18(5)(b)); with the meaning of "expedient" understood in the manner explained by the High Court, by reference to the circumstance that release in the context of s 18(5)(b) means unconditional release, the criterion for making a direction for indeterminate detention in the first place, and the provisions for conditional release of such a detainee.

[54] The fact that one of the doctors did not expressly address the question of incapacity *per se* does not support a conclusion of error of law on the part of the Governor in Council, for the reasons already articulated.

[55] The applicant relied upon a more recent decision of the Court of Appeal, delivered after the High Court's decision, in relation to an application for judicial review of a decision not to release another prisoner who had been the subject of indefinite detention since 1970: *Butler v Attorney-General* [2018] QCA 243. In that case, the Court of Appeal held that the Governor in Council had made his decision in excess of jurisdiction, because he failed to address "the only relevant question": "upon the basis of the expert opinions that have been offered, am I satisfied affirmatively that the appellant is presently incapable of properly controlling his sexual instincts?" (at [48]). Consistently with the High Court's decision, this sentence ought to be read with the additional words "in the context of unconditional release" at the end.

[56] As it appears from the Court of Appeal's reasons, *Butler* was a very different case from this one, both in terms of the factual context and the reasons for the decision, in that the reports of the medical practitioners supported the conclusion that Mr Butler, by this time an 80 year old, infirm, man, was capable of exercising proper control over his sexual instincts (based on his age, physical health, and behaviour over the 48 years of his incarceration, which had included opportunities for unsupervised access to the community over a number of years) (see *Butler* at [6]-[7], [23]-[25], [28] and [30]). In addition, it was noted that Mr Butler had ceased taking anti-libidinal medication in January 2017, and as such there was said to be no risk attached to the fact that such medication may not be available or administered if he were released (*Butler* at [29]). In that context, the decision maker's apparent focus on whether there remained nevertheless some risk, and whether suitable support measures would be available to Mr Butler if he were released, was found to have resulted in the relevant "test" being misconstrued (*Butler* at [45]-[47]).

[57] The Court of Appeal applied the High Court's decision in *Pollentine v Bleijie* (*Butler* at [35]-[36]). At [37] of *Butler* the Court of Appeal said this:

> "It can be seen that the onus is on the Executive to establish the single ultimate fact upon which alone further indefinite detention can be justified, the detainee's incapacity in the statutory sense. This must be so, for only by

> proof if this extreme condition can such an extraordinary basis for incarceration be justified according to accepted social norms. It is important not to conflate considerations about predictions of future behaviour and notions of 'unacceptable risk' with the statutory criterion, which remains the detainee's present incapacity."

[58] As already noted, the release provision (s 18(5)(b)) is in terms that an offender or prisoner who is directed to be indeterminately detained (for example, under s 18(3)) "shall not be released until the Governor in Council is satisfied on the report of 2 medical practitioners that it is expedient to release the offender or prisoner". The notion of an "onus" on the Executive to establish something does not, in my respectful view, sit comfortably with the wording of s 18(5)(b). However, when one considers the factual context of *Butler* it may be what the Court was conveying was that, in circumstances where, in the reports which are the basis for the formation of the Governor in Council's satisfaction, there is support for the conclusion that the offender is now capable of exercising proper control over their sexual instincts, in order for the Governor in Council to lawfully (and legally reasonably) be satisfied it is not expedient to release them, he bears an evidentiary onus to establish a basis to support that conclusion. In any event, given the distinguishing features between *Butler* and the present application, it is unnecessary to resolve this. The outcome in *Butler* does not support a different conclusion in this case.

[59] In addition, the applicant relied upon *Butler* as supporting the argument that the medical practitioners must expressly address the question, in order for any decision under s 18(5)(b) to be lawfully made. For example, at [46] the Court said:

> "This appeal is not concerned with whether there have been errors of fact in arriving at the decision. The significance of the reports of the medical practitioners is that neither of them expressed the opinion that the appellant satisfied the statutory criterion that, alone, could justify his continued incarceration."

[60] In the context of the decision in *Butler* it seems to me this was an observation about the fact that the medical reports supported the conclusion that Mr Butler *was capable* of exercising the requisite proper control, which called into question the lawfulness of the Governor in Council's decision; it was not a statement of principle that the authors of the medical reports must expressly articulate an opinion as to capacity (as opposed to addressing matters directed to, or which deal with, that issue), in order for the Governor in Council's decision to be lawfully made under s 18(5)(b)).

Conclusion and orders

[61] For the reasons above, I am not persuaded the decision involved any error of law, and accordingly the application for review is dismissed. I will hear the parties as to costs.