SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Winston* [2019] QSC 237
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **DENIS WINSTON** (respondent)
FILE NO/S:	No 9202 of 2008
DIVISION:	Trial Division
PROCEEDING:	Application
DELIVERED ON:	18 September 2019
DELIVERED AT:	Brisbane
HEARING DATE:	18 September 2019
JUDGE:	Davis J
ORDER:	**Orders in terms of the Schedule to these reasons.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY – where the respondent has been detained on a continuing detention order – whether the respondent continues to be a serious danger to the community – whether the respondent should continue to be subject to the continuing detention order *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld), s 8, s 13, s 30 *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396, followed *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, followed
COUNSEL:	J Rolls for the applicant K Prskalo for the respondent
SOLICITORS:	G R Cooper, Crown Solicitor for the applicant Legal Aid Queensland for the respondent

[1] The respondent is presently the subject of a continuing detention order under the provisions of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act").

[2] The Attorney-General applies pursuant to s 27 of the Act for a review of the continuing detention order.

[3] The circumstances of the case are somewhat peculiar. In the end though, both parties urge:

(i) For the confirmation of a decision made on 6 February 2009 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act;

(ii) That the continuing detention order made on 30 October 2018 be rescinded;

(iii) That the respondent be released from custody tomorrow on a supervision order.

Background

[4] The respondent has a long history of sexual offending. In one of the various decisions made by this court under the Act concerning the respondent, A Lyons J set out the respondent's criminal history as follows;[1]

Date	**Description of Offence**	**Sentence**
21/01/1966 Millmerran MC	Aggravated assault of a sexual nature	Convicted and fined £10 pounds. Costs £1/5/-
24/01/1996 Brisbane DC	Indecent dealing with a child under 16 years (2 charged on 1/4/95) Wilfully expose a child under 16 to an indecent act (1/4/95) Wilfully expose a child under 16 to an indecent video tape (1/4/95) Indecent dealing with a child under 16 (1/4/95) Unlawful assault	On each charge: Conviction recorded Probation 3 years concurrent On each charge: conviction recorded imprisonment of 2 years concurrent wholly suspended for a period of 4 years Community service 240 hours
19/08/1997 Brisbane DC	Maintain an unlawful relationship of a sexual nature with a child under 12 years and committed carnal knowledge by anal intercourse with circumstances of aggravation (30/11/96 and 01/01/97)	Imprisonment 10 years

[1] *Attorney-General for the State of Queensland v Winston* [2015] QSC 297.

	Wilfully expose a child under the age of 12 years to an indecent act with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Indecent dealing with a child under the age of 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Wilfully expose a child under the age of 12 years to an indecent photograph with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Wilfully expose a child under the age of 12 years to an indecent video tape with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Carnal knowledge by anal intercourse of a person not an adult under the age of 12 years with circumstances of aggravation (3 charges date unknown between 30/11/96 and 01/01/97)	Imprisonment 7 years
	Maintain an unlawful relationship of a sexual nature with a child under 12 years	Imprisonment 10 years
	Permitting that person to have carnal knowledge by anal intercourse with circumstances of aggravation (between 30/11/96 and 01/01/97)	Imprisonment 10 years
	Permit male person not an adult to have carnal knowledge by anal intercourse whilst under 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 7 years
	Indecent dealing with a child under 12 years with circumstances of aggravation (date unknown between 30/11/96 and 01/01/97)	Imprisonment 4 years
	Wilfully expose a child under 16 years to an indecent magazine (date unknown between 30/11/96 and 28/01/97)	

	Indecent dealing with a child under 12 years (date unknown between 30/11/96 and 28/01/97)	Imprisonment 4 years Imprisonment 4 years All terms of imprisonment to be served concurrently
2/10/1997 Brisbane DC	Breach of probation order of 24/01/96 Breach of community service order of 24/01/96 Breach of suspended sentence of 24/01/96	Breach proven - no action Breach proven - no action Suspended sentence of 2 years imposed - cumulative on sentence of 19/08/97. 125 days spent in custody deemed time already served. Under s 19 of the *Criminal Law Amendment Act* 1945 (Qld), must report address upon release; and report change of address for 10 years after release.

[5] On 6 February 2009, Byrne SJA found that the respondent was a serious danger to the community in the absence of the Division 3 order and then, pursuant to s 13(5)(a) of the Act, ordered that the respondent be detained in custody for an indefinite term for care, control and treatment (a continuing detention order).[2]

[6] The continuing detention order was affirmed on various occasions until 2017. On 16 November 2017, the continuing detention order was rescinded and a supervision order was made by Burns J.

[7] Burns J found that the respondent suffered from borderline intellectual functioning, advancing symptoms of dementia and paedophilia. His Honour found that release upon a supervision order provided adequate protection to the community[3] provided that he be housed in a "secure nursing home-type accommodation."

[8] Such accommodation was found and the respondent was effectively released to that secure accommodation.

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2 Unreported Byrne SJA 6 February 2009 CFI 38.

3 *Dangerous Prisoners (Sexual Offenders) Act* 2003 s 13(6).

[9] On 18 April 2018, the organisation running the supported accommodation indicated that it could no longer offer a spot to the respondent.

[10] Given that it was a term of the supervision order that the respondent reside at approved accommodation, the Attorney-General took the view that the respondent had contravened the supervision order. The responded conceded the alleged contravention and on 30 October 2018, Bowskill J rescinded the supervision order and made a continuing detention order. In doing so, her Honour said;

> "Although it is a contravention of the supervision order, it is appropriate to observe and record that it is not a contravention resulting from particular conduct on the part of Mr Winston in breach of the supervision order, but rather, sadly and unfortunately, the fact that there are not available facilities to care for and cater for a person in his very particular circumstances.
>
> That contravention having been established, the onus is on the respondent to satisfy the court that the adequate protection of the community can still be ensured by a supervision order. The respondent has not sought to do that, accepting, as it seems to me he must, in the circumstances, that in the absence of a secure dementia ward, it cannot be shown.
>
> In those circumstances, I am satisfied that it is appropriate to make orders rescinding the supervision order made on 16 November 2017 and further that the respondent be detained in custody for an indefinite term for care, control and treatment. I will sign an order in terms of the draft handed up, thank you."

[11] Section 20 of the Act deals with contravention of supervision orders and that 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…"[4]

[12] To my mind, it is questionable whether s 20 is engaged where there is no positive act by a person the subject of supervision which can be said to "contravene, is contravening, or has contravened… [the supervision order]."

[13] In any event, that is not a question for me now. It was also not a question for Bowskill J as the respondent conceded that the supervision order had been contravened.

[14] Since her Honour's order, the respondent has been in custody on the continuing detention order which her Honour made.

[15] Alternate appropriate accommodation is available from tomorrow and the parties both consider it appropriate for the respondent to be released on a new supervision order; effectively released to the new secure accommodation which is available.

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[4] *Dangerous Prisoners (Sexual Offenders) Act* 2003 s 20(1).

Statutory provisions

[16] A pivotal section in the Act is s 13. It provides as follows:

> "**13 Division 3 orders**
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> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made.
>
> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
>
> (a) by acceptable, cogent evidence; and
>
> (b) to a high degree of probability;
>
> that the evidence is of sufficient weight to justify the decision.
>
> (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).”

[17] Under s 27, the onus is cast upon the Attorney-General to make applications for review of a continuing detention order made under s 13(5)(a).

[18] Section 30 governs the determination of review applications. Section 30 is as follows:

“**30 Review hearing**

(1) This section applies if, on the hearing of a review under section 27 or 28 and having regard to the required matters, the court affirms a decision that the prisoner is a serious danger to the community in the absence of a division 3 order.

(2) On the hearing of the review, the court may affirm the decision 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 affirm the decision.

(3) If the court affirms the decision, the court may order that the prisoner—

(a) continue to be subject to the continuing detention order; or

(b) be released from custody subject to a supervision order.

(4) In deciding whether to make an order under subsection (3)(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.

(5) If the court does not make the order under subsection (3)(a), the court must rescind the continuing detention order.

(6) In this section—

required matters means all of the following—

(a) the matters mentioned in section 13(4);

(b) any report produced under section 28A."

[19] Section 30, in many ways, mirrors s 13. As to the Court's consideration, the central question is whether the prisoner "is a serious danger to the community in the absence of the division 3 order" and in that way, s 30(1) mirrors s 13(1). The notion of a "serious danger to the community"[5] incorporates the concept of "unacceptable risk".[6] Like an application under s 13, "… the paramount consideration is the need to ensure adequate protection of the community", as can be seen from s 30(4)(a). There is no definition of "unacceptable risk", but in *Fardon v Attorney-General (Qld)*,[7] this was said:

> "225. The yardstick to which the Court is to have regard, of an unacceptable risk to the community, relevantly a risk established according to a high degree of probability, that the prisoner will commit another sexual offence if released, established on and by acceptable and cogent evidence, adduced according to the rules of evidence, is one which courts historically have had regard to in many areas of the law. The process of reaching a predictive conclusion about risk is not a novel one. The Family Court undertakes a similar process on a daily basis

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5 Sections 13(1) and 30(1).
6 Section 13(2).
7 (2004) 223 CLR 575; see also *Attorney-General for the State of Queensland v DBJ* [2017] QSC 302.

and this Court (Mason CJ, Brennan, Dawson, Toohey and Gaudron JJ) said this in *M v M* of the appropriate approach by the Family Court to the evaluation of a risk to a child:

> 'Efforts to define with greater precision the magnitude of the risk which will justify a court in denying a parent access to a child have resulted in a variety of formulations. The degree of risk has been described as a 'risk of serious harm', 'an element of risk' or 'an appreciable risk', a 'real possibility', a 'real risk', and an 'unacceptable risk'. This imposing array indicates that the courts are striving for a greater degree of definition than the subject is capable of yielding. In devising these tests the courts have endeavoured, in their efforts to protect the child's paramount interests, to achieve a balance between the risk of detriment to the child from sexual abuse and the possibility of benefit to the child from parental access. To achieve a proper balance, the test is best expressed by saying that a court will not grant custody or access to a parent if that custody or access would expose the child to an unacceptable risk of sexual abuse.'

226. Sentencing itself in part at least may be a predictive exercise requiring a court on occasions to ask itself for how long an offender should be imprisoned to enable him to be rehabilitated, or to ensure that he will no longer pose a threat to the community. The predictive exercise of an assessment of damages for future losses is also a daily occurrence in the courts." (citations omitted)

[20] In the leading case of *Attorney-General for the State of Queensland v Francis*,[8] the Court of Appeal observed:

> "Adequate protection of the community from the risk of violent sexual offending does not impose a standard that is capable of precise measurement or prediction. The Act does not contemplate that arrangements under a supervision order to prevent the risk of reoffending must be 'watertight'."[9]

[21] Both *Fardon* and *Francis* were cases concerned with the making of orders under s 13 of the Act, but for the reasons I have already explained, the statements of principle are equally apposite to a review under s 30.

[22] Section 29 of the Act provides as follows;

> "**29 Psychiatric reports to be prepared for review**
>
> (1) Unless the court otherwise orders at the hearing of any application under this Act, for the purposes of a review under section 27 or 28, the chief executive must arrange for the prisoner to be examined by 2 psychiatrists.

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8 [2007] 1 Qd R 396.

9 At [39]; see also *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at [29] and *Turnbull v Attorney-General (Qld)* [2015] QCA 54 at [36].

(2) For subsection (1) and the purposes of a review, sections 11 and 12 apply with necessary changes.

(3) Subsection (1) authorises examinations of the prisoner by the 2 psychiatrists.

Psychiatric Reports

[23] Dr Ness McVie and Dr Scott Harden, both consultant psychiatrists, examined the respondent and provided reports in 2017. They have not examined the respondent for the purpose of the present application.

[24] Dr McVie assessed the respondent as an untreated sexual offender suffering a paraphilia of paedophilia being a homosexual, non-exclusive type. She opined that the respondent's risk of reoffending sexually is high and will remain so. She opined that given the respondent's intellectual difficulties he is unable to undergo meaningful therapy.

[25] A place in an aged care facility which provides a dementia unit that is secure and locked and children are not permitted to enter, is available for the respondent from tomorrow. Dr McVie opines that the risk of the respondent committing a serious sexual offence in that environment is acceptably low. She opined that the supervision order should remain in place for 10 years.

[26] Dr Harden also considers the respondent to be a high risk and opines that the risk will continue until he reaches one of the stages of physical incapacity or death. However, Dr Harden's view is that if accommodated in the facility which is now available, the risk would become low. He opines that the term of the supervision order should be at least 10 years.

Consideration

[27] An application for review of a continuing detention order must, by s 29, be preceded by an examination of the respondent by two psychiatrists "unless the court otherwise orders".

[28] Here, there has been no fresh examination of the respondent. Experienced psychiatrists examined him in 2017. It is obvious that his risk is fairly static. He has been on supervision and the supervision order was only revoked because his placement was revoked. By this review, the parties seek to reinstall the respondent into the type of facility where he had previously been successfully housed under supervision. In those circumstances, I will order, under s 29(1), that the requirement for psychiatric examination of the respondent for the purposes of this application be dispensed with.

[29] Under s 30(1) the first question is whether the decision made on 6 February 2009 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act, should be affirmed. The psychiatric evidence suggests that the finding should be affirmed and I will do so.

[30] The next question is whether the respondent should continue to be detained or should be released on supervision. That question is determined by reference to whether the adequate protection of the community can be ensured by the making of a supervision order.

[31] The psychiatric evidence is to the effect that the risk is manageable in a secure facility such as that proposed. I accept the psychiatric evidence and find that the adequate protection of the community can be ensured by the making of a supervision order in the terms appearing in the schedule.

Orders

[32] I make orders in terms of the Schedule to these reasons.

SUPREME COURT OF QUEENSLAND

SCHEDULE TO: *Attorney-General for the State of Queensland v Winston* [2019] QSC 237

PARTIES: **ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND**
(applicant)
v
DENIS WINSTON
(respondent)

SCHEDULE

THE ORDER OF THE COURT IS THAT:

1. Pursuant to s.29(1) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"), the requirement for psychiatric examination of the respondent by two psychiatrists be dispensed with.

2. Pursuant to s.30(1) of the Act, the decision made on 6 February 2009 that the respondent, Denis Winston, is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act be affirmed.

3. Pursuant to s.30(5) of the Act, the continuing detention order made on 30 October 2018 be rescinded.

4. Pursuant to s.30(3)(b) of the Act, the respondent be released from custody on 19 September 2019 and be subject to the following requirements until 19 September 2029.

The respondent must:

General terms

1. report to a Queensland Corrective Services officer at the Queensland Probation and Parole Office closest to his place of residence between 9am and 4pm on the day of his release from custody, and at that time, advise the officer of his current name and address;

2. report to, and receive visits from, a Queensland Corrective Services officer at such times and at such frequency as determined by Queensland Corrective Services;

3. notify a Queensland Corrective Services officer of every change of his name, place of residence or employment at least two (2) business days before the change happens;

4. be under the supervision of a Queensland Corrective Services officer for the duration of this order;

5. comply with a curfew direction or monitoring direction;

6. comply with any reasonable direction under section 16B of the Act given to him;

7. comply with every reasonable direction of a Queensland Corrective Services officer that is not directly inconsistent with a requirement of this order;

8. not commit an offence of a sexual nature during the period of this order;

9. not commit an indictable offence during the period of this order;

Residence

10. not leave or stay out of Queensland without the permission of a Queensland Corrective Services officer;

11. reside at a place within the State of Queensland as approved by a Queensland Corrective Services officer by way of a suitability assessment and obtain written approval prior to any change of residence;

12. not reside at a place by way of short term accommodation including overnight stays without the permission of a Queensland Corrective Services officer;

Contact with victims

13. not have any direct or indirect contact with the victims of his sexual offences;

Requests for information

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

Disclosure of plans and associates

15. if directed by a Queensland Corrective Services officer, make complete disclosure of the terms of this supervision order and the nature of his past offences to any person as nominated by the Queensland Corrective Services officer, who may contact such persons to verify that full disclosure has occurred;

Alcohol and other substances

16. abstain from the consumption of alcohol and illicit drugs for the duration of this order;

17. submit to any form of drug and alcohol testing including both random urinalysis and breath testing as directed by a Queensland Corrective Services officer;

18. disclose to a Queensland Corrective Services officer all prescription and over the counter medication that he obtains;

19. take prescribed drugs as directed by a medical practitioner;

Treatment and counselling

20. attend upon and submit to assessment, treatment, and/or medical testing by a psychiatrist, psychologist, social worker, counsellor or other mental health professional as directed by a Queensland Corrective Services officer at a frequency and duration which shall be recommended by the treating intervention specialist;

21. permit any medical, psychiatrist, psychologist, social worker, counsellor or other mental health professional to disclose details of treatment, intervention and opinions relating to level of risk of re-offending and compliance with this order to Queensland Corrective Services if such a request is made for the purposes of updating or amending this supervision order and/or ensuring compliance with this order;

22. attend any program, course, psychologist, social worker or counsellor, in a group or individual capacity, as directed by a Queensland Corrective Services officer in consultation with treating medical, psychiatric, psychological or other mental health practitioners where appropriate;

Children

23. not establish or maintain any supervised or unsupervised contact with children under 16 years of age, including undertaking any care of children under 16 years of age, except with prior written approval of a Queensland Corrective Services officer;

24. advise a Queensland Corrective Services officer of any repeated contact with a parent of a child under 16 years of age;

25. not visit or attend on the premises of any establishment where there is a dedicated children's play area or child minding area without the prior written approval of a Queensland Corrective Services officer;

26. not visit public parks without the prior written approval of a Queensland Corrective Services officer;

27. obtain the prior approval of a Queensland Corrective Services officer before attending the premises of any shopping centre;

28. not join, affiliate with, attend on the premises of or attend at the activities carried on by any club or organisation in respect of which there are reasonable grounds for believing there is either child membership or child participation without the prior written approval of a Queensland Corrective Services officer;

29. not collect any material that contains images of children, and dispose of such material if directed to do so by a Queensland Corrective Services officer;

Mobile phones and other devices

30. obtain the prior written approval of a Queensland Corrective Services officer before accessing a computer or the internet;

31. supply to a Queensland Corrective Services officer any password or other access code known to him to permit access to such computer or other device or content accessible through such computer or other device and allow any device where the internet is accessible to be randomly examined using a data exploitation tool to extract digital information or any other recognised forensic examination process;

32. not access child exploitation material or images of children on a computer or on the internet or in any other format;

33. allow any other device including a telephone or camera to be randomly examined. If applicable, account details and/or phone bills are to be provided upon request of a Queensland Corrective Services officer; and

34. advise a Queensland Corrective Services officer of the make, model and phone number of any mobile phone owned, possessed or regularly utilised by him within 24 hours of connection or commencement of use, and this includes reporting any changes to mobile phone details.