SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Penningson* [2019] QSC 271
PARTIES:	**THE ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **PAIS WANMAN PENNINGSON** (respondent)
FILE NO/S:	SC No 2031 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	4 November 2019
JUDGE:	Davis J
ORDER:	**THE COURT, being satisfied to the requisite standard that the respondent, Pais Wanman Penningson, is a serious danger to the community in the absence of an order pursuant to Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (the Act), ORDERS THAT:** **1. The decision made by Burns J on 24 June 2016 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act, be affirmed; and** **2. The respondent be released on 6 November 2019 under supervision for five years until 6 November 2024 on an order 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 for three years – where at the second annual review one year ago the continuing detention order was affirmed – where the respondent was subject to examination by psychiatrists for the purposes of the third

	annual review – where the parties agreed that adequate protection of the community could be ensured by a supervision order under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (the DPSOA) – where the respondent conceded the need for a supervision order under Division 3 of Part 2 of the DPSOA – whether the respondent should continue to be subject to the continuing detention order
	Dangerous Prisoners (Sexual Offenders) Act 2003, s 13, s 16, s 27, s 30
	Attorney-General for the State of Queensland v Fardon [2019] QSC 002, cited *Attorney-General for the State of Queensland v Francis* [2007] 1 Qd R 396, followed *Attorney-General (Qld) v Penningson* [2016] QSC 146, related *Attorney-General (Qld) v Penningson* (unreported Dalton J 30 October 2017), related *Attorney-General (Qld) v Penningson* [2018] QSC 263, related *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, followed *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, followed *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, cited
COUNSEL:	M Maloney for the Applicant A E Loode for the Respondent
SOLICITORS:	G R Cooper, Crown Solicitor for the Applicant Legal Aid Queensland for the Respondent

[1] The respondent is the subject of a continuing detention order made under s 13(5)(a) of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) ("the Act").

[2] Continuing detention orders must be reviewed.[1] This is the third review.

Background

[3] The respondent was born on 29 January 1996. He is of Papua New Guinean and Torres Strait Islander heritage.

[4] A continuing detention order was made by Burns J on 24 June 2016.[2] That order was reviewed by Dalton J on 30 October 2017[3] and reviewed again by me on 5 November 2018.[4] In both 2017 and 2018, the continuing detention order was affirmed.

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1 *Dangerous Prisoners (Sexual Offenders) Act* 2003, Part 3.

2 *Attorney-General (Qld) v Penningson* [2016] QSC 146.

[5] The respondent's history of offending is described in the earlier judgments[5] as is his medical state, including various diagnoses.[6]

[6] When the matter was last reviewed, significant problems with releasing the respondent on a supervision order included:

(i) his underlying risk factors were largely untreated because he had not completed appropriate programs;

(ii) because of his intellectual limitations, group programs were unsuitable;

(iii) again, because of his limitations, he would require significant support in the community.

[7] On the occasion of the last review of the continuing detention order, an affidavit was received under the hand of Jolene Monson (Ms Monson). Ms Monson is the acting manager of the High Risk Offender Management Unit (HROMU) in Corrective Services and is involved in the management of prisoners such as the respondent. She swore that arrangements had been made for individual treatment to be provided to the respondent by a psychologist, Tracy Richards. Ms Monson swore that the individual treatment with Ms Richards commenced on 17 August 2018.

The current position

[8] The respondent has undergone further treatment with Ms Richards. Psychiatrists, Doctors Arthur and Harden examined the respondent and prepared reports.

[9] Dr Arthur opined:

1. the respondent's unmodified risk of sexual recidivism remains moderately high;

2. if released on supervision, the respondent will need significant levels of support because of his intellectual disabilities and other issues; and

3. if released on supervision, the respondent should have treatment from a mental health team and "culturally appropriate community supports".

[10] Dr Harden's opinion is that the respondent's unmodified risk of sexually reoffending is "at least moderate-high and possibly high". However, "if he were to be placed on a supervision order in the community, in my opinion the risk of sexual recidivism would reduce to low to moderate". Dr Harden, like Dr Arthur, emphasised the need for personal care and support in the community.

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3 *Attorney-General (Qld) v Penningson* (unreported Dalton J 30 October 2017).

4 *Attorney-General (Qld) v Penningson* [2018] QSC 263.

5 *Attorney-General (Qld) v Penningson* [2018] QSC 263 at [5]-[8].

6 At [12] and [24]-[25].

[11] What was proposed by the respondent was that he be released on supervision to live with his mother and family. A detailed assessment of that proposal was completed at the direction of Ms Monson which concluded that such an arrangement was unsuitable.

[12] An application has been made for assistance for the respondent under the National Disability Insurance Scheme (NDIS). Funding has not yet been approved for an NDIS package which therefore somewhat limits the options available to Corrective Services in providing support to the respondent. However, Ms Monson gave evidence before me to the following effect:

(i) suitable accommodation has been identified;

(ii) the respondent will continue, while in the community, receiving treatment from Ms Richards and will see her weekly;

(iii) participation by the respondent with an indigenous men's group will be facilitated;

(iv) the respondent will see his senior case manager twice a week;

(v) the respondent will be case managed by a community mental health service;

(vi) the respondent will work with a community based art project group;

(vii) the respondent will participate in a life skills activities group.

[13] Ms Monson maintained in her evidence that the respondent's mother's residence remains unsuitable as accommodation for him in the community under supervision. She said that work would be done to see if and when the respondent could be integrated back into the family home, although that was not a short-term proposition.

[14] Counsel informed me from the bar table that the two psychiatrists had been consulted about the arrangements now being proposed and did not have specific concerns with those arrangements. No party required the doctors to give evidence or be cross-examined and they were not called.

The statutory regime

[15] Section 13 is a pivotal section. It provides as follows:

> "**13 Division 3 orders**
>
> (1) This section applies if, on the hearing of an application for a division 3 order, the court is satisfied the prisoner is a serious danger to the community in the absence of a division 3 order (a ***serious danger to the community***).
>
> (2) A prisoner is a serious danger to the community as mentioned in subsection (1) if there is an unacceptable risk that the prisoner will commit a serious sexual offence—
>
> (a) if the prisoner is released from custody; or
>
> (b) if the prisoner is released from custody without a supervision order being made.

(3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—

(a) by acceptable, cogent evidence; and

(b) to a high degree of probability;

that the evidence is of sufficient weight to justify the decision.

(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)."

[16] As in this case, when a continuing detention order is made, s 27 casts an onus upon the Attorney-General to make annual applications for review of the order.

[17] 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."

[18] 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"[7] incorporates the concept of "unacceptable risk".[8] 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).

[19] There is no definition of "unacceptable risk", but in *Fardon v Attorney-General (Qld)*[9], 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

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[7] Sections 13(1) and 30(1).

[8] Section 13(2).

[9] (2004) 223 CLR 575.

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 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)[10]

[20] In *Attorney-General for the State of Queensland v Francis,*[11] 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'."

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

Consideration

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[10] For analysis of the concept of risk, and the risk being "unacceptable" see *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268 at [28]-[30], *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359 at [6], and the judgment of Bowskill J in *Attorney-General for the State of Queensland v Fardon* [2019] QSC 002.

[11] [2007] 1 Qd R 396.

[22] The applicant seeks an order under s 30(1) affirming the decision of Burns J made on 24 June 2016 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act. That affirmation of the order made on 24 June 2016 must only be made upon "acceptable, cogent evidence"[12] and must be made "to a high degree of probability".[13]

[23] Here, the uncontested evidence of the two psychiatrists, Dr Arthur and Dr Harden, who are well experienced in this area, is that the respondent's risk of reoffending sexually,[14] if unsupervised is high. That evidence should be accepted and is of sufficient weight to affirm the decision that the respondent is a serious danger to the community in the absence of a Division 3 order.[15]

[24] Both parties urge the making of a supervision order in the terms which appear as a schedule to these reasons. In exercising the discretion given by s 30(3) of the Act, I have turned my mind to the mandatory considerations prescribed by s 30(4).

[25] The evidence here, which I accept, is that the risk is significantly reduced where the respondent is released on a supervision order to live in suitable accommodation and is provided with the appropriate levels of support and treatment.

[26] I accept the evidence of Ms Monson that appropriate accommodation has been identified and is available. I accept her evidence that Corrective Services is in a position to provide the treatment and support I have outlined earlier.

[27] The supervision order, by its terms, requires the respondent to follow directions of a Corrective Services' officer[16] and I accept Ms Monson's evidence that Corrective Services will implement the plan that she has outlined in her evidence for the respondent's accommodation, treatment and management.

[28] I am satisfied that the adequate protection of the community can be ensured by releasing the respondent on a supervision order in terms appearing in the schedule.

Orders

[29] I make the following orders:

1. The decision made by Burns J on 24 June 2016 that the respondent is a serious danger to the community in the absence of an order pursuant to Division 3 of the Act, be affirmed; and

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[12] Section 30(2)(a).

[13] Section 30(2)(b).

[14] Which I take to be a reference to the risk of committing a "serious sexual offence" (s 13(2) and definition of "serious sexual offence" and s 30(1)).

[15] Section 30(1) and (2).

[16] Section 16(1)(b).

2. The respondent be released under supervision on 6 November 2019 for five years until 6 November 2024 on an order in terms of the schedule to these reasons.

SUPREME COURT OF QUEENSLAND

SCHEDULE TO:	*Attorney-General for the State of Queensland v Penningson* [2019] QSC 271
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **PAIS WANMAN PENNINGSON** (respondent)

SCHEDULE

THE COURT is satisfied that Pais Wanman Penningson is a serious danger to the community. The rules in this order are made according to the *Dangerous Prisoners (Sexual Offenders) Act 2003*.

THE COURT ORDERS THAT Pais Wanman Penningson be released from prison on 6 November 2019 and must follow the rules in this supervision order for five years, until 6 November 2024.

TO Pais Wanman Penningson:

1. You are being released from prison but only if you obey the rules in this supervision order.

2. If you break any of the rules in this supervision order, the police or Queensland Corrective Services have the power to arrest you. Then the Court might order that you go back to prison.

3. You must obey these rules for the next five years.

Reporting

4. On the day you are released from prison, you must report before 4 pm to a corrective services officer at the Community Corrections office closest to where you will live. You must tell the corrective services officer your name and the address where you will live.

5. A corrective services officer will tell you the times and dates when you must report to them. You must report to them at the times they tell you to report. A corrective services officer might visit you at your home. You must let the corrective services officer come into your house.

   To "report" means to visit a corrective services officer and talk to them face to face.

Supervision

6. A corrective services officer will supervise you until this order is finished. This means you must obey any reasonable direction that a corrective services officer gives you about:

    (i) where you are allowed to live; and

    (ii) rehabilitation, care or treatment programs; and

    (iii) using drugs and alcohol; and

    (iv) anything else, except for instructions that mean you will break the rules in this supervision order.

    A "reasonable direction" is an instruction about what you must do, or what you must not do, that is reasonable in that situation.

    If you are not sure about a direction, you can ask a corrective services officer for more information, or talk to your lawyer about it.

7. You must answer and tell the truth if a corrective services officer asks you about where you are, what you have been doing or what you are planning to do, and who you are spending time with.

8. If you change your name, where you live or any employment, you must tell a corrective services officer at least two business days before the change will happen.

    A "business day" is a week day (Monday, Tuesday, Wednesday, Thursday and Friday) that is not a public holiday.

No Offences

9. You must not break the law by committing a sexual offence.

10. You must not break the law by committing an indictable offence involving violence.

Where you must live

11. You must live at a place approved by a corrective services officer. You must obey any rules that are made about people who live there.

12. You must not live at another place. If you want to live at another place, you must tell a corrective services officer the address of the place you want to live. The corrective services officer will decide if you are allowed to live at that place. You are allowed to change the place you live only when you get written permission from a corrective services officer to live at another place.

    This also means you must get written permission from a corrective service officer before you are allowed to stay overnight, or for a few days, or for a few weeks, at another place.

13. You must not leave Queensland. If you want to leave Queensland, you must ask for written permission from a corrective services officer. You are allowed to leave Queensland only after you get written permission from a corrective services officer.

Curfew direction

14. A corrective services officer has power to tell you to stay at a place (for example, the place you live) at particular times. This is called a curfew direction. You must obey a curfew direction.

Monitoring Direction

15. A corrective services officer has power to tell you to:

    (i) wear a device that tracks your location; and

    (ii) let them install a device or equipment at the place you live. This will monitor if you are there.

    This is called a monitoring direction. You must obey a monitoring direction.

Employment or study

16. You must get written permission from a corrective services officer before you are allowed to start a job, start studying or start volunteer work.

17. When you ask for permission, you must tell the corrective services officer these things:

    (i) what the job is;

    (ii) who you will work for;

    (iii) what hours you will work each day;

    (iv) the place or places where you will work; and

    (v) (if it is study) where you want to study and what you want to study;

18. If a corrective services officer tells you to stop working or studying you must obey what they tell you.

Motor Vehicles

19. You must tell a corrective services officer the details (make, model, colour and registration number) about any vehicle you own, borrow or hire. You must tell the corrective services officer these details immediately (on the same day) you get the vehicle.

    A vehicle includes a car, motorbike, ute or truck.

Mobile Phone

20. You are only allowed to own or have (even if you do not own it) one mobile phone. You must tell a corrective services officer the details (make, model, phone number and service provider) about any mobile phone you own or have within 24 hours of when you get the phone.

21. You must give a corrective services officer all passwords and passcodes for any mobile phone you own or have. You must let a corrective services officer look at the phone and everything on the phone.

No contact with any victim

22. You must not contact or try to contact any victim(s) of a sexual offence committed by you. You must not ask someone else to do this for you.

    "Contact" means any type of communication, including things like talking, texting, sending letters or emails, posting pictures or chatting. You must not do any of these things in person, by telephone, computer, social media or in any other way.

Rules about Alcohol and Drugs

23. You are not allowed to take (for example, swallow, eat, inject, smoke or sniff) alcohol.

24. You are not allowed to take (for example, swallow, eat, inject, smoke or sniff) any illegal drugs. You are also not allowed to have with you or be in control of any illegal drugs.

25. A corrective services officer has the power to tell you to take a drug test or alcohol test. You must take the drug test or alcohol test when they tell you to. You must give them some of your breath, spit (saliva), pee (urine) or blood when they tell you to do this.

26. You are not allowed to go to bottle shops, pubs, clubs, hotels or nightclubs which are licensed to supply or serve alcohol. If you want to go to one of these places, you must first get written permission from a corrective services officer. If you do not get written permission, you are not allowed to go.

Rules about medicine

27. You must tell a corrective services officer about any medicine that a doctor prescribes (tells you to buy). You must also tell a corrective services officer about any over the counter medicine that you buy or have with you. You must do this within 24 hours of seeing the doctor or buying the medicine.

28. You must take prescribed medicine only as directed by a doctor. You must not take any medicine (other than over the counter medicine) which has not been prescribed for you by a doctor.

Rules about rehabilitation and counselling

29. You must obey any direction a corrective services officer gives you about seeing a doctor, psychiatrist, psychologist, social worker or other counsellor.

30. You must obey any direction a corrective services officer gives you about participating in any treatment or rehabilitation program.

31. You must let corrective services officers get information about you from any treatment or from any rehabilitation program.

Speaking to corrective services about what you plan to do

32. You must talk to a corrective services officer about what you plan to do each week. A corrective services officer will tell you when and how to do this (for example, face to face or in writing).

33. You must also tell a corrective services officer the name of new persons you have met;

    This includes: people who you spend time with, work with, make friends with, see or speak to (including by using social media or the internet) regularly; and

34. You may need to tell new persons about your supervision order and offending history. A corrective services officer will instruct you to tell those persons and a corrective services officer may speak to them to make sure you have given them all the information.