SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General for the State of Queensland v Burley* [2019] QSC 286
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **TROY ALLEN BURLEY** (respondent)
FILE NO/S:	No 11902 of 2019
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Date of Orders: 15 November 2019 Date of Publication of Reasons: 22 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	15 November 2019
JUDGE:	Davis J
ORDER:	**Date of Orders: 15 November 2019** **THE COURT, being satisfied that there are reasonable grounds for believing that the respondent, Troy Allen Burley, is a serious danger to the community in the absence of an Order made under Division 3 of the *Dangerous Prisoners (Sexual Offenders) Act* 2003 ("the Act"), ORDERS THAT:** **1) The application for a Division 3 Order be set for hearing at 10:00am on 27 July 2020;** **2) Pursuant to s 8(2)(a) of the Act, the respondent undergo examinations by two psychiatrists being, Dr Timmins and Dr Aboud, who are to prepare reports in accordance with s 11 of the Act;** **3) Pursuant to s 8(2)(b)(ii) of the Act, the respondent be detained in custody until 4:00pm on 27 July 2020.**
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 is

serving a term of imprisonment upon his pleas of guilty to 28 counts, including three of rape – where the Attorney-General commenced proceedings against the respondent under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (Qld) (DPSOA) – where the respondent was convicted of further offences and sentenced to a term of imprisonment after the filing of that application – where the respondent has filed an appeal against those convictions – where from 15 February 2020 the respondent will only be serving the sentences subject to the appeal – where questions arose as to the impact of the conviction and subsequent appeal upon the DPSOA proceedings – whether the s 8 hearing should be adjourned – whether the respondent presents a serious danger to the community in the absence of a supervision order under Division 3 of Part 2 of the DPSOA

Corrective Services Act 2006 (Qld), Sch 4
Criminal Code Act 1899 (Qld), s 349
Criminal Law Amendment Act 1945 (Qld), s 18
Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld), s 3, s 5, s 8, s 9A, s 11, s 13, s 43A
Penalties and Sentences Act 1992 (Qld), Part 10, s 159A

Attorney-General for the State of Queensland v Beattie [2007] QCA 96, cited
Attorney-General for the State of Queensland v CCJ [2019] QSC 267, cited
Attorney-General for the State of Queensland v DBJ [2017] QSC 302, cited
Attorney-General (Qld) v Fardon [2019] 2 Qd R 487, cited
Attorney-General for the State of Queensland v Fisher [2018] QSC 74, cited
Attorney-General for the State of Queensland v Kanaveilomani [2015] 2 Qd R 509, followed
Attorney-General for the State of Queensland v Lawrence [2011] QCA 347, cited
Attorney-General for the State of Queensland v Nemo [2018] QSC 202, cited
Attorney-General for the State of Queensland v Phineasa [2013] 1 Qd R 305, cited
Attorney-General for the State of Queensland v Travers [2018] QSC 73, cited
The Queen v Troy Allen Burley; ex parte Attorney-General of Queensland [1998] QCA 098, cited

COUNSEL: J Rolls for the Applicant
B Mumford for the Respondent

SOLICITORS: G R Cooper Crown Solicitor for the Applicant

Legal Aid Queensland for the Respondent

[1] The Attorney-General commenced proceedings against the respondent under the *Dangerous Prisoners (Sexual Offenders) Act* 2003 (DPSOA). After filing the application, the respondent was convicted of further offences and sentenced to a term of imprisonment. The respondent appealed against that conviction. The appeal has not yet been heard and determined.

[2] Questions have arisen as to the impact of the conviction and subsequent appeal upon the proceedings which have been commenced under the DPSOA.

[3] The Attorney-General initially applied for the application to be adjourned, but then after argument, pressed for orders under s 8 of the DPSOA.

[4] On 15 November 2019, I made the following orders:

1. The application for a Division 3 Order be set for hearing at 10:00am on 27 July 2020;
2. Pursuant to s 8(2)(a) of the Act, the respondent undergo examinations by two psychiatrists being, Dr Timmins and Dr Aboud, who are to prepare reports in accordance with s 11 of the Act;
3. Pursuant to s 8(2)(b)(ii) of the Act, the respondent be detained in custody until 4:00pm on 27 July 2020.

Background

[5] The respondent is presently serving a sentence of imprisonment consequent upon his pleas of guilty in the District Court at Brisbane on 24 November 1997 to 28 counts, including three of rape.[1]

[6] The respondent's offending involved violent attacks upon women unknown to him. The offending occurred during a period of eight months in 1995 and 1996.

[7] The respondent was sentenced to a term of imprisonment of 16 years and that was increased to 20 years upon an appeal by the Attorney-General.[2] He committed further offences which attracted further terms of imprisonment ordered to be served cumulatively

[8] The terms of imprisonment all expire on 15 February 2020.

[9] On 29 October 2019, the Attorney-General filed an application seeking orders pursuant to the DPSOA. That application was returnable before the court on 13 November 2019.

[10] On 30 October 2019, the respondent was convicted of three counts of sexual assault and three counts of rape committed by him in prison. He was sentenced to an effective term of seven years cumulative upon the sentences presently being served. The result of the 2019 sentences is that all the sentences being served by the respondent will expire in May 2027.

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[1] *Criminal Code* s 349.

[2] *The Queen v Troy Allen Burley; ex parte Attorney-General of Queensland* [1998] QCA 98.

[11] On 7 November 2019, the respondent filed a Notice of Appeal against the 2019 convictions. No date has been set by the Court of Appeal for the hearing of that appeal.

[12] When the matter came before me on 13 November 2019, the Attorney-General applied for an adjournment of the application to await the outcome of the appeal. That was not opposed, but questions arose as to whether the respondent could be lawfully held in custody after 15 February 2020 if the appeal was allowed. Questions also arose as to whether, if the appeal was allowed some time after 15 February 2020, the court retained jurisdiction to make orders against the respondent under the DPSOA.

[13] I heard further argument on 15 November 2019 and made the orders that I did.

Statutory context

[14] To appreciate the questions that have arisen, it is necessary to refer to various provisions of the DPSOA.

[15] Section 3 of the DPSOA expresses the legislation's objects. Section 3 is as follows:

> "**3 Objects of this Act**
>
> The objects of this Act are—
>
> (a) to provide for the continued detention in custody or supervised release of a particular class of prisoner to ensure adequate protection of the community; and
>
> (b) to provide continuing control, care or treatment of a particular class of prisoner to facilitate their rehabilitation."

[16] The "particular class of prisoner" to whom the DPSOA is intended to apply is identified in various sections. Section 5 empowers the Attorney-General to apply for orders against "a prisoner". The term "prisoner" is defined in s 5 itself. Section 5 provides:

> "**5 Attorney-General may apply for orders**
>
> (1) The Attorney-General may apply to the court for an order or orders under section 8 and a division 3 order in relation to a prisoner.
>
> (2) The application must—
>
> (a) state the orders sought; and
>
> (b) be accompanied by any affidavits to be relied on by the Attorney-General for the purpose of seeking an order or orders under section 8; and
>
> (c) be made during the last 6 months of the prisoner's period of imprisonment.
>
> (3) On the filing of the application, the registrar must record a return date for the matter to come before the court for a hearing (preliminary hearing) to decide whether the court is satisfied that

there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a division 3 order.

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

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

(6) In this section—

prisoner means a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, or serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section." (emphasis added)

[17] Section 5(6) defines "prisoner" by reference to a person serving a period of imprisonment "for a serious sexual offence". That term is defined as:

"***serious sexual offence*** means an offence of a sexual nature, whether committed in Queensland or outside Queensland—

(a) involving violence; or

(b) against a child; or

(c) against a person, including a fictitious person represented to the prisoner as a real person, whom the prisoner believed to be a child under the age of 16 years."

[18] At the time the Attorney-General filed the application under s 5, the respondent was serving a term of imprisonment which included the period of imprisonment imposed upon him in the Court of Appeal in 1998 for the offences of rape. There is no doubt that those offences were "serious sexual offences"[3] and that the respondent was then a "prisoner" as defined by s 5(6).

[19] Once the application is filed, there is a preliminary hearing pursuant to s 8 of the DPSOA. At that hearing, the court determines whether there ought to be a further hearing against "the prisoner" for orders under s 13.

[20] Sections 8 and 13 are as follows:

"**8 Preliminary hearing**

(1) If the court is satisfied there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a

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[3] *Attorney-General for the State of Queensland v Phineasa* [2013] 1 Qd R 305.

division 3 order, the court must set a date for the hearing of the application for a division 3 order.

(2) If the court is satisfied as required under subsection (1), it may make—

(a) an order that the prisoner undergo examinations by 2 psychiatrists named by the court who are to prepare independent reports; and

(b) if the court is satisfied the application may not be finally decided until after the prisoner's release day—

(i) an order that the prisoner's release from custody be supervised; or

(ii) an order that the prisoner be detained in custody for the period stated in the order. (statutory note deleted)

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)."

[21] The definition of "prisoner" in s 5(6) only applies for the purposes of s 5. The definition in s 5(6) identifies that class of prisoner against whom an application can be filed.

[22] The definition of "prisoner" in s 5(6) does not apply to either ss 8 or 13. For those sections, the definition of "prisoner" is:

> "***prisoner*** means a prisoner within the meaning of the Corrective Services Act 2006.
>
> *Note—*
> Also see section 43A."

[23] The *Corrective Services Act* 2006 defines "prisoner" relevantly here as:

> "***prisoner***—
>
> (a) means a person who is in the chief executive's custody ..."[4]

[24] Section 43A of the DPSOA is in these terms:

> **"43A Persons who remain prisoners for particular purposes**
>
> (1) This section provides for the application of this Act to a person.
>
> (2) A person who is subject to a continuing detention order or interim detention order remains a prisoner.
>
> (3) A person who is subject to a supervision order or interim supervision order remains a prisoner for the purposes of any relevant application, appeal or rehearing.
>
> (4) A person who is released from custody, without an interim supervision order having being made, after the court sets a date for the hearing of an application for a division 3 order relating to the person remains a prisoner for the purposes of the application.
>
> (5) A person who is released from custody, without an interim supervision order having being made, after the Court of Appeal makes an order under section 43(2)(d)[5] relating to the person remains a prisoner for the purposes of the rehearing.
>
> (6) A person who is released from custody after the hearing of any application under this Act, without an interim supervision order having being made, remains a prisoner for the purposes of any appeal against the decision and for any subsequent appeal." (emphasis added)

[25] Therefore, an application under s 5 can only be filed against a person who is then serving a period of imprisonment for a "serious sexual offence" or is "serving a period of imprisonment that includes a term of imprisonment for a "serious sexual offence". Once that term of

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[4] Schedule 4.

[5] Section 43(2)(d) concerns appeals from orders made under the *Dangerous Prisoners (Sexual Offenders) Act* 2003.

imprisonment expires, so does the Attorney-General's right to file an application against the person. However, once the application is filed, the Attorney-General can proceed to seek orders notwithstanding that the term of imprisonment for the "serious sexual offence" has expired.[6]

[26] Section 8(2)(b) provides that if the application is not to be finally decided until after expiry of the sentence then the prisoner can be detained, by order, until the proceedings are concluded (an interim detention order). There is also power under s 9A to make an interim detention order. Section 9A is as follows:

> **"9A Court may adjourn hearing for division 3 order**
>
> (1) The court may, on application or on its own initiative, adjourn the hearing of an application for a division 3 order.
>
> (2) If the court adjourns the hearing of the application and is satisfied the application may not be finally decided until after the prisoner's release day, the court may make an order—
>
> (a) that the prisoner's release from custody be supervised; or
>
> (b) that the prisoner be detained in custody for the period stated in the order." (statutory note deleted)

The issue

[27] Presently, the respondent is serving an effective sentence of 27 years which includes sentences for "serious sexual offences". After 15 February 2020, he will only be serving the sentences which were imposed on 30 October 2019. Even if the sentences imposed on 30 October 2019 were not themselves "serious sexual offences" (which in fact they are), he would still qualify as a "prisoner" under s 5(6) because the sentences for the October 2019 convictions commence immediately upon the expiry of the 1998 sentences, and there is therefore one unbroken period of imprisonment, part of which is being served for a "serious violent offence".[7]

[28] However, if before the s 8 hearing is completed, the respondent is successful in his appeal against the 2019 convictions and those convictions fall some time after 15 February 2020, then the respondent:

(i) will have served the sentences imposed in 1998;

(ii) will not be serving sentences for the convictions in October 2019 as those convictions have fallen; and

(iii) is therefore not a "prisoner" for the purposes of either s 5 or s 8.

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[6] *Attorney-General for the State of Queensland v CCJ* [2019] QSC 267 at [41] and [42].

[7] *Attorney-General v Kanaveilomani* [2015] 2 Qd R 509.

[29] If the s 8 application proceeds and a date is set for the s 13 hearing, then even if the Court of Appeal quashed the 2019 convictions and entered acquittals, he would still be a "prisoner" for the purposes of s 13.[8]

[30] If however the appeal against the convictions of October 2019 is unsuccessful, then the Attorney-General cannot, on the authority of *Attorney-General for the State of Queensland v Kanaveilomani*[9] seek orders either under s 5, s 8 or s 13 because applications under the DPSOA can only be made within six months of the expiry of the term of imprisonment identified under s 5, and the definition of "prisoner" in s 5(6) informs the operation of s 13.

[31] In *Kanaveilomani*,[10] the respondent was serving a period of imprisonment for offences of rape. Those offences were undoubtedly "serious sexual offences" for the purposes of the DPSOA. He was granted parole but reoffended. His parole was suspended indefinitely. Arguably, the later offences were not "serious sexual offences". The Attorney-General filed an application under s 5. That application was brought within six months of the expiry of the sentences imposed on the rape charges.

[32] Orders under s 8 were made and a date set for the final hearing under s 13. The rape sentences expired and the respondent was detained by order under s 9A. Before the final hearing, the respondent pleaded guilty to the later offences and was sentenced to 13 years imprisonment. A declaration was made by the sentencing judge that time served from the date of expiry of the rape sentences was time served on the later offences.[11] The effect of that declaration was that the whole period from the commencement of service of the rape sentences to the end of the sentences for the later offences, was "a period of imprisonment that includes a term of imprisonment for a serious sexual offence".[12]

[33] The judge who heard the s 13 application in *Kanaveilomani* dismissed it, and on appeal, questions arose as to whether the court could, or should, make an order under s 13 where the release of the respondent was still a decade away.

[34] All three judges on appeal held:

(i) that the application, when filed, was a valid application under s 5;

(ii) that there was an unbroken period of imprisonment ending in 2023 which "[includes] a term of imprisonment for a serious sexual offence"; and

(iii) therefore an application under the DPSOA could be made within six months of the end of the sentence then being served.

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[8] Section 43A; and see my observations at paragraphs [52] and [53].

[9] [2015] 2 Qd R 509.

[10] [2015] 2 Qd R 509.

[11] *Penalties and Sentences Act* 1992, s 159A(3)(c).

[12] *Dangerous Prisoners (Sexual Offences) Act* 2003, s 5(6) and the definition of "period of imprisonment" and *Attorney-General for the State of Queensland v Kanaveilomani* [2015] 2 Qd R 509 at [122]-[133] and [155]-[166].

[35] Both McMurdo P and Philippides J (as her Honour then was) held that the dismissal of the application by the primary judge was appropriate because an application under the DPSOA could be made within six months of the end of the sentence that had been imposed for the later offences. That was because the entire period was a "period of imprisonment" and that period of imprisonment "[included] a term of imprisonment for a serious sexual offence". McMurdo P held:

> "[27] The primary judge was right to dismiss the appellant's application for a Pt Div 3 order. By the time that application was heard, the respondent was serving a period of imprisonment that includes a term of imprisonment for a serious sexual offence so that the appellant could apply under s 5 of the *DPSO Act* after 20 May 2023 for Pt 2 Div 3 orders concerning the respondent. As a result, the present application was inutile."

And Philippides J:

> "[169] The application, which was validly brought, when filed on 22 June 2010, was premised on a then correct understanding that the respondent's period of imprisonment expired on 19 November 2010. By the time of the hearing, the period of imprisonment in terms of s 5(6) of the *DPSOA* that applied had altered and the relevant full time discharge date had been superseded by one that expired on 20 November 2023. In those circumstances, the application was futile; it ceased to have any utility."

[36] Morrison JA conducted an extensive analysis of the provisions of the DPSOA concluding that essential to the scheme of the legislation was that the assessment of risk under s 13 was to be conducted at or near the expiry of the term of imprisonment for the "serious sexual offence" or the term of imprisonment which included a term of imprisonment for a "serious sexual offence".

[37] With respect, his Honour's judgement highlights the fundamental distinction between the scheme of the DPSOA and that of other schemes of preventative detention that have been introduced in Queensland. Section 18 of the *Criminal Law Amendment Act* 1945 (the 1945 Act) provides that where a person is convicted of a sexual offence, the sentencing judge might determine that the offender "is incapable of exercising proper control over the offender's sexual instincts" and might, at the time of sentence, direct that the person be detained during her Majesty's pleasure. Part 10 of the *Penalties and Sentences Act* 1992 (Part 10) provides that a sentencing judge might impose a term of imprisonment and then declare an "indefinite sentence" resulting in the detention of the offender after expiry of the sentence. Both schemes therefore require an assessment, at the time of sentence, of the risk which may be posed by the offender at the date of expiry of the sentence. The DPSOA authorises the filing of an application within six months of the expiry of the sentence[13] and an assessment of risk upon proposed release.[14]

[38] His Honour then held:

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[13] Section 5(2)(c).

[14] *Attorney-General for the State of Queensland v Kanaveilomani* [2015] 2 Qd R 509 at [118]-[120].

"**Relevance of subsequent custody to s 13(1)?**

[122] Under s 5(1) of the Act an application for a Division 3 order can only be made in relation to a prisoner as defined under s 5(6).

[123] Section 9A provides a mechanism whereby the prisoner can be detained in custody if the final hearing may occur —after the prisoner's release day. Since an application has to be made within the last six months of the prisoner's period of imprisonment, and brought on with some speed it seems clear that the reference to the prisoner's release day in s 9A(2) is to the release day in respect of the custody under the period of imprisonment referred to in s 5(6).

[124] Section 13(2) defines when a prisoner is a serious danger to the community for the purposes of s 13(1). That is so if there is an unacceptable risk that the prisoner will commit a serious sexual offence if the prisoner is released from custody, or released from custody without a supervision order being made. In my opinion the reference to being "released from custody" refers to the custody resulting from the period of imprisonment referred to in s 5(6) of the Act, as extended by any interim custody the product of an order under s 9A(2)(b), that is to say the period of imprisonment which relates to the serious sexual offence, or that which includes a term of imprisonment for a serious sexual offence, as extended by any detention order (pending the hearing of the application) under s 9A(2)(b). A term of imprisonment for another offence which does not form part of the "period of imprisonment" for the purposes of s 5(6) of the Act does not result in custody for the purposes of s 13(2).

[125] Were it otherwise, as the respondent contends, the court would be required to assess the question of risk at an indeterminate point in the future. Whilst the respondent argues that it would be at the end of the subsequent term of imprisonment, that does not necessarily follow. A subsequent term that did not form part of the "period of imprisonment" for the purposes of s 5(6) would be the subject of possible remissions, parole, a successful appeal out of time or even (perhaps more remotely) a pardon. At the point in time at which the court is making its assessment under s 13 how could the court possibly know when that eventual release from custody might occur?

[126] An example will suffice to illustrate the problem with adopting that approach, and why it runs contrary to the objects of the *DPSO Act* (in particular that relating to ensuring adequate protection of the community) and the proper construction of s 13(1) and (2) as set out above.

[127] Consider a prisoner serving a period of imprisonment which qualifies for the purposes of s 5(6) of the Act. An application is regularly brought for a continuing detention order. Because the application may be finally determined after the release day under that period of imprisonment,

orders are made under s 9A for further detention in custody. The release day passes but the prisoner is still in custody under those orders. The prisoner commits another offence whilst in custody and as a consequence is sentenced to a term of imprisonment for a substantial period of years. The subsequent offences are not serious sexual offences. There is no declaration under s 159A of the *PSA*, backdating the sentence to a point earlier than the commission of the offences.

[128] Under that scenario the second term of imprisonment could not be part of the "period of imprisonment" for the purposes of s 5(6) of the Act. On the respondent's approach the court would nonetheless have to make its assessment of risk under s 13(2) by reference to the eventual release date under the second term of imprisonment. However, the eventual release date from custody under that term of imprisonment may not be a set time. That time may vary according to parole, possible appeals or even a pardon. How can the court dealing with the application predict when that release date might be? In my opinion, the indeterminate nature runs entirely contrary to the scheme of the *DPSO Act*, and the canons applicable to the construction of such a statute, which require interference with the rights and liberties of a prisoner to no more than the necessary extent, and timely determination of an application for a Division 3 order.

[129] The scenario postulated becomes even more difficult to sustain if one follows the course which is advanced by the respondent in this particular case. The contention was that because the learned primary judge had to look to the eventual release date under the subsequent term of imprisonment the court could not come to a conclusion that there was a relevant risk at that eventual release date, even though if that question was assessed at the date of the determination of the application the conclusion would be that there was an unacceptable risk. Under that scenario the application would be dismissed. Subsequent to the dismissal the prisoner brings a successful appeal in respect of the subsequent term of imprisonment (obtaining an extension of time to do so). Thus the reason why the court could not conclude that there was a risk has disappeared and a prisoner who would have been assessed as an unacceptable risk but for that fact, is released into the community.

[130] What is a court to do when confronted with that situation? Should it simply adjourn the application to see what might unfold in respect of the second sentence of imprisonment? The answer is clearly, no.

[131] The foregoing is sufficient to demonstrate why the respondent's contention does not sit with a sensible construction of s 13(2), nor with the objects of the Act.

[132] Therefore, in my opinion, when s 13(2)(a) refers to a risk being assessed "if the prisoner is released from custody", that is a reference to the custody which is a product of the period of imprisonment referred to in

s 5(6), as extended by any interim custody the product of an order under s 9A.

[133] That construction conforms with the evident purpose behind requiring that any application for a Division 3 order be made during the last six months of the prisoner's period of imprisonment, brought on within 28 business days after filing, and given a timely hearing. It means that the court will be making its assessment under s 13 at a time proximate to the possible release of the prisoner, and not in relation to some indeterminate period or point in the future. That level of certainty is consistent with the balancing that must be made between what the legislation requires, the protection of the community, and the rights of the prisoner.

[134] None of the foregoing means that the subsequent term of imprisonment would not be a relevant factor for the court to take into account in exercising its discretion under s 13(5) of the Act. But that is a different question from the one postulated under s 13(1) and (2)." (citations omitted)

[39] Some of the issues considered by Morrison JA in the passage I have reproduced, assume that the second period of imprisonment is not one for a "serious sexual offence" and that the second period of imprisonment does not flow continuously from the initial period of imprisonment imposed for a "serious sexual offence", so together the two terms do not form a "period of imprisonment" for the DPSOA.

[40] Neither the scenario imagined in paragraph [128] of his Honour's judgement, nor that postulated in paragraph [129] relates to the current situation. In the present case, the second period of imprisonment is a period of imprisonment for a serious sexual offence, and the second period of imprisonment and the initial period of imprisonment together clearly form a continuous "period of imprisonment" for the purposes of the DPSOA. The problem faced here is that, given the pending appeal, it is unclear when the "period of imprisonment" might end. It may end on 15 February 2020, or it may end in 2027.

[41] I do not consider his Honour's comments at paragraph [130] of the passage reproduced above to shut out the possibility here of adjourning the s 8 hearing.

[42] In my view however, while it might be appropriate to adjourn the s 13 hearing here if an order is made under s 8, it is not appropriate to adjourn the s 8 hearing.

[43] The power to make an interim detention order under s 9A does not arise unless the court "adjourn(s) the hearing of an application for a Division 3 order". That must mean adjourning the date set under s 8. The power to make an interim detention order under s 8 only arises, by s 8(2) "if the court is satisfied as required under subsection (1)". Section 8(1) refers to the satisfaction that "there are reasonable grounds for believing the prisoner is a serious danger to the community in the absence of a Division 3 order". In other words, that determination under s 8(2)(b) must be made after the determination of the substance of the s 8 application.

[44] Consequently, it was appropriate to:

(i) hear the s 8 application;

(ii) if the Crown obtained the finding under s 8(1), the s 13 hearing could be set for a date well into the new year by which time hopefully the appeal will be determined;

(iii) make orders under s 8(2)(a) for psychiatric examination of the respondent; and

(iv) make an interim detention order covering the period up to the hearing.

[45] If by the time of the s 13 hearing the appeal has not been determined, then an application for an adjournment under s 9A and the making of further interim detention orders under that section can be entertained.

The s 8 application: are there reasonable grounds for believing the respondent is a serious danger to the community in the absence of a Division 3 order?

[46] The function of the court hearing a s 8 application was explained succinctly, with respect, in *Attorney-General (Qld) v Fardon*[15] where the Court of Appeal said:

> "[11] The practical effect of s 8 is to provide a threshold to be met by applicants for Division 3 orders, as a pre-requisite for being able to seek those orders at a final hearing. If the threshold is passed, it allows the application to proceed to a final hearing and, in the meantime, s 8 allows the Court to make orders, including that the prisoner undergo a psychiatric examination. It can be seen that there is limited occasion for any exercise of discretion under s 8. If the court is satisfied that reasonable grounds for the prescribed belief are shown, a hearing date must be set; the discretion is confined to deciding whether orders for psychiatric examination and further supervision or custody pending the final hearing should be made. In contrast, s 13 confers a complete discretion as to whether and which orders are made once the requisite satisfaction for the purposes of that provision is reached."[16]

[47] By s 13(2) of the DPSOA, a prisoner is a serious danger to the community if there is an "unacceptable risk" that the prisoner will commit a "serious sexual offence" if released from custody or released without a supervision order being made. The risk to be assessed is not a risk of offending generally, or even offending violently, but a risk of commission of a "serious sexual offence"; a risk of an offence of a sexual nature involving violence or against children.[17] Whether a risk is unacceptable is ultimately a matter of judgment taking into account at least

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[15] [2018] QCA 251.

[16] See also *Attorney-General for the State of Queensland v Nemo* [2018] QSC 202.

[17] *Attorney-General for the State of Queensland v Travers* [2018] QSC 73 and *Attorney-General for the State of Queensland v Fisher* [2018] QSC 74.

the nature of the risk, the likelihood of it eventuating and the seriousness of the consequences in the event that the risk is realised.[18]

[48] Here there are reasonable grounds for believing that the respondent is an unacceptable risk of committing a serious sexual offence in the absence of a Division 3 order. In particular:

(i) Dr Michael Beech, Psychiatrist, in his report dated 6 August 2018, considered that the respondent suffered from substance use disorder and sexual sadism. He also, according to Dr Beech, demonstrated significant psychopathic traits; and

(ii) Dr Scott Harden, Psychiatrist, in his report dated 13 September 2019, diagnosed the respondent with sexual sadism with a mixed personality disorder with antisocial and narcissistic features with possible psychopathic features. Dr Harden thought that the unmodified risk of sexual recidivism was high.

[49] It is appropriate then, pursuant to s 8 of the DPSOA, to set the date for hearing as 27 July 2020. Hopefully by that point the respondent's appeal against his convictions will have been determined.

[50] Mr Rolls for the Attorney-General submitted that psychiatrists should not be nominated until the outcome of the appeal against the 2019 convictions is known. I reject that submission. There are often significant delays between the nomination of psychiatrists under s 8 and the production by the psychiatrists of their reports. This is no doubt, at least in part, caused by the fact that often there is a large amount of material for the psychiatrists to review. If the appeal is successful and acquittals are entered then the only reason for the respondent's detention will be the pending DPSOA application. It is not fair to the respondent that there is a delay in the preparation of reports. The examinations of him should commence now.

[51] It was appropriate to nominate two psychiatrists for the purposes of conducting examinations pursuant to s 8(2)(a) and I nominated Drs Timmins and Aboud.

[52] Over objection from Mr Mumford who appeared for the respondent, I made an order pursuant to s 8(2)(b)(ii) that the respondent be detained in custody until 4.00 pm on 27 July 2020, being the date for hearing of the application for orders under s 13. Mr Mumford submitted that such an order was not necessary because by s 43A(4), if the respondent's appeal against conviction was upheld at a time after 15 February 2020 and he was released from custody, he would still be a "prisoner" for the purposes of s 13[19] and therefore a person against whom orders could be made.

[53] Mr Mumford's submission should be accepted to the extent that it accurately reflects the operation of s 43A(4). However, in the absence of an interim detention order made under s 8(2)(b)(ii), if the respondent's appeal was upheld and his convictions quashed and an

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[18] *Attorney-General for the State of Queensland v Beattie* [2007] QCA 96 at [19], *Attorney-General for the State of Queensland v Lawrence* [2011] QCA 347 at [90] and *Attorney-General for the State of Queensland v DBJ* [2017] QSC 302 at [13].

[19] Because a date for hearing for Division 3 orders had been set.

acquittal entered, he would then be at large until the DPSOA proceedings were concluded. Given the current psychiatric evidence, that is not desirable.

[54] For those reasons, I made the orders which I did.