SUPREME COURT OF QUEENSLAND

CITATION:	*Attorney-General (Qld) v Flenady* [2020] QSC 44
PARTIES:	**ATTORNEY-GENERAL FOR THE STATE OF QUEENSLAND** (applicant) **v** **JAMES BRIAN ROBERT FLENADY** (respondent)
FILE NO/S:	BS No 10062 of 2019
DIVISION:	Trial Division
PROCEEDING:	Originating application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	13 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	2 March 2020
JUDGE:	Burns J
ORDER:	**Being satisfied to the requisite standard that the respondent, James Brian Robert Flenady, is a serious danger to the community in the absence of an order under Division 3 of Part 2 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), the order of the court is that the respondent is detained in custody for an indefinite term for control, care or treatment.**
CATCHWORDS:	CRIMINAL LAW – SENTENCE – SENTENCING ORDERS – ORDERS AND DECLARATIONS RELATING TO SERIOUS OR VIOLENT OFFENDERS OR DANGEROUS SEXUAL OFFENDERS – DANGEROUS SEXUAL OFFENDER – GENERALLY– where there is an application pursuant to s 5 of the *Dangerous Prisoners (Sexual Offenders) Act 2003* for an order pursuant to Division 3 of Part 2 of that Act – whether the respondent is a serious danger to the community in the absence of a Division 3 order – where the court may order a continuing detention order or a supervision order pursuant to s 13(5) of the Act – whether the adequate protection of the community could be reasonably and practicably managed by a supervision order – whether the requirements under s 16 of the Act could be reasonably and practicably managed by corrective services officers *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld), s 13, s 16,

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Attorney-General for the State of Queensland v Beattie [2007] QCA 96, cited
Attorney-General for the State of Queensland v Fardon [2011] QCA 155, cited
Attorney-General v Francis [2006] QCA 324, cited
Attorney-General for the State of Queensland v Sutherland [2006] QSC 268, cited
Attorney-General for the State of Queensland v Waghorn [2006] QSC 171, cited

COUNSEL: M Maloney for the applicant
L Dollar for the respondent

SOLICITORS: Crown Solicitor for the applicant
Legal Aid (Qld) for the respondent

[1] The Attorney-General for the State of Queensland applies for an order pursuant to s 13(5) of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) to detain the respondent, James Brian Robert Flenady, in custody for an indefinite term for care, treatment or control or, in the alternative, that he be released from custody subject to a supervision order.

[2] The statutory premise for the making of either form of order is that there is evidence on which the court can be satisfied that the respondent is a serious danger to the community, that is to say, that there is an unacceptable risk that he will commit, relevantly, a sexual offence against children if released into the community. The respondent concedes, through his counsel, that he is a serious danger to the community in the absence of an order but contends that the adequate protection of the community can be ensured by his release subject to a supervision order for a period of 10 years. Nevertheless, the applicant, through her counsel, presses for the making of a continuing detention order. That is principally because, it was contended, the respondent presents as a high risk of committing a serious sexual offence if released and the underlying causes of his offending are largely untreated.

[3] For the reasons that follow, the respondent will be detained in custody for an indefinite term for control, care or treatment.

Background

[4] The respondent is a 38 year old divorced man, and father to three daughters from two relationships. He was born in Brisbane and raised around Queensland. He had a complicated and quite deprived childhood, having been placed in foster care at a young age. He left school when he was about 14 years of age and moved out of home when he was 18 (by this time, he was living with his maternal grandmother and mother). Thereafter, his employment history was patchy, although he worked casually with his grandfather as a cleaner for a period of time along with some seasonal work. The respondent also attempted to complete his secondary schooling at one stage and was, according to him, accepted into a degree course in Theology, but dropped out after approximately 12 months. He was placed on a disability pension around 2005 after he was

diagnosed with Schizotypal Personality Disorder, Anxiety and Agoraphobia. Apart from some stints at a call centre in 2011 or 2012, he has not worked much ever since.

[5] There is evidence before the court to the effect that the respondent has an established history of alcohol abuse. There are also some reports to the effect that he misused prescription drugs and cannabis although, to some who have asked him questions about that, the respondent has denied any such use. He has significant psychiatric issues, commencing with the diagnosis just mentioned when he was a teenager, and he has been medicated for his conditions. The respondent appears to accept that he has suffered from anxiety type symptoms in the past but denies that he has been depressed. My overall impression is that the respondent is not a particularly reliable historian so far as his psychiatric history is concerned.

[6] In around 2000, the respondent formed a relationship with a woman with whom he lived for five or six years. During that time, their union produced two daughters. After separating, he formed another relationship about a year later. That woman had two children from a previous relationship and, eventually, a child to the respondent. He remained with her until July 2014 when police became aware of allegations made by one of her children (then nine years of age) to the effect that the respondent had attacked her in a bathroom. I will come to that episode in a moment.

[7] The respondent has a concerning, and relevant, criminal history.

[8] On 23 July 2003, he pleaded guilty in the District Court at Brisbane to one count of stalking. At the time of this offence, he was aged between 21 and 22 years and was 22 at the time of sentencing. The offence involved sending numerous letters containing obscene material to his 32 year old female neighbour. He was placed on two years' probation. The order contained a condition requiring him to submit to medical, psychological or psychiatric treatment.

[9] On 3 April 2006, the respondent again appeared in the District Court at Brisbane. He pleaded guilty to one count of using the internet to expose indecent material to a child under the age of 16 years. He was 23 at the time of this offence. The circumstances of this offending were that he engaged in a sexually explicit conversation on an internet chat site with a police officer posing as a 14 year old boy. Amongst other things, the respondent sent photographs of his genitals. He was sentenced to a period of 12 months imprisonment to be served as an Intensive Correction Order. Again, the order contained a condition requiring him to submit to medical, psychological or psychiatric treatment.

[10] As to the index offences, on 20 July 2017, the respondent was convicted by a jury in the District Court at Ipswich of five offences – one count of assault with intent to rape, one count of attempted rape, one count of common assault, one count of deprivation of liberty and one count of indecent treatment of a child under 12 years. Each of these offences arose from the same episode, committed in December 2013 against the nine year old daughter of his then de facto wife (and referred to at [6] above). The respondent was aged 32 at the time of these offences and was 36 years old at the time of sentencing.

[11] The circumstances of this offending are confronting. The victim had been asleep in her bedroom and was awoken by the respondent who took hold of her and told her to stay calm. He led her into a spare bedroom and removed her clothing. The child attempted to resist but the respondent pinned her legs down with his own legs and held her arms above her head. He then attempted to place his penis in her mouth and, when she tried to call

for help, the respondent placed his hand over her mouth. Somehow, the child managed to struggle free and crawled under the bed. The respondent dragged her out and continued attempts to make her suck his penis.

[12] Eventually, the victim was allowed to use the bathroom but when she tried to close the door, the respondent held it open. As she went to rise from the toilet, the respondent held her down by her shoulder, prised her mouth open and again attempted to place his penis inside her mouth. She struggled, closing her mouth and biting his thumb. The respondent then grabbed her around her throat and this obstructed her breathing. He then told her that she could either choose to suck his penis or he would penetrate her anus. At one point she tried to escape, managing to run to the door, but the respondent grabbed her legs and dragged her back. He again held her down on the toilet seat. He was holding her with one hand and masturbating with the other. He then ejaculated onto her leg and, soon after, his attack ended when his then de facto wife wanted to use the bathroom. Her daughter immediately told her what had happened and the police were eventually informed. The respondent was arrested on 17 February 2015 and during his four day trial in July 2017, he denied all allegations.

[13] For this offending, the respondent received an effective head sentence of three years imprisonment.[1] The learned sentencing judge, his Honour Judge Horneman-Wren SC, made the following pertinent observations when passing sentence:

> "This offending against your nine year old, effectively, stepdaughter was brazen offending and a significant breach of trust. It was quite persistent on the occasion on which it occurred, although it did, as [the respondent's barrister] has pointed out, only occur over this one occasion. It did involve a level of personal violence against her. There is no victim impact statement from the child. There is one from the mother, but that does not speak of any particular ongoing difficulties for the child in a psychological or emotional sense, which is something for which everyone can be grateful. The mother does, however, speak of the ongoing effects which this breach of trust has had upon the family.
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> …
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> The sentence must be one which punishes you to an extent or a way that is just in all the circumstances, and provide conditions that the court considers will help you to be rehabilitated. Your prospects for rehabilitation do not appear all that strong, given your further offending. The sentence must also deter you and others from committing the same or similar offences, and you quite obviously need personal deterrence, given your earlier offending of a sexual kind and, indeed, with some violence with an earlier common assault, but general deterrence is also a particularly important sentencing consideration in a case such as this. Those who breach the trust and abuse children in their care must know that such conduct will be met with condign punishment, and the

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[1] A period of 258 days of pre-sentence custody was declared as time served under the terms of imprisonment that were imposed.

sentence must make it clear that the community, acting through the court, denounces this sort of conduct. It goes almost without saying to say that the community finds all sexual offending against children abhorrent, particularly within a household where a child is meant to be safe and protected."

[14] The respondent subsequently appealed against his convictions, complaining that the verdict of the jury was unreasonable. On 20 April 2018, the Court of Appeal dismissed the appeal.

[15] The respondent's full time release date is tomorrow, 14 March 2020.

Is the respondent a serious danger to the community in the absence of an order?

[16] Section 13 of the Act is in the these terms:

> "**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***).
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> (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—
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> (a) if the prisoner is released from custody; or
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> (b) if the prisoner is released from custody without a supervision order being made.
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> (3) On hearing the application, the court may decide that it is satisfied as required under subsection (1) only if it is satisfied—
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> (a) by acceptable, cogent evidence; and
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> (b) to a high degree of probability;
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> that the evidence is of sufficient weight to justify the decision.
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> (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—
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> (aa) any report produced under section 8A;
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> (a) the reports prepared by the psychiatrists under section 11 and the extent to which the prisoner cooperated in the examinations by the psychiatrists;
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> (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] It will be seen that s 13 of the Act requires the court to consider whether the respondent is a serious danger to the community in the absence of a Division 3 order. To do so, it is necessary to determine whether there is an unacceptable risk that the respondent will commit a serious sexual offence if released from custody or if he is released from custody without a supervision order being made. A "serious sexual offence" means an offence of a sexual nature involving violence or against children. The court may decide that the respondent is a serious danger to the community in the absence of an order under Division 3 only if satisfied by acceptable, cogent evidence and to a high degree of probability that the evidence is of sufficient weight to justify that decision. Furthermore, in deciding whether a prisoner is a serious danger to the community, the court must have regard to the various matters set forth in s 13(4). The onus is on the applicant to satisfy the court that an order is required: s 13(7).

[18] It is important to a proper understanding of the provisions of the Act to appreciate that the relevant risk is the risk of commission of a serious sexual offence; it is not the risk that the respondent will offend in other ways. It follows that the respondent will represent a serious danger to the community within the meaning of s 13(2) if there is an unacceptable risk that he will commit a serious sexual offence if released from custody, with or without a supervision order. In considering whether any such risk is unacceptable, it is necessary to take into account, and balance, the nature of the risk and the degree of likelihood of it eventuating, with the seriousness of the consequences if that risk does eventuate.

[19] The respondent has been satisfactorily behaved whilst in custody. There have been no reported breaches, incidents or contraventions. He became eligible for parole on 12 September 2018 but no application was made. He is currently employed in the prison system as a level 3 team leader in Ferrous Metal.

[20] At different times whilst in custody, risk assessments have bene made, in consequence of which it was recommended that he participate in a specialised sexual offending program, as well as low intensity substance intervention. Although the respondent did accept a place on the Short Substance Intervention Program conducted at the Wolston Correctional Centre in late 2009, (he could not complete that program) he has steadfastly refused any offence specific sexual treatment in custody. This is not because he maintains any denial of the index offending; rather, it is because he does not wish to participate in group therapy. He is however willing to engage in individual treatment.

[21] In 2018, the respondent declined two offers of a place on the Getting Started: Preparatory Program.[2] That program is designed to motivate offenders to participate in a group setting to address their offending in a more intensive treatment program, reduce anxiety to being in a group environment, identify any possible barriers to offenders participating in a more intensive sexual offending program and increase their belief in the ability to change, as well as the ability to maintain that change. Following completion of the GS:PP, an offender's suitability to undertake a more intensive form of sexual offending program is assessed. The GS:PP runs over a period of approximately six weeks, with participants

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[2] On 29 November 2018 and 17 December 2018.

attending two sessions per week, each of two hours duration.

[22] On 16 October 2019, the respondent was offered, and accepted, a place on the Moderate Intensity Substance Intervention Program. This was a 10 week initial substance abuse program using a cognitive behavioural approach to provide participants with knowledge and skills to change their substance misuse. He did not attend the first session of the program (on 29 November 2019) and his enrolment was therefore cancelled. He was approached again on 17 January 2020 to gauge his willingness to participate in a MISIP commencing in April this year. He declined to do so. Nonetheless, should the court order his continuing detention, it is likely that this offer will be repeated. Likewise, he will be offered a place on the Low Intensity Substance Intervention Program that will commence in May.

[23] The more intensive form of sexual offending treatment is the High Intensity Sexual Offending Program. It is, again, a group based program which assists participants to identify thoughts, feelings and behaviours associated with their offending behaviour, and develop skills and strategies to avoid reoffending. The program is delivered in a continuous rolling format to allow for greater flexibility in tailoring the intensity and pace of the participants' progression through treatment in accordance with their assessed risk and need. Three sessions are delivered each week, with each session being three hours in duration. The total number of hours required to complete the program is 351. It generally takes between nine to 12 months to complete.

[24] The HISOP is not offered in the community, and there are limited spaces within the group. There is a waiting list to enter the program. With current waitlist projections, the next available opportunity for the respondent to enter the HISOP would likely be in January 2021, should he reconsider his attitude to participation.

[25] There is also the Medium Intensity Sexual Offending Program. That program is, however, only offered to prisoners who have been assessed at being at low to moderate risk of reoffending. Given the expert psychiatric evidence adduced in this case, it seems unlikely that, even if the respondent was willing, he would be offered a place in this program because his overall risk of reoffending is considered to be high.

[26] As earlier mentioned, the respondent's risk of reoffending has been the subject of assessment. In 2014 and 2019, the Static-99R risk assessment tool was administered and, on both occasions, the respondent was assessed as representing a high risk of reoffending. In between those assessments, the respondent was assessed by Mr Alec Jones, a consultant forensic psychologist, in 2017. Mr Jones produced a report dated 11 September 2017. He noted that the respondent appeared to have been impacted by unstable mental health "for some time" and then suffered from symptoms of anxiety, agoraphobia and alcohol abuse. Mr Jones also expressed the opinion that the respondent suffers from the "severe effects of childhood trauma". He recommended that further testing be undertaken to confirm his putative diagnosis of Schizotypal Personality Disorder.

[27] More recently, and for the purposes of this application, the respondent was examined by three psychiatrists, Drs Arthur, Beech and Phillips. Each was required for cross-examination on the hearing of the application.

[28] **Dr Arthur** assessed the respondent on 9 November 2018 at the Wolston Correctional Centre. In his report dated 5 December 2018, Dr Arthur noted what he described as a "significant psychiatric history" on part of the respondent, although "little in his current

clinical presentation to suggest a primary psychotic illness". The respondent's history of anxiety with elements of social phobia and panic with acrophobia along with mood symptoms which possibly reached the diagnostic threshold for a depressive disorder were noted. In Dr Arthur's opinion, the respondent also fulfilled the criteria for Alcohol Misuse Disorder, currently in remission in a controlled environment. Furthermore, given the respondent's reported history of paranoia, suspiciousness of others and hallucinations, Dr Arthur considered that he fulfilled the criteria for a Psychotic Disorder not otherwise specified. A valid differential diagnosis would include Schizotypal Personality. Lastly, the respondent appeared to Dr Arthur to have "significant avoidant personality traits".

[29] Dr Arthur administered a range of risk assessment tools which he relied on, along with structured clinical judgment to express the opinion that the respondent's risk of sexual reoffending would be "high at the time of his release from jail". Dr Arthur also noted that the respondent's offences are recurrent and show a pattern of escalation in severity. The index offences, in particular, involve physical coercion and threats of violence. Dr Arthur also considered that the respondent appeared to have a very poor understanding of the drivers for his sexual offences and appeared to be in denial regarding the presence of deviant sexual interests. His appreciation of his risks for future sexual violence was poor and risk management strategies to address deviant sexual interests or sexual preoccupation were largely absent.

[30] Dr Arthur considered that, if released, the respondent is at risk of engaging in inappropriate sexual behaviour with minors, driven by his deviant sexual interests. If suitably aroused or under the disinhibiting effects of alcohol, the respondent might seek to progress such interactions to contact with children or teenagers. An alternate scenario would be that the respondent enters a long-term relationship with an adult female partner which brings him into contact with children. In that scenario, there is a risk that the respondent might act out against children in a manner similar to his index offences. Again, that risk would be increased by the concomitant abuse of alcohol. Interpersonal conflict or dissatisfaction in adult relationships may also be relevant precipitating factors.

[31] Dr Arthur recorded that the respondent had not engaged in any offence specific treatment. He expressed the firm view that the respondent has "unmet treatment needs in relation to his sexual offending and alcohol abuse". Dr Arthur considers that the respondent should complete the HISOP prior to release from custody and that he will require further psychological therapy to address his deviant sexual interests.

[32] That said, Dr Arthur expressed the opinion in his report that a supervision order, with strict conditions, may reduce the respondent's risk of reoffending. However, when giving evidence on the hearing of the application, Dr Arthur pointed out that, because of the respondent's treatment needs, if the respondent were to be released he would be leaving "jail pretty much the way he came into jail, with the same level of risk, the same lack of insight and with an inadequate plan to manage his risks and to better understand his triggers and … specific risk factors for his sexual reoffending". He added that the respondent had little insight, would not acknowledge the risk he posed and had no plan to manage it. It is therefore preferable, Dr Arthur said, that the respondent receive treatment prior to release because that will give those treating him a better understanding of his offending as well as the "drivers and reasons for them". Individual treatment in the community is not an adequate substitute for the HISOP although individual therapy should still occur in his opinion.

[33] When cross-examined, it was pointed out that the respondent was adamant that he would not participate in any group programs, even under a continuing detention order. If that remains the position, he would be left untreated. Aspects of the respondent's prejudicial upbringing were drawn to Dr Arthur's attention and the difficulties, including anxiety, the respondent would experience in a group setting. Dr Arthur agreed that it is not unreasonable to assume that the respondent will experience some anxiety were he be required to engage in a group treatment program but considered that, after a period of time, that anxiety would drop. Dr Arthur said that group therapy is a core aspect of cognitive behavioural therapy. He continued:

> "So in effect what we have here is a man who has been socially avoidant for much of his life and the problem with that is that I think that that potentially feeds into his risk. Because he is socially avoidant and because he is socially isolated he doesn't do a lot with support networks that allows him to manage his emotions, to manage the emotional problems he has in a better way. So it's really important that that's challenged. So in effect his engagement in a group treatment program not only will address to begin with his sexual offending, but will also allow him an opportunity to actually develop some skills in managing his anxiety and developing social skills which should actually protect him in the future."

[34] As to the respondent's resistance in this regard, Dr Arthur thought that could be overcome through psychological therapy. He would probably only require three to six sessions to gain enough benefit in order to commence the GS:PP and he could continue with individual therapy whilst undertaking that program. That is the case even though the respondent has avoidant and schizotypal personality traits. If the only treatment he obtains is on a one-on-one basis, that would allow the respondent to continue to engage in avoidance behaviour. To Dr Arthur's mind, the benefits of completing the GS:PP and the HISOP "outweigh the risk that somehow that might deter him from then engaging in any other treatment". Until he receives that treatment, he poses a high risk of reoffending on release. There is also an associated, and serious, problem concerning the management of that risk "due to a lack of information". There would also be a real concern whether the respondent would engage in individual treatment on release.

[35] **Dr Beech** interviewed the respondent at the Wilston Correctional Centre on 15 November 2019 and furnished a report on 10 December. In it, he expressed the opinion that the respondent has Alcohol Use Disorder (currently in remission) and Mixed Personality Disorder. Dr Beech considered it difficult to know to what extent the respondent has a sexual deviance. Although his offending may represent paedophilia, that was unclear. Dr Beech did think that the respondent becomes sexually preoccupied and had attempted to deal with stressors by sexual means. He chose vulnerable victims and has a very limited insight into the nature of his offending, the issues that underlie it, and the risk factors for further offending.

[36] In Dr Beech's opinion, the risk of further offending is high. This emanates from the respondent's personality disorder, the use of sex to meet his psychological and emotional needs, his problematic drinking, and his disregard for supervision. He has limited insight and has not benefited from any rehabilitation programs. Likewise, the plans he has for his release are limited and there is no specific plan for the risk factors that might lead to further offending. His motivation to pursue treatment is also limited.

[37] Dr Beech did think that a supervision order might reduce the risk of reoffending by precluding the respondent from having contact with children in person or online but thought that it would have to be "a very intensive vigilant form of supervision because [the respondent] has little regard for supervision, conditions and restrictions, and is likely to work against it". He has treatment needs and, according to Dr Beech, without the benefit of early treatment it is difficult to see that he will engage in therapy or maintenance therapy in the community.

[38] Dr Beech agreed with Dr Arthur that the preference would be for the respondent to complete a suitable sexual offender treatment program so that he would be better prepared for release and could be supervised by people who are better informed about his personal or specific risks. As things currently stand, were the respondent to be released into the community on a supervision order, those who are charged with the responsibility of supervising him would lack a detailed understanding of his offending pathway and, for that reason, would struggle to know how much or how far to restrict him and for how long.

[39] In his report, Dr Beech expressed the opinion that supervision would "necessarily reduce his risk to a moderate level that would need to continue for many years in the absence of other treatment response".

[40] When he was called to give evidence on the hearing of the application, he expressed general agreement with the views expressed by Dr Arthur. The respondent, Dr Beech said, represents a high risk of reoffending within the next five years. His treatment needs are such that he should complete the GS:PP and HISOP and his alcohol related difficulties require completion of substance abuse programs. In addition, he has a personality disturbance and would benefit from both group and individual therapy to help him address some of his avoidant personality traits.

[41] The respondent advanced reasons to Dr Beech for not wanting to participate in the group sexual offender programs. He said that he distrusts Corrective Services' psychologists and did not want to hear about other peoples' lives, their crimes or their history. According to Dr Beech, such a view is not uncommon amongst participants. He then added:

> "But that, in essence, is the … thrust of the program when the rehabilitation occurs because it makes you explore your own offending, to think about it, reflect on the factors, but also learn from the experiences of others. And when you start to minimise your own behaviour or deny it, having other people around you challenge it and that's why group therapy's much more effective than individual therapy. Instead of you sitting in a room with another person arguing about whether you did something or not and whether this was a factor or not, you've got another dozen people around the room saying, "Well, you know, come on. We've been there. We know what you're talking about", and it's much more powerful as … a therapeutic tool. That's why it's a treatment of choice for this level of sex offending".

[42] The point was also made by Dr Beech that if the respondent only had individual therapy, it might give him a "false sense of complacency" that he had addressed his treatment needs when in fact, that would not be so. Such an approach, Dr Beech said "actually makes things worse". Nevertheless, individual therapy is something that should be seriously

considered for the respondent if he refuses to undertake any other treatment because the anomalies in his thinking that feed into social anxiety and avoidance need to be addressed. It would also prepare him for a group program and, provide him with support during the course of a group program. Otherwise, Dr Beech agreed that the strictures incorporated in a supervision order would reduce the risk that the respondent would reoffend, although his history of non-compliance with supervision when on court orders means that there would be a lingering concern that the respondent "would get around it or would fight against it and he'd be hard to supervise".

[43] **Dr Phillips** provided a report dated 10 February 2020. For this purpose, she interviewed the respondent at the Wolston Correctional Centre on 30 November 2019.

[44] Dr Phillips considered that the respondent's history and presentation were consistent with Dysthymia (differential diagnosis, Adjustment Disorder with depressed mood or Major Depressive Disorder), Social Anxiety Disorder and Panic Disorder, although, at the time of assessment, his mood and anxiety symptoms were in remission. She noted that the respondent had previously been diagnosed with Schizophrenia by a psychiatrist in 2005 (Dr Colls) and that he had also been treated with anti-psychotic medications by his general practitioner, as well as a private psychiatrist (Dr Mujumdar). At the time of her assessment, Dr Phillips did not think that the respondent presented with any current psychotic symptoms but his presentation was consistent with Psychosis Not Otherwise Specified. The differential diagnoses would include Schizophrenia or Schizotypal Personality Disorder.

[45] After administering a number of risk assessment tools and making her own clinical judgment, Dr Phillips expressed the opinion that the respondent's risk of future sexual reoffending "falls in [the] high range, if released from custody without a supervision order". A supervision order would, in her opinion, assist in reducing the risk of reoffending by offering assertive monitoring and interventions to target dynamic risk factors for sexual and physical violence. There would need to be "offence specific psychological intervention, psychiatric management, compliance with mental health treatment, abstinence from alcohol and robust supervision in the community. If all of that occurred, his risk of sexually reoffending would be in the moderate range. On the other hand that risk would increase if there was a relapse to alcohol abuse, acute intoxication or psychosocial stressors such as relationship breakdowns, loss of social supports, loneliness or boredom.

[46] Dr Phillips noted that the respondent had limited adaptive coping skills to manage psychological stressors and would be at risk of emotional collapse and returning to his longstanding maladaptive patterns of alcohol use or use of sex as coping in the context of psychosocial stressors. His risk of sexual reoffending would also increase with victim access, particularly if he were to re-partner with a woman who had young children. Likewise, the risk may increase if there is a deterioration in his mental state or if he fails to take his medication.

[47] When giving evidence on the hearing of the application, Dr Phillips said that, if the respondent was released on a supervision order without completing the GS:PP or the HISOP, there would be some reduction in risk but, she agreed, it would be "somewhere between moderate and high". If all of the measures she had suggested in her report were in place, it might reduce to moderate. Dr Phillips said that it was difficult to quantify that. Time would also be needed for the treatment to take effect. Dr Phillips was asked about

this again in cross-examination. She offered this opinion:

> "If he was released today, the risk would be, I think, lower than high because of the environmental measures, but not as much as … we would hope to have reduced after the more comprehensive package so that would fall somewhere between the moderate and high range".

[48] Dr Phillips also expressed the opinion that, if the respondent is made the subject of a continuing detention order, he might "realise the significance of having made the decision to refuse treatment and may decide to re-evaluate that and volunteer to engage" in the GS:PP and HISOP. If not, Dr Phillips considered that the "pathway forward would be to commence individual one on one psychological treatment" to try to assist him to "develop skills and insight to the point that he did want to engage in the HISOP or, if that point could not be reached, at least … a court would then have more information that had come to light during the course of that individual treatment which would allow for better evaluation risk, risk management planning, etcetera." She agreed with Drs Arthur and Beech that individual treatment should not be seen as a "complete alternative" because there are benefits which are derived from a … group situation which he would miss out on". Although Dr Phillips accepted that the respondent will likely "struggle in the group environment", she did not see that as being "a contraindication to him participating" in the GS:PP and the HISOP. She believes that he could engage in such a program. Individual treatment will nevertheless also be required to explore his suspected underlying sexual deviance.

[49] It will be seen from the above summary of the expert opinion in this case that the psychiatrists agree that the respondent represents a high risk of sexually reoffending against children if he is released into the community. Currently, he is very much an untreated sex offender. His substance abuse issues are also yet to be treated. He has limited insight with a very poor understanding of the drivers for his offending. He lacks motivation to get to the bottom of any of this. It is therefore perhaps unsurprising that he has no real appreciation of his risks for future sexual offending, let alone risk management strategies or appropriate plans for his release into the community.

[50] As mentioned at the outset of these reasons (at [2]), the respondent through his counsel conceded that is a serious danger to the community in the absence of an order under Division 3. He was right to make that concession. The evidence all points one way.

[51] I am satisfied by acceptable, cogent evidence and to the high degree of probability required by the Act that the evidence overall is of sufficient weight to justify the conclusion that the respondent is a serious danger to the community in the absence of a Division 3 order.

Which, if any, order should be made?

[52] As s 13(5) of the Act makes plain, when the court is satisfied that a prisoner is a serious danger to the community in the absence of a Division 3 order, the court may order that the prisoner be detained in custody for an indefinite term for control, care or treatment (a continuing detention order) or that he be released from custody subject to the requirements it considers appropriate that are stated in the order (a supervision order). In deciding whether to make either of those orders, the paramount consideration is the need to ensure adequate protection of the community. In that regard, the court must consider whether adequate protection of the community can be reasonably and practicably

managed by a supervision order and, further, whether the requirements under s 16 of the Act can be reasonably and practicably managed by Corrective Services officers.

[53] Section 16 of the Act provides as follows:

> "**16 Requirements for orders**
>
> (1) If the court or a relevant appeal court orders that a prisoner's release from custody be supervised under a supervision order or interim supervision order, the order must contain requirements that the prisoner—
>
> (a) report to a corrective services officer at the place, and within the time, stated in the order and advise the officer of the prisoner's current name and address; and
>
> (b) report to, and receive visits from, a corrective services officer as directed by the court or a relevant appeal court; and
>
> (c) notify a corrective services officer of every change of the prisoner's name, place of residence or employment at least 2 business days before the change happens; and
>
> (d) be under the supervision of a corrective services officer; and
>
> (da) comply with a curfew direction or monitoring direction; and
>
> (daa) comply with any reasonable direction under section 16B given to the prisoner; and
>
> (db) comply with every reasonable direction of a corrective services officer that is not directly inconsistent with a requirement of the order; and
>
> *Examples of direct inconsistency—*
>
> If the only requirement under subsection (2) contained in a particular order is that the released prisoner must live at least 1km from any school—
>
> 1 A proposed direction to the prisoner would be directly inconsistent if it requires the released prisoner to live at least 2km from any school.
>
> 2 A proposed direction to the prisoner would not be directly inconsistent if it requires the released prisoner to live at least a stated distance from something else, including, for example, children's playgrounds, public parks, education and care service premises or QEC service premises.
>
> 3 A proposed direction to the prisoner would not be directly inconsistent if it requires the released

prisoner not to live anywhere unless that place has been approved by a corrective services officer.

(e) not leave or stay out of Queensland without the permission of a corrective services officer; and

(f) not commit an offence of a sexual nature during the period of the order.

(2) The order may contain any other requirement the court or a relevant appeal court considers appropriate—

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

Examples for paragraph (a)—

- a requirement that the prisoner must not knowingly reside with a convicted sexual offender
- a requirement that the prisoner must not, without reasonable excuse, be within 200m of a school
- a requirement that the prisoner must wear a device for monitoring the prisoner's location

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

[54] In the exercise of the discretion conferred by s 13(5) of the Act, the principal question is whether the protection of the community can be adequately ensured. If supervision of the prisoner is apt to ensure adequate protection, then an order for supervised release should, in principle, be preferred to a continuing detention order. This is because "the intrusions of the Act upon the liberty of the subject are exceptional, and the liberty of the subject should be constrained to no greater extent than is warranted by the statute which authorises such constraint".[3] It is for that reason that a continuing detention order should only be made where the applicant proves that the community cannot be adequately protected by a supervision order.[4]

[55] It is important also to keep in mind that the risk in relation to which the community requires protection is the risk that the respondent, if released, will commit a serious sexual offence. Even then, the existence of *some* risk of reoffending is not sufficient; the risk must be of an unacceptable order.[5] Adequate protection is a relevant concept, as is unacceptable risk. As such, the Act recognises that some level of risk can be acceptable consistently with the adequate protection of the community. Indeed, the assessment of what level of risk is unacceptable or, expressed another way, what order is necessary to ensure adequate protection of the community, is not a matter for psychiatric opinion. It is a matter for the court, requiring a "value judgment as to what risk should be accepted

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3 *Attorney-General v Francis* [2006] QCA 324, [39].

4 *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, [27].

5 See *Attorney-General for the State of Queensland v Waghorn* [2006] QSC 171, [24].

against the serious alternative of the deprivation of a person's liberty".[6]

[56] The onus of demonstrating that the supervision order affords inadequate protection of the community is on the applicant. If, on all of the evidence, a supervision order would be likely to reduce the opportunity to the respondent to engage in sexual offending against children to an "acceptably low level"[7] then such an order should be made provided there is some evidence to demonstrate that the respondent would be likely to comply with it.[8]

[57] Here, each of the psychiatrists has expressed the opinion that it would be preferable for the respondent to undertake the GS:PP followed by the HISOP before consideration is given to his release from custody. To my mind, such a course is not only preferable, it is essential.

[58] It is not to the point to argue, as the respondent's counsel did (at least in writing) that there are good reasons why the respondent is resistant to group therapy, that he is quite prepared to undertake individual therapy in the community under a supervision order and that there will now be a lengthy delay in the delivery of that therapy to the respondent if he remains in custody. In the first place, the expert evidence is to the effect that the respondent's resistance to group therapy is not uncommon and may be capable of being overcome. Secondly, individual therapy is not an adequate substitute for group therapy, for the various reasons advanced by the psychiatrists in evidence and which are discussed above. Thirdly, assuming the respondent now accepts that he will need to participate in group therapy, the expected delay before that will occur is most unfortunate but that does not change his current treatment status. He is untreated and, if released on supervision, he will still be untreated. Even if individual therapy in the community was to be regarded as an adequate substitute for group therapy, that may be expected to take a considerable period of time before it has any real effect. As Dr Arthur said in evidence, if the respondent were to be released he would be leaving "jail pretty much the way he came into jail, with the same level of risk, the same lack of insight and with an inadequate plan to manage his risks and to better understand his triggers and … specific risk factors for his sexual reoffending".

[59] Although I accept that, were the respondent to be released on a supervision order on the strict conditions proposed in this case, there would be some reduction in the risk the respondent poses due to the strictures of such an order, the risk of commission of a serious sexual offence will remain unacceptably high unless and until the underlying causes of his sexual offending are properly explored and then addressed. Currently, that can only be achieved through his participation in the GS:PP followed by the HISOP. Individual psychological therapy as a forerunner to the GS:PP (and then running alongside the two successive group programs) is also indicated.

[60] I am satisfied that that the community cannot be adequately protected by a supervision order. He must be placed on a continuing detention order.

Conclusion

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6 See *Attorney-General for the State of Queensland v Sutherland* [2006] QSC 268, [30].

7 See *Attorney-General for the State of Queensland v Beattie* [2007] QCA 96, [19].

8 See *Attorney-General for the State of Queensland v Fardon* [2011] QCA 155.

[61] The respondent will be detained in custody for an indefinite term for control, care or treatment. By s 27(1A) of the Act, this order must be reviewed within two years.